

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Namecheap, Inc. (Namecheap))
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4600 East Washington Street, Suite 305)
Phoenix, AZ 85034)
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Claimant)
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v.)
)
Internet Corporation For)
Assigned Names and Numbers)
(ICANN))
)
12025 Waterfront Drive, Suite 300)
Los Angeles, CA 90094-2536)
)
Respondent)
_____)

ICDR Case No. _____

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

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I. INTRODUCTION

1. The Claimant, Namecheap, submits this request for the appointment of an Emergency Panelist and an order providing for Interim Measures of Protection (the ‘Interim Request’ pursuant to Article IV(3) of the ICANN Bylaws (‘Bylaws’), Article 10 of the Interim Supplementary Procedures for ICANN Independent Review Process (‘Supplementary Procedures’), and Articles 6 and 24 of the International Arbitration Rules of the International Centre for Dispute Resolution (‘ICDR Rules’).

2. Namecheap makes this Interim Request in the context of a dispute between Namecheap and ICANN. The dispute arises from the ICANN Board’s and Staff’s breaches of the ICANN Articles of Incorporation (‘AoI’, **RM¹ 1**) and Bylaws (**RM 2**), by *inter alia*, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .org, .info and .biz generic top-level domains. In particular, the dispute relates to ICANN’s decision to remove the provisions according to which the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap is an ICANN-accredited registrar that is directly impacted by this decision. With respect to .org, the removal of the price cap provision is aggravated by the fact that the operation of .org risks being moved from a non-profit entity to a for-profit entity.

3. The Interim Request is limited to ICANN’s breaches with respect to the operation of .org. The request is made because of recent events that jeopardize ongoing discussions between Namecheap and ICANN in which Namecheap seeks to resolve the dispute. Namecheap is

¹ Reference Material

negotiating with ICANN in good faith and hopes that a solution can be found without the need for adversarial proceedings.

4. Nevertheless, in order to comply with the requirement of Article 6(1) of the ICDR Rules, Namecheap submits notice of the Interim Request concurrent with the submission of a Notice of Arbitration / Request for Independent Review Process ('IRP'). The Notice of Arbitration is kept succinct not to stymie the negotiations with ICANN. However, Namecheap reserves the right to amend and complete its Notice of Arbitration, should the negotiations be unsuccessful.

5. Namecheap submits this Interim Request, seeking a stay of all ICANN actions that further the change of control of the .org registry operator to a for-profit entity during the pendency of the IRP, including but not limited to, (i) the renewal of any registry agreement for .org, (ii) the approval of any direct or indirect change of control of the .org registry operator or of any other assignment of the .org registry agreement. Namecheap also requests that, in order to maintain the *status quo*, ICANN take all actions that are necessary to prevent that the .org registry operator can charge fees to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another that are exceeding the maximum fees that were applicable before the execution of the .org registry agreement of 30 June 2019. This Interim Request is warranted because (i) Namecheap, and an important part of the Internet community, will suffer irreparable harm barring such a stay and interim relief; (ii) Namecheap raises serious questions regarding ICANN's compliance with its AoI and Bylaws in (a) removing the price cap provisions for the .org, .biz and .info gTLDs, and (b) the process for evaluating the .org registry operator's request for approving a change of control; and (iii) ICANN will suffer no harm should the Interim Request be granted. The balance of hardships weighs decidedly in favour of Namecheap.

II. BACKGROUND OF THE DISPUTE

A. As the custodian of the Internet and the DNS, ICANN is committed to act in good faith, to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition in a regulated market

6. ICANN is a non-profit public benefit corporation, incorporated under the laws of California. Its mission and the limits of its authority are defined in ICANN's Articles of Incorporation (AoI), Bylaws and agreements. Pursuant to Article III AoI, ICANN '*shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets'* (emphasis added). This commitment is reiterated in Article I(2)(a) Bylaws.

7. A cornerstone for ICANN's decision-making process is its obligation to operate in an open, transparent and fair manner. Article III(1) Bylaws provide that ICANN and its constituent bodies '*shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness'* (emphasis added). ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Article II(3) Bylaws provides:

'ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.'

8. The abovementioned fundamental obligations exist since ICANN's incorporation in 1998 and were never changed (**RM 5**, Article III(1) and Article IV(1)(c)).

