

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

Namecheap, Inc.

Claimant,

Case Number: 01-20-0000-6787

- and -

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

PROCEDURAL ORDER NO. 1

1. On July 28, 2020, at 12:00 pm Eastern time, a preparatory conference in the above-captioned arbitration was held by Zoom videoconference pursuant to a notice from the International Centre for Dispute Resolution dated July 26, 2020. The following individuals participated:

Flip J. Petillion (Petillion, Huizingen, Belgium), counsel for Claimant
Jan Janssen (Petillion, Huizingen, Belgium), counsel for Claimant
Jeffrey A. LeVee (Jones Day, Los Angeles, CA), counsel for Respondent
Kelly Ozurovich (Jones Day, Los Angeles, CA), counsel for Respondent
Amy A. Stathos (Deputy General Counsel, ICANN)
Casandra Furey (Associate General Counsel, ICANN)
Glenn P. Hendrix, Chairman of the Independent Review Panel (the "Panel")
Grant L. Kim, Panel Member
Christof Siefarth, Panel Member
Thomas Ventrone (International Centre for Dispute Resolution)
Tom Simotas (International Centre for Dispute Resolution)

Background

2. The parties to this arbitration are the Claimant, Namecheap, Inc. ("Namecheap" or "Claimant"), a Delaware corporation, and the Respondent, Internet Corporation for Assigned Names and Numbers ("ICANN" or "Respondent"), a California nonprofit public benefit corporation. ICANN is responsible for overseeing the technical coordination of the Internet's domain name system on behalf of the

Internet community. Acting in that capacity, ICANN contracts with entities that operate top-level domains (“TLDs”), which represent the portion of a domain name to the right of the final dot, such as “.org” or “.com.” Namecheap is an ICANN-accredited domain registrar and web hosting provider with over 10 million domains under management.

3. The Independent Review Process (“IRP”) was commenced by Claimant’s Request for Independent Review Process, submitted on February 25, 2020. The IRP request states that this dispute arises from:

ICANN’s breaches of its [Articles of Incorporation] and Bylaws by the ICANN Board and staff 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.

4. Also on February 25, 2020, Claimant filed a request for the appointment of an Emergency Panelist and an order providing for Interim Measures of Protection (the “Emergency Request”), seeking to require ICANN, *inter alia*, to: (1) stay all actions that further the change of the control of the .org registry operator to a for-profit entity during the pendency of the IRP; and (2) take all actions that are necessary to prevent the .org registry operator from charging 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 exceed the maximum fees that were applicable prior to June 30, 2019.

5. ICANN responded to the Emergency Request on March 11, 2020.

6. On March 20, 2020, the Emergency Panelist, Gary L. Benton, rendered a decision denying the Emergency Request on the basis that “the balance of hardships with respect to the requested interim relief tips in favor of ICANN.” (Decision on Request for Emergency Relief, ¶ 141). The Emergency Panelist also stated that: “In determining that interim relief is not appropriate at this time with respect to elimination of the price controls or the pending change of control review, it should be made clear that this decision does not resolve the merits to be fully addressed by the IRP Panel.” (*Id.* ¶ 130).

7. ICANN responded to Claimant's Request for Independent Review on April 10, 2020, stating, *inter alia*, that the Request should be denied for two separate and independent reasons:

First, Namecheap has not established that it has suffered any harm as a result of ICANN's conduct; accordingly, Namecheap is not a proper "Claimant" under ICANN's Bylaws, and it has no standing to pursue this IRP Request. Second, Namecheap has not demonstrated that ICANN violated its Articles of Incorporation ... or its Bylaws in any of the respects identified in Namecheap's Request for IRP. Namecheap plainly has not carried its burden.

8. The Panel issued an initial draft of this Procedural Order to the parties on August 3, 2020. This Order incorporates several rounds of comments by both parties.

Place of Arbitration and Governing Laws and Procedures

9. The parties agree that this Independent Review shall be conducted in accordance with the ICANN Amended and Restated Articles of Incorporation filed with the California Secretary of State on October 3, 2016, and the ICANN Bylaws as amended on November 28, 2019.

10. This Independent Review is administered by the International Centre for Dispute Resolution ("ICDR") of the American Arbitration Association. The ICDR International Arbitration Rules, contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of June 1, 2014, and as supplemented by the Interim Supplementary Procedures for ICANN Independent Review Process (the "IRP Procedures") adopted October 25, 2018, shall apply to this proceeding. Section 2 of the IRP Procedures states: "In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR Rules, these Interim Supplementary Procedures will govern."

11. The parties have stipulated that the place of arbitration (seat) is Los Angeles, California, USA.

12. The Panel views this proceeding as an "international arbitration" within the meaning of the California International Arbitration and Conciliation Act ("CIACA"), Cal. Civ. Proc. Code § 1297.11 et seq., given that the subject matter is "related to commercial interests in more than one state." *See* Cal. Civ. Proc. Code § 1297.13(d). Given the global nature of the Internet, this dispute about the operation of the .org, .info and .biz generic TLDs has worldwide implications. The Panel also observes that the ICANN Bylaws provide that Independent Review is intended to

“[l]ead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.” ICANN Bylaws, Section 4.3(a)(viii). Further, the IRP Procedures provide that independent reviews shall be conducted in accordance with the ICDR’s International Arbitration rules. Accordingly, this proceeding falls within the CIACA, to the extent that statute is not preempted by the Federal Arbitration Act. This means, among other things, that non-California counsel may participate in these proceedings. *See* Cal. Civ. Proc. Code §§ 1297.185-189.

