

**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. 2**

1. On September 25, 2020, at 9:00 am Pacific Time, a status conference in the above-captioned arbitration was held by Zoom videoconference, as previously scheduled in Procedural Order No. 1. The following individuals participated:

Flip J. Petillion (Petillion, Huizingen, Belgium), counsel for Claimant,  
Namecheap, Inc. ("Namecheap" or "Claimant")  
Jan Janssen (Petillion, Huizingen, Belgium), counsel for Claimant  
Jeffrey A. LeVee (Jones Day, Los Angeles, CA), counsel for Respondent, Internet  
Corporation for Assigned Names and Numbers ("ICANN" or "Respondent")  
Kelly Ozurovich (Jones Day, Los Angeles, CA), counsel for Respondent  
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  
Miroslava Schierholz, International Centre for Dispute Resolution ("ICDR")  
Tom Simotas, ICDR

The conference was adjourned at approximately 11:00 am Pacific Time. By agreement of the parties, the conference was recorded.

2. The status conference focused initially on the process and schedule for resolving the parties' respective objections to one another's disclosure requests. Prior to the status conference, the parties exchanged preliminary thoughts on that issue via email, copying the Panel.

3. Following the status conference, the Panel issued a draft procedural order to the parties for comment. The Panel received comments from the parties via email and during a Zoom videoconference conducted on October 15, 2020, at 9:30 am Pacific Time. The following individuals participated:

Flip J. Petillion (Petillion, Huizingen, Belgium), counsel for Claimant,  
Namecheap, Inc. ("Namecheap" or "Claimant")  
Jan Janssen (Petillion, Huizingen, Belgium), counsel for Claimant  
Jeffrey A. LeVee (Jones Day, Los Angeles, CA), counsel for Respondent, Internet  
Corporation for Assigned Names and Numbers ("ICANN" or "Respondent")  
Kelly Ozurovich (Jones Day, Los Angeles, CA), counsel for Respondent  
Amy A. Stathos (Deputy General Counsel, ICANN)  
Glenn P. Hendrix, Chairman of the Independent Review Panel (the "Panel")  
Grant L. Kim, Panel Member  
Christof Siefarth, Panel Member  
Tom Simotas, ICDR

#### Disclosure

4. As provided in Paragraph 26 of Procedural Order No. 1, the parties timely served disclosure requests and responses and objections (but not yet responsive documents).

5. Taking due account of the parties' submissions and also considering the respective views of the parties as expressed during conferences with the Panel, the parties shall have until November 4, 2020 to submit any motions to compel the disclosure of documents that the other party refuses to produce. Responses to any such motions shall be submitted on or before November 24, 2020. Prior to submitting a motion to compel, each party shall engage in reasonable and good faith attempts at an informal resolution of each issue presented by the motion. Such attempts shall include live communication between lead counsel for the parties via telephone or videoconference.

6. In the event that motion(s) to compel disclosure are submitted, and the parties continue to be unable to resolve their disagreements, the Panel will conduct a hearing on such motions on December 2, 2020, beginning at 8:00 am Pacific Time. The hearing will be conducted via Zoom videoconference. The Zoom meeting coordinates will be issued by the ICDR in advance of the conference.

7. The deadline for production of documents is April 1, 2021 and the parties shall keep one another and the Panel apprised of any problems meeting this date. The Panel expects that the parties will commence producing documents on a rolling basis as soon as practicable, and hopefully conclude production well before that date.

### Confidentiality Order

8. On October 15, 2020, the parties submitted a stipulated protective order for purposes of protecting certain confidential, proprietary, or private information from use for any purpose other than prosecuting this proceeding.

### The Final Merits Hearing

9. By agreement of the parties, the final merits hearing in this matter will commence on August 23, 2021. The Panel has set aside the entire week of August 23, 2021, although it is not clear that the hearing will actually require that much time.

10. The Panel is presently operating under the presumption that the hearing will be conducted remotely via Zoom, in part due to continued uncertainty surrounding international travel as a result of the COVID-19 pandemic, and in part based on Rule 5A of the Interim Supplementary Procedures for ICANN Independent Review Process (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.

11. Claimant has advocated for an in-person hearing, but recognizes that this may not be feasible due to the COVID-19 pandemic. Respondent presently disagrees

with the need for an in-person hearing. The Panel remains open to the possibility of an in-person hearing, if feasible notwithstanding the pandemic, and either 1) both parties agree or 2) the Panel finds good cause for an in-person hearing in response to a motion filed in accordance with Rule 5A of the IRP Procedures.