B. The careful reassignment of .org

9. One of ICANN's missions and principal objectives is to promote competition and develop policy concerning the Internet's unique identifiers, in particular in the gTLD name space. Before ICANN's formation in 1998, the gTLD name space contained only three gTLDs

which operated upon a first-come, first-served basis: .com, .net and .org (these gTLDs are referred to as ‘original gTLDs’). These original gTLDs were all managed by Network Solutions, Inc. (NSI). In the mid-nineties, NSI’s monopoly over domain name registrations gave rise to criticism and there was a growing dissatisfaction concerning the absence of competition and the dominance of NSI (**RM 7**). In the U.S. Government’s White Paper² that led to the appointment of ICANN as the custodian of the DNS, the U.S. Government made clear that the creation of a competitive environment was one of the key tasks for the new custodian.

10. During the first years of its existence, ICANN tried to break the monopoly of NSI, while preserving the interests of the Internet users. It did so by (i) separating the registry business³ from the registrar business⁴, (ii) requiring NSI to develop a Shared Registration System interface for its .com, .net and .org TLDs, which should ensure that competitive registrars could use the registry on the same terms as NSI’s registrar branch, (iii) imposing maximum prices for original gTLDs, and (iv) reassigning the .org gTLD to a new registry operator, Public Interest Registry (‘PIR’) a non-profit created under the auspices of the Internet Society (ISOC).⁵

11. The reassignment of .org to PIR was done following a policy development process to assist in the orderly selection of a successor entity to operate .org. In accordance with the policy developed by the DNSO (**RM 10**), ICANN organized a request for proposals (RFP) and created evaluation criteria for selecting a new registry operator from the proposals that were submitted (**RM 11**).

12. ICANN received 11 proposals and ultimately selected ISOC/PIR (**RM 12-14**). To

² **RM 6**

³ *I.e.*, the technical operation of the gTLD.

⁴ *I.e.*, the business of registering domain names in TLDs for customers.

⁵ See **RM 8; RM 9**.

obtain the reassignment of .org, PIR had made important commitments to comply with the RFP's criteria and the policy requirements (**RM 14-15**). PIR committed to maintain maximum prices to comply with the requirement for the .org registry fee charged to accredited registrars to be as low as feasible consistent with the maintenance of good quality service. PIR also recognized the unique public-interest-focused nature of .org. and committed to institute mechanisms for promoting the registry's operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community (**RM 14-15**).

13. On 2 December 2002, ICANN and PIR entered into a registry agreement ('RA') for the operation of the .org TLD (**RM 16**). The RA was subsequently renewed on 8 December 2006 and 22 August 2013 (**RM 17-18**). To comply with the requirement that the .org registry fee charged to accredited registrars be as low as feasible consistent with the maintenance of good quality service, these RAs contained maximum prices that PIR 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 (**RM 17-18**).

C. The sudden removal of price caps

14. On 18 March 2019, ICANN announced that it planned to renew the .org RA, making it more similar to the terms of the base registry agreement that ICANN used for new gTLDs that were introduced from 14 July 2013 onwards. The newly proposed .org RA no longer contained maximum prices that PIR could charge to ICANN-accredited registrars. ICANN gave the following explanation for this radical change:

'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.'
(Annex 2)

15. The proposed removal of price caps in .org was not well received within the Internet community. By 29 April 2019, ICANN had received over 3,500 comments rejecting the proposed change. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions. An analysis of the data shows that comments came from a varied cross-section of Internet users and that about 20% of all comments were submitted by Namecheap customers.

16. ICANN rejected all of the comments against removing the price caps with a conclusory statement that is devoid of any supporting evidence. ICANN stated:

‘There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price 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, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.’ (Annexes 5-7)

17. ICANN then went on to state that any price increases would require 6 months advance notice and that registrants could renew for 10 years at that point. These generalisations in ICANN’s analysis ignore significant information that is contrary to ICANN’s conclusions and turn a blind eye to the impact on budget planning for registrars and their customers. For a more detailed explanation, see Annex 8, pp. 5-10 and Annex 9, p. 5.

18. On 30 June 2019, ICANN org renewed the .org RAs without maintaining the historic price caps, despite universal widespread public comment supporting that the price caps be maintained (RM 29). This controversial decision goes against the interests of the Internet community as a whole and violates various provisions aimed at protecting those interests set forth in ICANN’s Articles of Incorporation, Bylaws, policies, and the renewal terms of the RAs.