13. The parties have stipulated that California law is the substantive law governing this Independent Review. Further, Article III of the ICANN Articles of Incorporation provides that ICANN “shall ... carry[] out its activities in conformity with relevant principles of international law and international conventions.” *See also* ICANN Bylaws, Art. 1, § 1.2(a) (ICANN “must ... carry[] out its activities in conformity with relevant principles of international law and international conventions”).

14. The language of the arbitration is English.

The Current Status of the Dispute

15. At the preparatory conference, ICANN noted that on April 30, 2020, with respect to the .org TLD, the ICANN Board denied the change of control request that would have resulted in the transfer of the Public Interest Registry (“PIR”) from the Internet Society to Ethos Capital, a for-profit entity. ICANN maintains that this development has rendered the change of control issue raised by Namecheap in this IRP moot.

16. Namecheap acknowledged that the change of control of the .org registry operator is no longer pending, but maintains that documents pertaining to the proposed change of control may nonetheless be relevant to the price cap issue and that it may seek disclosure of such documents from ICANN. ICANN disagrees that such documents would be relevant; however, this issue is neither ripe nor presently before the Panel.

The Parties’ Views on Scheduling and Various Procedural Matters

17. Counsel for each party confirmed during the preparatory conference that neither has any objections to the jurisdiction or constitution of the Independent Review Panel.

18. The Panel solicited the parties’ views regarding:

- a) The application of Article 4, Section 4.3(s) of the Bylaws, which provides that:

An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action.

- b) The nature of the final merits hearing in this matter, taking due account of Rule 5A of the IRP Procedures, which provides as follows:

Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies). The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an “in-person hearing” refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

19. Flip Petillion, Esq. addressed these issues for the Claimant, with contributions from Jan Janssen, Esq. The Claimant noted that this is not a typical IRP proceeding involving the assignment of new TLDs and that “there are substantial issues at stake.” Claimant stated that completing the proceeding within six months (as ideally contemplated under Article 4, Section 4.3(s) of the Bylaws) would be “impossible.” Claimant stated that, in practice, the “shortest” IRP cases are concluded within 11

months. Claimant gave examples of other IRP cases that were less complicated in its view, and with less significant public policy implications, that were still ongoing in their second year. Claimant indicated that it would need disclosure from ICANN. It also advocated for an in-person hearing (to the extent feasible, taking into account the COVID-19 pandemic), citing the .web IRP case as precedent for such a hearing.

20. Jeffrey A. LeVee, Esq. addressed these issues for the Respondent. ICANN cited other IRP cases that it believed were more complicated than the present case, but did not dispute that this proceeding could not and should not be concluded within six months. ICANN agreed that allowing a reasonable time for disclosure was appropriate. ICANN noted that Rule 5A of the IRP Procedures provides that the IRP Panel “should conduct its proceedings with the presumption that in-person hearings shall not be permitted” and that “[t]he presumption against in-person hearings may be rebutted only under extraordinary circumstances.” ICANN suggested that it would be premature to decide the timing and format of the hearing.

21. Taking due account of the views of the parties and other circumstances—including that the deadline for the parties to object to the appointment of the Chair of the Panel expired only on July 29, 2020 (just 27 days before the end of the six-month period)—the Panel concludes that completing the process within six months after the filing of the Claim on February 25, 2020 is not feasible. Further, the six-month provision in Article 4, Section 4.3(s) of the Bylaws is merely precatory (*i.e.*, “[a]n IRP Panel *should* complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim”). Nevertheless, the Panel intends to keep the case moving expeditiously, as a prolonged proceeding would be contrary to the interests of both parties and the larger Internet community.

22. Both parties indicated that they wish to submit further written briefs, but that it would be premature to establish a briefing schedule. The parties also seek to defer a number of issues, including the timing of the final hearing, the timing for designating experts (if any), the manner in which witness testimony will be submitted, and other such matters until they have completed exchanging information (the timing of which is addressed below) or at least have a better sense of how long that process will take.

23. Neither party presently contemplates any amendment to its pleadings.

24. Neither party presently anticipates filing a dispositive motion, although ICANN reserved the right to file: 1) a motion challenging Namecheap’s standing to bring this proceeding; and 2) a motion to dismiss Namecheap’s claims with respect to the proposed transfer of the .ORG registry. No party shall file a dispositive motion without first seeking leave from the Panel.

Exchanges of Information

25. The Panel solicited the parties' views on exchanges of information, asking that they take due account of Rule 8 of the IRP Procedures and Article 21 of the ICDR Rules.

