

**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. 15**

**Introduction**

1. This Procedural Order addresses the following issues:
  - a. A request by Claimant Namecheap, Inc. (“Namecheap” or “Claimant”) that certain redacted documents produced by Respondent Internet Corporation for Assigned Names and Numbers (“ICANN” or “Respondent”) and attached to Namecheap’s Further Motion to Compel as Annexes 67 and 78 be completely unredacted.
  - b. A request by Namecheap that ICANN produce electronically stored information from the Slack communication platform.
  - c. A request by Namecheap that ICANN produce communications between ICANN and Dennis Carlton during the period of November 2018 to January 2019.
  - d. A request by Namecheap that ICANN commit to having specified current and former ICANN Board members and staff appear for examination at the final evidentiary hearing.

**Annex 67**

2. The Panel denies Namecheap’s request that Annex 67 be further unredacted. ICANN re-produced Annex 67 to the Panel with modified redactions in accordance with the Panel’s order on 23 November 2021, which stated: “The Panel

sustains the relevance redactions except as” set forth in the order. The redactions for privilege were applied only to the version of Annex 67 that was submitted to the Panel during its in camera review for relevance. The Panel has already ruled on Annex 67, and ICANN has complied with that ruling.

### Annex 78

#### **Procedural Background:**

3. Annex 78 is a 1 July 2021 email from Gwen Carlson to Brad White, with a copy to Russell Weinstein. None of the three are attorneys. The email with the redaction reads as follows:

Redacted - Confidential Information

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This message was prompted by an email string that started the same day with the following inquiry from a reporter:

Redacted - Confidential Information

Mr. White forwarded the reporter's email to Ms. Carlson, Mr. Weinstein and Cyrus Namazi (also a non-attorney), with the following message:

Redacted - Confidential Information

4. The Panel briefly addressed Annex 78 in Procedural Order No. 13, noting that Namecheap "argues that it is unclear why ICANN redacted portions of the Annex 78 email (including an attachment) as privileged." The Panel agreed and stated: "ICANN has not directly responded to Namecheap's argument. Accordingly, ICANN is directed to explain why it contends that the redacted text and attachments are privileged."

5. ICANN responded on 9 November 2021, stating:

ICANN set forth a prima facie claim for privilege on its privilege log for both the email chain and the attachment referenced in Annex 78. As for the redacted portions of the email chain, ICANN's privilege log explains that they "reflect[] legal advice from ICANN counsel re price control provisions in registry agreements." The redacted attachment also appears on ICANN's privilege log with the description "ICANN Issues Scorecard prepared in consultation with ICANN counsel for the purpose of providing legal advice re renewal of registry agreements."

6. Namecheap replied on 18 November 2021 with the following:

ICANN fails to respond to Namecheap's argument that the communication involves no inside or outside counsel and that the redacted sentence seems to pertain to instructions from ICANN's CEO, Goran Marby, and that guidance from Sally Newell Cohen, who is not legally qualified, is requested. It looks as if the redacted sentence relates to the instructions from ICANN's CEO for which guidance from Ms. Newell Cohen is sought. The attachment to the email is withheld entirely as privileged. However, there is no indication whatsoever that the attachment (sent by ICANN's Senior Director of GDD Communications to

non-legal staff) would be privileged. The custodian for these documents is unspecified and no information is provided as to the author of the attachment. It is all too easy for ICANN to assert that a communication between two non-legal staff members reflects legal advice from ICANN counsel, to redact even the document name of the attachment, and to allege that the attachment consists of an 'Issues Scorecard prepared in consultation with ICANN counsel'. These mere assertions do not make out a prima facie case that the attachment and the redactions in the e-mail contain privileged information. More specifically, there is no reason for ICANN to redact the document name of the attachment, as a document name cannot be seen as containing legal advice that is protected under privilege. The point is all the stronger, as the custodian for these documents is unspecified and no information is provided as to the author of the attachment. As a result, Namecheap has rebutted ICANN's prima facie claim for privilege and ICANN has failed to respond to Namecheap's arguments. Therefore, the redacted information and the attachment should be produced.

7. On 22 November 2021, the Panel posed the following questions to ICANN:

- Whether the "Sally" referenced in the document is an attorney.
- Whether the redacted portion of Annex 78 recites confidential communications containing legal advice from ICANN's counsel.