D. Namecheap strongly opposed the removal of price caps

19. On 12 July 2019, Namecheap asked the ICANN Board to reconsider ICANN’s decision to remove the price cap requirement in the .org RA. Namecheap’s request is known as ‘Reconsideration Request 19-2’ (**Annex 8**). Within the framework of Reconsideration Request 19-2, Namecheap pointed out that the decision was made in disregard of ICANN’s fundamental rules and obligations and on the basis of an incomplete and non-transparent record (**Annexes 8 and 10**).

E. The proposed change of control of PIR

20. On 13 November 2019, while Namecheap’s reconsideration request was pending, the Internet Society and PIR announced that PIR was sold to the investment firm Ethos Capital for an undisclosed sum of money. As a result of this transaction, PIR would no longer be a non-profit company. The timing of the proposed transaction raised suspicion, as the likely corporate entity for Ethos Capital to acquire PIR was formed the day after ICANN was due to publish its summary of public comments. The transaction also involved former executives and senior staff of ICANN, including ICANN’s former CEO (**Annex 10**).

21. When Namecheap raised these issues to ICANN and reminded ICANN of its duty to review Namecheap’s concerns, ICANN responded that PIR’s corporate structure is not relevant to Namecheap’s reconsideration request, which – according to ICANN – concerns the 30 June 2019 renewal of the .org RA (**Annexes 11-12**).

22. Namecheap considers, however, that the 30 June 2019 renewal of the .org RA and the proposed acquisition of PIR are related issues that must be addressed jointly. By allowing for the elimination of price caps in .org, ICANN has already failed to apply its policies equitably. By removing the price caps, ICANN has allowed for unstable registration and renewal prices and contravenes established policy that these prices must be as low as feasible consistent with

the maintenance of good quality service. This policy violation would only be exacerbated if ICANN were to allow PIR be acquired by a for-profit company.

F. Namecheap requests transparency and fairness in ICANN’s evaluation of price caps and the proposed change of control

23. In an attempt to resolve the issues related to the removal of the price caps and the proposed acquisition of PIR, Namecheap entered into a cooperative engagement process (‘CEP’) with ICANN on 18 November 2019 (**Annexes 13 and 14**). While the cooperative engagement process was ongoing, it became apparent that ICANN was still evaluating the proposed acquisition of PIR by Ethos Capital. However, it became also clear that ICANN would not be open and transparent about the evaluation process *proprio motu*. Therefore, Namecheap asked the ICANN Board to reconsider ICANN’s actions and inactions with respect to the removal of price caps in .org and the proposed change of control of PIR. Namecheap filed its reconsideration request on 8 January 2020, requesting the necessary openness and transparency from ICANN. This request is known as ‘Reconsideration Request 20-1’ (**Annex 9**). Namecheap simultaneously filed a request for document production (‘DIDP Request’) with ICANN (**Annex 15**).

G. Limited disclosure by ICANN shows that irreparable harm could result from ICANN’s actions and inactions with respect to the proposed acquisition of PIR

24. On 8 February 2020, ICANN provided its initial response (ICANN’s DIDP Response) to Namecheap’s DIDP Request (**Annex 16**). While ICANN’s Response was largely unsatisfactory, it revealed pressing issues, that required ICANN’s immediate attention.

25. It appears from the background description in ICANN’s Response that ICANN had until 17 February 2020 to provide or withhold its consent to PIR’s change of control. Until recently, ICANN has not postponed its deadline.

26. On 23 January 2020, ICANN had received a request from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC to Ethos Capital (**Annexes 16-18**). On 30 January 2020, ICANN sent a letter to PIR informing PIR about the CA-AGO's request for information and documents. ICANN requested that PIR agrees to extend ICANN's deadline to provide or withhold its consent to PIR's proposed change of control (**Annex 19**). ICANN claims that PIR's counsel responded to the letter on 30 January 2020 (**Annex 16**). ICANN did not provide a copy of this letter. However, ICANN's Response contains a hyperlink to a letter of 3 February 2020 from PIR's counsel (**Annexes 16 and 20**).

27. It appears from PIR's counsel's letter of 3 February 2020 that PIR agreed to a postponement of ICANN's deadline to 29 February 2020 (**Annex 20**).