26. Following a discussion of the parties' respective needs for disclosure, the parties agreed upon the following schedule:

- Namecheap will serve any disclosure requests on or before August 18, 2020.
- ICANN will serve any disclosure requests on or before August 28, 2020.
- ICANN will respond in writing to Namecheap's disclosure requests on or before September 8, 2020.
- Namecheap will respond in writing to ICANN's disclosure requests on or before September 18, 2020.

27. Each disclosure request shall contain:

- (1) a description of each requested document sufficient to identify it, or (2) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; in the case of documents maintained in electronic form, the requesting party may, or the Panel may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such documents in an efficient and economical manner;
- a statement as to how the documents requested are relevant to the case and material to its outcome; and
- (1) a statement that the documents requested are not in the possession, custody or control of the requesting party or a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents, and (2) a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody or control of another party.¹

28. For each item or category requested, the response shall either state that the information will be provided as requested or state with specificity the grounds for objecting to the request, including the reasons. The production shall then be completed

¹ These requirements are adapted from the International Bar Association Rules on Taking Evidence in International Arbitration (the "IBA Rules"). Although the IBA Rules are not generally applicable in this proceeding, the parties agreed during the preparatory conference that requests for information and responses to such requests would conform to typical practice in international arbitration. The IBA Rules reflect customary international arbitration practice with respect to exchanges of information.

no later than the time specified in the request or another reasonable time specified in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to only part of a request shall specify the part and shall not relieve the party of responding to the non-objectionable part(s) of the request.

Confidentiality

29. The Panel asked the parties if there was any need for measures to protect the confidentiality of information (while taking due account of the transparency provisions in Article 4, Section 4.3(u) of the ICANN Bylaws). Both parties indicated that certain information, such as pricing, may require a confidentiality order. If so, they will seek to agree upon the terms of such an order and provide a draft to the Panel for its consideration.

30. The Panel drew the attention of the parties to the *AAA-ICDR Best Practices Guide for Maintaining Cybersecurity and Privacy* and the *AAA-ICDR Cybersecurity Checklist*.

Pleadings and Communications with the Panel

31. It was agreed that the parties should communicate directly with the Panel (as opposed to through the ICDR). Email will be the preferred means of communication. The parties should signal any need for urgent action in the body of any email, rather than only in an attachment. No party or representative of a party shall engage in any ex parte communication with the Panel.

32. Any document that a party seeks to have included in the arbitral record for purposes of judicial review or an appeal pursuant to Section 14 of the IRP Procedures should also be filed in the ICDR's case management system at www.adr.org.

33. Unless another time is specified, the parties will be deemed to have complied with time limits established by the Panel if they transmit the material in question to the opposing party and the Panel by email no later than 11:59 pm Pacific Time on the date of the deadline.

34. The Panel may request that certain voluminous submissions, briefs, witness statements, and expert reports be sent to the Panel in hard copy. Such hard copies should be dispatched by courier on the business day following the date of the deadline (recognizing that this timeframe may be aspirational, given limitations imposed by the COVID-19 pandemic). Unless otherwise directed, any hard copies should be sent to the members of the Panel at the addresses below:

Glenn P. Hendrix
Arnall Golden Gregory LLP
171 17th Street NW, Suite 2100
Atlanta, GA 30363 USA

Grant L. Kim
LimNexus LLP
220 Montgomery Street, Suite 1411
San Francisco, CA 94104 USA

Christof Siefarth
GÖRG Partnerschaft von Rechtsanwälten mbB
Kennedyplatz 2
50679 Cologne
Germany

Exhibits

35. The parties have already submitted evidentiary exhibits and legal authority/reference material exhibits in connection with their prior submissions in this matter. The parties need not re-submit any such previously submitted exhibits. Any new exhibits should be labeled consistently with the labeling formats previously used by each party and numbered consecutively starting with the number following the number of the last exhibit previously submitted by that party. When transmitted electronically, the Panel requests that exhibits be in a searchable PDF format.

Other Matters

36. The Panel will issue a reasoned final award in accordance with Section 4.3 (v) of the ICANN Bylaws, which provide that “all IRP decisions shall be written and made public, and shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.”

37. Each party will submit to the Panel and the ICDR, within a week of the date of this Order, a list of all counsel who will represent that party in this arbitration. Except for the addition of associates from each firm appearing for a party, the addition of new counsel after that date will require the consent of the Panel, to avoid the late introduction of a possible conflict for a member of the Panel.

38. A status conference is scheduled for September 25, 2020, at 12:00 p.m. Eastern Daylight Time, via Zoom videoconference. The meeting coordinates will be issued by the ICDR in advance of the conference. The parties agreed that the status conference will be recorded.

39. All deadlines shall be strictly adhered to; however, either party may request that the deadlines set forth in this Order be adjusted.

40. In the event this Order reflects that the parties have agreed upon any provision set forth herein, but one or more of the parties do not in fact so agree, such party or parties shall so advise the Panel within three business days of this Order.

**As at Los Angeles, California, USA
August 27, 2020**

FOR THE PANEL:

A handwritten signature in black ink, appearing to read "Glenn P. Hendrix". The signature is written in a cursive, flowing style.

Glenn P. Hendrix, Chair