

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. 4**

1. Procedural Order No. 3 established a December 16, 2020 deadline for the Claimant (Namecheap) to make an evidentiary submission articulating the harm that supports its claim of standing under the ICANN Bylaws.

2. On December 16, 2020, at 9:37 a.m. Pacific Time, Namecheap requested an extension of the deadline on the following grounds:

“We would like to inform the Panel that we have commissioned experts and asked them to prepare an independent, objective, and fact-based assessment and report. The report will support the evidentiary submission requested by the Panel.

“Today, the experts informed us that they have been working diligently on a draft report outlining the theory of harm in detail and working on the collection and analysis of the data in support of the articulation of the harm that supports Namecheap’s claim of standing under the ICANN Bylaws.

“They have asked if they can be granted additional time to finalize their report. They experience difficulties in getting hold of resources, partly because of the current Covid-19 situation.

“We have informed them that we would request an extension.

“We hereby ask you for an extension. In view of the current situation and the coming holiday season, we would find it

warranted if Namecheap be granted an extension till mid-January 2021.

“Thank you for your attention to this request.”

3. The Respondent (ICANN) responded the same day as follows:

“ICANN objects to Namecheap’s request for an extension of time for several reasons.

“First and foremost, Namecheap’s proposal to produce an expert report – now or a month from now – is not what the Panel ordered. Procedural Order No. 3 requires that Namecheap “make an evidentiary submission – presumably in the form an affidavit with exhibits – articulating the harm that supports its claim of standing under the ICANN Bylaws.” ICANN is entitled to review the actual evidence (if any) that allegedly demonstrates that Namecheap has standing to pursue this IRP, and that is precisely what the Panel required Namecheap to produce, not some expert report that Namecheap needs weeks to prepare. Indeed, Namecheap represented to the Emergency Panelist during the hearing on Namecheap’s Emergency Request that it had evidence in the form of an affidavit demonstrating its harm (but the Emergency Panelist declined to receive the evidence because it was not timely). ICANN has yet to receive any such affidavit or any other evidence demonstrating that Namecheap qualifies as a Claimant, and that evidence – not an expert report – is what ICANN is entitled to receive and what the Panel ordered to be provided by today.

“Second, to qualify as an IRP “Claimant,” Namecheap was supposed to be able to demonstrate its harm at the outset of this IRP, nearly a year ago. And Namecheap has known since the outset of this IRP that ICANN was challenging whether Namecheap had standing to pursue its claims. Namecheap has had ample opportunity to identify any evidence demonstrating that it qualifies as a Claimant in this IRP, and its request for an extension on the very day that evidence is due is simply too late.

“Third, in view of the fact that Namecheap obviously does not have non-expert information that demonstrates its harm with respect to price controls, ICANN should be permitted to file its motion on the current briefing schedule to adjudicate this critical issue before expending any additional resources. (As previously discussed,

“ICANN also will be moving to dismiss Namecheap’s claims related to the Change of Control Request for .ORG.) The fact that Namecheap lacks non-expert information to show harm, in ICANN’s view, will be outcome-determinative with respect to whether this IRP should continue.

“Finally, if the Panel does allow any extension of Namecheap’s deadline, ICANN requests that the entire IRP schedule be moved back by the same amount of time as ICANN’s motion to dismiss is delayed so that ICANN’s motion can be adjudicated without ICANN having to bear the significant cost of discovery that is scheduled to occur during the first four months of 2021.”

4. Namecheap replied as follows:

“We briefly respond to ICANN’s arguments.

“First, ICANN is not to decide what form the evidentiary submission should take. The record shows that the Panel asked that Namecheap present a theory of harm and to make a prima facie case showing its harm. An affidavit with exhibits is one form the evidence could take. Namecheap has opted to present an expert report with exhibits. ICANN cannot object to an evidentiary submission containing more information than one might expect from an affidavit.

“Second, Namecheap submits that it was able to demonstrate its harm at the outset, as recognized by the emergency arbitrator. Before this Panel, Namecheap has maintained consistently that it sought to demonstrate its harm inter alia on the basis of information that is requested from ICANN. ICANN has not yet disclosed any of the data (and has still not presented the search terms it proposes to use as asked by the Panel), but only recently insisted on a showing of harm before the submission of Namecheap’s brief on the merits and before the document production phase has ended.

“Third, ICANN’s third argument is purely speculative, incorrect and relates to the first argument. ICANN is not to dictate the nature of the evidence that Namecheap presents to demonstrate its harm.

“We respectfully request that the experts are given the opportunity to assist the Panel and perform a full analysis of the evidence Namecheap has presented to them.

“Finally, should the Panel not grant the requested extension, Namecheap will file the preliminary report as currently drafted and requests that the experts be given an opportunity to complete the report in the coming weeks. We remind that the record shows that ICANN plans not to work during the Christmas holidays. We do not see how ICANN can be harmed by that approach.”

5. On December 16, at 3:27 p.m. Pacific Time (December 17, 12:27 a.m. for one of the three Panelists), the Panel Chair advised the parties that “[t]he Panel has not had an opportunity to reach a decision on the extension request. I will exercise Chair’s prerogative to grant an extension until at least tomorrow, when I expect that the Panel will be in a position to render a collective decision.”

6. Having considered the parties’ submissions, the Panel orders as follows:

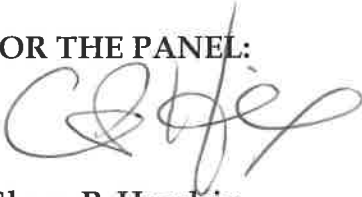
- a) As a preliminary matter, the Panel does not consider it appropriate to request an extension on the date a submission is due. Going forward, absent a showing of exigent circumstances, the Panel will not countenance requests for extension received on or near the due date for a submission, especially where those deadlines were established by agreement of the parties.
- b) As to the substance of Namecheap’s request, the Panel notes that at this stage in the proceedings, the Panel is simply requesting that Namecheap make a prima facie showing of standing, meaning a showing that Namecheap has been materially affected by alleged violation(s) of ICANN’s Articles of Incorporation or Bylaws. The ICANN Bylaws provide that “[t]o be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.”
- c) The Panel is flexible as to how this prima facie showing is made. Procedural Order No. 3 provided for Namecheap to “make an evidentiary submission – presumably in the form an affidavit with exhibits – articulating the harm that supports its claim of standing under the ICANN Bylaws.” The reference to an affidavit was based on the Panel’s understanding that Namecheap had advised the Emergency Panelist during the hearing on Namecheap’s Emergency Request that it was prepared to submit an affidavit demonstrating its harm (although the Emergency Panelist declined that proffer). The Panel is open to receiving other evidence, including an expert report, but did not expect Namecheap to submit an expert report at this stage. Regardless of the form of Namecheap’s submission, the Panel expects that it will specifically identify the nature of any harm and its timing (past, present, or future) and

the manner in which the harm is directly and causally connected to ICANN's alleged violations.

- d) Namecheap's request for an extension until mid-January in order to submit an expert report is denied. Namecheap is granted an extension until Monday, December 21, 2020.
- e) The other deadlines in connection with ICANN's motion to dismiss are extended as follows:
  - ICANN will file its motion to dismiss and supporting brief on or before Wednesday, January 13, 2021.
  - Namecheap will file its response on or before Tuesday, January 26, 2021.

**As at Los Angeles, California, USA**  
**December 17, 2020**

**FOR THE PANEL:**

A handwritten signature in black ink, appearing to read 'G. Hendrix', written over a faint, illegible stamp or watermark.

**Glenn P. Hendrix**  
**Chair**