28. However, unless ICANN rejects PIR's request for a change of control, a postponement to 29 February 2020 will not leave sufficient time to address the concerns expressed by Namecheap in the framework of Reconsideration Requests 19-2 and 20-1, the DIDP Request, and the CEP. Unless PIR's request is rejected, ICANN must adequately address Namecheap's concerns before it can continue with the approval process for PIR's request for an indirect change of control. Therefore, any deadlines in this approval process must be suspended *sine die*.

29. On 14 February 2020, Namecheap raised the issue with the ICANN Board, ICANN's General Counsel and Deputy General Counsel (**Annex 21**). With respect to the imminent deadline of 29 February 2020, Namecheap urged ICANN to make clear to PIR that PIR's request for an indirect change of control cannot be processed until (i) the CA-AGO has terminated its investigation and has authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet

community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN. If PIR cannot agree to a suspension of its request for approving the change of control, Namecheap wrote that ICANN should make clear to PIR that such approval is reasonably withheld.

30. Namecheap made clear that it expected a response from ICANN at the latest on 18 February 2020 (Annex 21). On 20 February 2020, ICANN acknowledged receipt of Namecheap's letter of 14 February 2020. ICANN stated that the request is currently under review and that its response will be emailed to Namecheap 'on or before 15 March 2020' (Annex 22). With the imminent deadline of 29 February 2020, Namecheap cannot wait for ICANN to come back on or before 15 March 2020.

31. On 24 February 2020, Namecheap read on Ethos' website that PIR had granted ICANN an extension until 20 March 2020 to respond to PIR's request for a change of control. Namecheap inquired with ICANN whether that was correct, asking ICANN to come back the same day (Annex 24). ICANN did not respond. Therefore, given the 29 February 2020 deadline, ICANN gave Namecheap no choice but to file the present request.

32. Not having received a satisfactory response, Namecheap seeks emergency interim relief to ensure that its pending CEP, Reconsideration Request and possible Independent Review Process Request are meaningful and not prematurely mooted.

III. NAMECHEAP IS ENTITLED TO EMERGENCY RELIEF TO ENSURE A MEANINGFUL COOPERATIVE ENGAGEMENT PROCESS, RECONSIDERATION REQUEST AND INDEPENDENT REVIEW PROCESS

A. Applicable rules

33. Pursuant to both Article IV(3)(o) Bylaws (and Article 10 Supplementary Procedures):

'A Claimant may request interim relief. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision until such time as the opinion of the IRP Panel is considered [...], in order to maintain the status quo. [...] Interim relief

may only be provided if the Emergency Panelist determines that the Claimant has established all of the following factors:

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

34. Where, as here, a claimant seeking IRP has requested interim measures to preserve the *status quo* and prevent ICANN from granting the operation of a registry to a third party, panels have always granted the claimants’ request.⁶ Namecheap’s Interim Request should likewise be granted for the reasons expressed below.

B. Namecheap, its clients, and the Internet community will suffer irreparable harm if the Interim Request is not granted

35. Namecheap is entitled to a process that can provide a meaningful remedy if it prevails in the IRP. Namecheap has a right to have the *status quo* preserved to protect the effectiveness of a future possible award.

36. The dispute concerns the control of a unique asset and the ramifications the removal of price caps and the shift from a non-profit registry operator to a for-profit entity may have for Namecheap and its customers. Allowing ICANN to proceed would cause irreparable harm to Namecheap. Namecheap’s customers have shown to be particularly concerned about the removal of price caps for .org. The potential of unrestricted price increases in combination with .org being run by a for-profit will have a direct impact on Namecheap’s domain name registration business as well as additional services. ICANN’s approval of a change of control

⁶ ICDR Case No. 01-14-0002-1065, *Gulf Cooperation Council (GCC) v. ICANN*, Panel Interim Declaration on Emergency Request for Interim Measures of Protection, 12 February 2015 (**RM 32**); ICDR Case No. 01-14-0001-5004, *Dot Registry LLC v. ICANN*, Emergency Independent Review Panelist Order on Request for Emergency Measures of Protection, 23 December 2014 (**RM 33**); ICDR Case No. 50 117 T 1083 13, *DCA Trust v. ICANN*, Panel Decision on Interim Measures of Protection, 12 May 2014 (**RM 34**).

to a for-profit cannot be readily undone. As a result, Namecheap would suffer an irreparable injury should ICANN proceed to approve PIR's change of control.