12. In the event the hearing is conducted remotely, the present plan is to commence at 8:00 am Pacific Time / 11:00 am Eastern Time / 5:00 pm Central European Time. The hearing would likely conclude each day at approximately 12:00 pm Pacific Time / 3:00 pm Eastern Time / 9:00 pm Central European Time.

### **Prehearing and Post-Hearing Briefs and Witness Statements**

13. The Panel and the parties discussed several alternatives in connection with the submission of prehearing briefs, including the simultaneous exchange of briefs, one round of sequential briefs (Claimant followed by Respondent), two rounds of sequential briefs (two briefs each from Claimant and Respondent, with Claimant filing first). Taking into consideration the views of the parties and the relatively tight timeframe between the end of the disclosure period (April 1, 2021) and the hearing (August 23, 2021), the Panel concludes that one round of sequential prehearing briefs is most appropriate in this case. The Panel anticipates requesting one round of post-hearing briefs from the parties, and this also factored into the decision to forgo a second round of prehearing briefs.

14. Prehearing submissions shall be submitted according to the following schedule:

April 1, 2021: Parties to complete production of all documents that they have agreed to produce or for which the Tribunal has ordered production.

May 3, 2021: Claimant to identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony. With respect to expert witnesses, the disclosure shall include a statement of the opinions the expert witness will express.

May 28, 2021: Claimant to submit its Pre-Hearing Brief and supporting witness statements, evidentiary exhibits, and legal authorities.

June 18, 2021: Respondent to identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony. With respect to expert witnesses, the disclosure shall include a statement of the opinions the expert witness will express.

July 6, 2021: Respondent to submit its Pre-Hearing Brief and supporting witness statements, evidentiary exhibits, and legal authorities.

15. Claimant may seek leave from the Panel to submit limited rebuttal witness statements and evidentiary exhibits to address unanticipated factual allegations in Respondents' Prehearing Brief. Any such request for leave shall: 1) explain why the need for such rebuttal witness statements or exhibits could not have been reasonably anticipated at the time Claimant submitted its Prehearing Brief; 2) not be used to introduce new arguments that could have been submitted previously; 3) attach the proposed rebuttal evidence; and 4) be submitted on or before August 3, 2021. ICANN may submit written objections to any limited rebuttal witness statements and evidentiary exhibits within the ten-day period set forth in Paragraph 16.

16. All witness statements shall include a signed affirmation that the contents are correct. Witness statements shall, in principle, constitute the direct testimony of each witness. All witnesses shall be available for cross-examination upon request by the other side. If a witness is not available for cross-examination at the hearing, the Panel may disregard any statement of that witness or, alternatively, take such unavailability into account in determining the weight to be given to the statement. If the other side does not request an opportunity to cross-examine a witness at the hearing, the witness statement shall be treated as direct testimony and the witness shall not testify at the hearing, unless leave is granted upon a showing of good cause. Hearing testimony shall begin with a very short direct confirming that the contents of the witness statement are correct, followed by cross-examination and then further redirect and re-cross at the Panel's discretion.

17. Prehearing briefs and witness statements shall include consecutively numbered paragraphs, to facilitate reference to specific points, and briefs shall include a table of contents. Factual and legal arguments shall include citations to the supporting evidence or legal authorities, which should be included with the pre-hearing brief unless previously submitted by either side. Any objection to evidentiary exhibits shall be made in the next scheduled submission of the objecting party, or within ten days if there is no such scheduled submission. Unless there is a specific, timely objection, all evidentiary exhibits shall be deemed to be authentic and to be part of the record. All evidentiary exhibits should be included with the parties' prehearing submissions. Leave to submit evidentiary exhibits at the hearing shall be granted in extraordinary circumstances only, upon a showing of good cause.

18. A prehearing conference will be conducted on August 10, 2021, at 8:30 am Pacific Time, via Zoom videoconference. The Zoom meeting coordinates will be issued by the ICDR in advance of the conference.

Other Matters

19. A status conference is scheduled for March 16, 2021, at 8:30 am Pacific Time, via Zoom videoconference. The Zoom meeting coordinates will be issued by the ICDR in advance of the conference.

20. The Panel issued an initial draft of this Procedural Order to the parties for review and comment.

21. 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  
October 21 2020

FOR THE PANEL:



Glenn P. Hendrix, Chair