37. In addition, the CA-AGO is presently investigating the impact to the non-profit community of the proposed transfer of PIR to Ethos Capital (**Annex 17**). According to an announcement by ICANN on 30 January 2020, the CA-AGO has asked for more time for its investigation (**Annex 18**). ICANN estimated that it needed up to 20 April 2020 to conclude both the CA-AGO and ICANN reviews (**Annex 19**). It is not excluded that ICANN may need time beyond 20 April 2020 if the CA-AGO's investigation takes longer than expected by ICANN and/or if ICANN is not fully transparent about its own review in order to allow Namecheap and the Internet community to check ICANN's compliance with its Articles of Incorporation and Bylaws.

38. Namecheap, and noticeably the Internet community as a whole, are concerned by the CA-AGO's investigation, as the CA-AGO has stated that a failure to cooperate and to produce requested documents to the CA-AGO can lead to '**suspension or revocation of registration**' (**Annex 17**). The stability of the Internet would be seriously at risk if ICANN were suspended or its registration revoked and ICANN, albeit temporarily, be withheld to perform its mission.

39. Namecheap considers that ICANN would frustrate the CA-AGO's investigation if it is not fully transparent about the change of control approval process or if it approves the change of control before the investigation is terminated. As ICANN's transparency about the approval process remains limited and as ICANN has not indicated that it will withhold its approval for the change of control until the CA-AGO's investigation is terminated, there is a serious risk that without staying a possible approval of the change of control, ICANN gets sanctioned by the CA-AGO. A possible suspension or revocation of ICANN's registration would harm Namecheap (and other actors of the Internet community) in a manner that is not even foreseeable.

C. Namecheap raises sufficiently serious questions related to the merits and is likely to succeed

40. Namecheap's Reconsideration Requests, the arguments raised during CEP and in its request for IRP raise several serious questions regarding ICANN's conduct in changing the price cap requirement and in evaluating PIR's request for a change of control.

1. Serious questions related to the change of control evaluation process

41. Namecheap has demonstrated that the reassignment of .org to PIR/ISOC in 2002 was not open-ended. This has been recognized by ICANN in a letter to PIR (**Annex 23**). Clear and unequivocal commitments were made by PIR/ISOC, who received an endowment of US\$ 5 million in exchange to operating as a non-profit and its commitment of making the .org registry the 'true global home of non-commercial organizations on the Internet.'⁷ To obtain the reassignment of .org, PIR/ISOC had to commit that (i) the .org registry be 'operated for the benefit of the worldwide community of organizations, groups, and individuals engaged in noncommercial communication via the Internet', (ii) the responsibility for the .org administration be 'delegated to a non-profit organization that has widespread support from and acts on behalf of that community', and (iii) the registry services fee charged to accredited registrars be 'as low as feasible consistent with the maintenance of good quality service'.⁸

42. Namecheap fails to see how these commitments are compatible with the operations and aspirations of a private investment firm. Private investment firms typically look to maximize the value of their investment. Such goal is incompatible with the requirement to charge fees that are as low as feasible and with the public-interest, non-profit nature of .org.

43. In addition, Namecheap observes that ICANN is not as open and transparent as it should be about its evaluation of PIR's request for change of control that would change its status as a

⁷ **RM 14**, Section II, point C11, 10.

⁸ See ICANN, Report of the Dot Org Task Force Adopted by the DNSO Names Council 17 January 2002 and accepted as guidance by the ICANN Board on 14 March 2002 (**RM 10**).

non-profit. If the requested interim measures are not granted, the request for change of control risks being granted by ICANN without any useful opportunity for Namecheap, or anyone in the Internet community, being able to scrutinize ICANN's approval.

2. **Serious questions with respect to the price cap removal**

44. ICANN's decision-making process resulting in the removal of price caps is equally opaque. The removal of price caps in legacy gTLDs⁹, including in the original .org gTLD, is a clear departure from longstanding practice and policy. Allowing individual registry operators to modify key conditions of registry agreements and/or the modification of their ownership leads to far-reaching new rules and non-transparent policies to the sole benefit of a single entity, without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process. Allowing such radical changes in undocumented and/or non-transparent processes, undermines ICANN's multistakeholder model and the GNSO policy development process.

45. Proceeding with a removal of price caps, in spite of – and without responding to – the concerns raised, an unprecedented number of public comments coming from an entire cross-section of the Internet community, is contrary to ICANN's commitment to remain accountable to the Internet community. It is also contrary to ICANN's commitment to *'employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector'* and to *'make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.'*

46. Pursuant to Article II(3) Bylaws ICANN *'shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment*

⁹ Namecheap refers to legacy TLDs when referring to the original gTLDs and those gTLD that have been delegated in accordance with the Proof-of Concept round or the 2004 Sponsored TLD round. Non-legacy TLDs are those gTLDs that were delegated in accordance with the New gTLD Program.

unless justified by substantial and reasonable cause, such as the promotion of effective competition'. To comply with this fundamental obligation to provide for non-discriminatory treatment, ICANN must treat like cases alike and unlike cases differently. This is a general axiom of rational behaviour, that one may expect from an entity with a mission as important as ICANN's.

47. By removing the price caps for the .org, .info and .biz legacy TLDs, ICANN made abstraction of the specific nature of these TLDs that cannot be compared to any new gTLD or so-called sponsored TLD. They all have had a significant number of domain names under management (DUMs) for several years. The number of DUMs in .org has been rising consistently since the registry was assigned to PIR to reach over 10 million DUMs in 2012. The .org registry maintained well over 10 million DUMs between 2012 and 2019. The .biz and .info registries also benefit from consistent levels of DUMs exceeding 1,6 million for more than a decade. No sponsored TLD comes even close to the levels of DUMs of .org, .info and .biz. Apart from a handful of low priced new gTLDs, the levels of DUMs in new gTLDs are significantly lower than the levels in .info and .biz; all are lower than .org. The new gTLD market is also fluctuating much more than the market of legacy TLDs.

48. Without any analysis of the particularities of the .org, .info and .biz legacy TLDs, ICANN decided to remove the price caps. ICANN provided no justification for the disparate treatment of .org, .info and .biz as compared to .com and .net (which are deemed comparable). ICANN also provided no justification for treating .org, .info and .biz similarly to non-comparable new gTLDs when it decided to remove the price caps. It is only after Namecheap had challenged ICANN's decision to remove the price caps that the ICANN Board tried to construct a justification. There are many serious issues with ICANN's after-the-fact

justification which is based on a ‘Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries’.¹⁰ To name a few:

- Dennis Carlton’s report is not a fact-based analysis and only a preliminary report, showing that the final reports were not even considered when ICANN tried to construct a justification;
- The subject-matter of the reports (both the preliminary report and the final reports) is not related to price caps in legacy TLDs; the reports only discuss price caps for new gTLD registries;
- The reports support a conclusion that price caps must be maintained in legacy TLDs. In the final reports, the author made clear that he saw no basis for eliminating price caps in existing gTLDs. He had understood from ICANN that there is no basis for the concern that the absence of price caps for new gTLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz, and others;
- In 2013, the then already four years old report was clearly not an impediment to maintain the price cap when renewing the .org, .info and .biz RAs at that time.

49. In the case of .org, the decision to remove price caps is also 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’.¹¹

50. In addition, the price cap removal violates the renewal clause in Section 4.2 of the 22 August 2013 RAs for .org, .info and .biz, which sets forth that the price of Registry Services under a renewed RA shall remain unchanged (**RM 18, 27-28**).

¹⁰ **Annex 11**; for a final version of Dennis Carlton’s reports, see **RM 23-24**.

¹¹ See ICANN, Report of the Dot Org Task Force Adopted by the DNSO Names Council 17 January 2002 and accepted as guidance by the ICANN Board on 14 March 2002 (**RM 10**).

51. As a result, ICANN has breached its AoI, Bylaws, and the commitments it made in previous RAs, by executing new RAs without price caps, wholly lacking in fairness, openness and transparency. The harm would only increase if ICANN were to allow that .org be operated by a for-profit entity.

D. Since ICANN will not suffer significant hardships should a stay be granted, the balance of hardships decidedly tips in Namecheap's favour

52. While Namecheap will suffer severe and irreparable harm should this Interim Request be denied, ICANN will suffer no hardship if Namecheap's request is granted. The opposite is true. ICANN itself has asked PIR for more time to review PIR's request for change of control. Granting a stay for the duration of an IRP proceeding would not significantly prejudice ICANN. It would allow ICANN to evaluate PIR's request for change of control in all openness and transparency and with the involvement of the Internet community.

53. As previously held by the GCC IRP panel, any prejudice that might be caused by a delay in assigning the control of a gTLD registry is '*counterbalanced by the advancement of the integrity in and the legitimacy of the IRP process.*'¹²

54. In addition, as a non-profit corporation working for the benefit of the Internet community as a whole, a stay of assigning the control of a gTLD registry to a third party will not cause any financial harm. ICANN should mainly be interested in (i) ensuring the legitimacy of the process for approving or reassigning control over .org; (ii) making fair, transparent and non-discriminatory decisions in relation to legacy gTLDs; (iii) maintaining the legitimacy of the IRP process.

55. For these reasons, the balance of harms heavily weights in favour of Namecheap, requiring the grant of the Interim Request.

¹² ICDR Case No. 01-14-0002-1065, *Gulf Cooperation Council (GCC) v. ICANN*, Panel Interim Declaration on Emergency Request for Interim Measures of Protection, 12 February 2015 (**RM 32**), para. 61.

IV. RELIEF REQUESTED

56. Based on the foregoing, and reserving all rights, Claimant respectfully requests that a timely appointed Emergency Panellist issue an order requiring ICANN to:

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

Respectfully submitted,
25 February 2020


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- Annex 1 - Company information on Namecheap
- Annex 2 - ICANN, Announcement on Proposed Renewal of .org Registry Agreement, 18 March 2019
- Annex 3 - ICANN, Announcement on Proposed Renewal of .info Registry Agreement, 18 March 2019
- Annex 4 - ICANN, Announcement on Proposed Renewal of .biz Registry Agreement, 3 April 2019
- Annex 5 - ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .org Registry Agreement, 3 June 2019
- Annex 6 - ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .org Registry Agreement, 3 June 2019
- Annex 7 - ICANN, Staff Report of Public Comment Proceeding, Proposed Renewal of .org Registry Agreement, 3 June 2019
- Annex 8 - Namecheap's Reconsideration Request 19-2, 12 July 2019
- Annex 9 - Namecheap's Reconsideration Request 20-1, 8 January 2020
- Annex 10 - Namecheap's Rebuttal in Reconsideration Request 19-2, 18 November 2019
- Annex 11 - ICANN, *Final Determination of the ICANN Board of Directors Reconsideration Request 19-2*, 21 November 2019
- Annex 12 - ICANN, *Approved Board Resolution 2019.11.21.01 – Special Meeting of the Board*, 21 November 2019, <https://www.icann.org/resources/board-material/resolutions-2019-11-21-en#1.a>
- Annex 13 - Namecheap's Notice to Invoke the Cooperative Engagement Process
- Annex 14 - Letter from Namecheap to ICANN of 10 December 2019 completing its Notice to Invoke the Cooperative Engagement Process
- Annex 15 - Namecheap's DIDP Request No. 20200108-1 of 8 January 2020
- Annex 16 - ICANN's Response to DIDP Request No. 20200108-1, dated 7 February 2020 and received on 8 February 2020
- Annex 17 - Letter from California Attorney General to ICANN Board of Directors of 23 January 2020
- Annex 18 - ICANN, *Announcement: ICANN Receives Letter from California Attorney General regarding .ORG Change of Control*, 30 January 2020, <https://www.icann.org/news/announcement-2020-01-30-en>
- Annex 19 - Letter from ICANN to PIR of 30 January 2020
- Annex 20 - Letter from counsel to PIR to ICANN of 3 February 2020
- Annex 21 - Letter from Namecheap to ICANN and ICANN Board of 14 February 2020
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- Annex 23 - Letter from counsel to ICANN to counsel to PIR of 13 February 2020
- Annex 24 - Email from Namecheap to ICANN of 24 February 2020

¹³ The list of annexes comprises the annexes that have been submitted together with Namecheap's IRP Request; some annexes may not be referenced in this Request for Interim Relief.

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¹⁴ The list of Reference Material comprises the Reference Material that have been submitted together with Namecheap's IRP Request; some Reference Material may not be referenced in this Request for Interim Relief

23. Report of Dennis Carlton Regarding ICANN's Proposed Mechanism for Introducing New gTLDs, 5 June 2009
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25. ICANN, Announcement Milestone: First Registry Agreements Executed – Internet Users Will Soon Be Able to Navigate the Web in Their Native Language, 15 July 2013
26. Registry Agreement of 14 July 2013 between ICANN and CORE Association
27. .info Registry Agreement of 22 August 2013
28. .biz Registry Agreement of 22 August 2013
29. .org Registry Agreement of 30 June 2019
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