8. ICANN responded on 24 November 2021 as follows:

Annex 78 also contains appropriate redactions of information protected by the attorney-client privilege. ICANN redacted the name of the attachment to Annex 78 as privileged, but the general subject matter is reflected on ICANN's privilege log, as ICANN previously explained. Specifically, the attachment comprises an "ICANN Issues Scorecard" that is prepared in consultation with ICANN's legal counsel for the purpose of providing legal advice regarding renewal of registry agreements. The ICANN Issues Scorecard is not distributed outside of ICANN, and it reflects topics (i.e., contract negotiations) that are inherently legal in nature. Therefore, this attachment, including the specific name of the attachment, contains confidential legal advice by ICANN's legal counsel. Likewise, the redactions in the body of the email are appropriate. They apply to a single sentence that specifically references confidential content contained in the privileged ICANN Issues Scorecard. As a result, the body of the email recites ICANN counsel's legal advice. Additionally, the Panel questions whether the "Sally" referenced in the document is an attorney. Annex 78

presumably refers to Sally Newell Cohen, who is not a lawyer; she is the Senior Vice President, Global Communications and Language Services. That no lawyers are included on this communication, however, is of no import. Instead, it is more than sufficient that the information redacted reflects ICANN counsel's legal advice, as set forth on ICANN's privilege log. *See Datel Holdings Ltd.*, 2011 WL 866993, at \*5; *Zurich Am. Ins. Co.*, 155 Cal. App. 4th at 1502.

9. Namecheap commented on 13 December 2021 that "Annex 78 is an email that includes no attorneys, yet ICANN has redacted a sentence as well as the name of the attachment to the email that ICANN claims is an 'ICANN Issues Scorecard.' ICANN claims that these redactions nevertheless reflect ICANN's counsel's legal advice because the scorecard 'reflects topics (i.e., contract negotiations) that are inherently legal in nature.' First, it is notable that ICANN has not claimed the scorecard was created by an attorney or how contract negotiations would reflect legal advice. But more fundamentally, it is questionable how the title of an issues scorecard could reflect the advice of ICANN's attorney."

10. On 21 December 2021, ICANN replied:

Namecheap's arguments again fail to rebut ICANN's prima facie claim for privilege, as set forth on its privilege log, and again via its 24 November 2021 correspondence. Namecheap argues erroneously that ICANN "has not claimed the scorecard was created by an attorney." But ICANN's privilege log entry for the attachment to Annex 78 clearly states: "ICANN Issues Scorecard prepared in consultation with ICANN counsel for the purpose of providing legal advice re renewal of registry agreements." Namecheap also claims that it cannot understand "how contract negotiations would reflect legal advice." Namecheap's confusion is simply not credible. Contract negotiations implicate both business/commercial issues and legal issues, such as the interpretation and legal implications of various contract provisions. Indeed, most contract negotiations for sophisticated businesses, such as Namecheap, surely involve legal counsel.

### **Panel Ruling:**

11. The party claiming attorney-client privilege has the burden of establishing the preliminary facts necessary to support its exercise. *See Cal.Evid.Code* § 954. Annex 78 does not appear on its face to be privileged. Nothing in the broader context of the email exchange (most of which is nonredacted) or the identity of its participants suggests any privileged communication. The emails concern whether to respond to a reporter's inquiry about the removal of price controls. The sentence

immediately preceding the redaction refers to a need to obtain guidance from Sally Newell Cohen, who is not an attorney. The email opens with a reference to an instruction from ICANN's CEO, who also is not an attorney.

12. The Panel agrees with ICANN that intra-corporate communication between non-lawyers reciting legal advice provided to the company may be privileged, but ICANN's primary basis for asserting that the redacted passage reflects legal advice is a statement that "it reflects topics (i.e., contract negotiations) that are inherently legal in nature." While communications between non-lawyers regarding contract negotiations may reflect legal advice, this is not necessarily (or even usually) the case. Indeed, even communications from an attorney regarding contract negotiations are not necessarily privileged. *See, e.g., Chicago Title Ins. Co. v. Superior Court*, 174 Cal.App.3d 1142, 1151, 220 Cal.Rptr. 507 (1985) ("It is settled that the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent"); *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 219 P.3d 736, 101 Cal.Rptr.3d 758 (2009) ("[T]he privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice").

13. Accordingly, the Panel is not inclined to view the redacted part of the email as privileged. Nevertheless, because disclosure of a document cannot be undone, the Panel offers ICANN a final opportunity to make the case that the document is privileged.<sup>1</sup> Should ICANN exercise that opportunity, the Panel requests that it address the following:

- a. ICANN should explain more specifically why the redacted passage is privileged, rather than relying on general statements about "contract negotiations." The Panel does not view discussion about contract negotiations as automatically legal and privileged in nature.
- b. Annex 78 is a communication between non-lawyers about whether to respond to a press inquiry. It seems that ICANN made a general decision not to respond to inquiries from a particular reporter based on an "instruction" from ICANN's CEO, Goran Marby. Why is that decision legal in nature, and why does it implicate privileged advice?
- c. Given the brevity of the redaction (the equivalent of one line in the email), it strikes the Panel as unlikely that legal advice could be captured within

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<sup>1</sup> The Panel is not permitted to assess ICANN's claim of privilege through in camera review. California Evidence Code Section 915 prohibits disclosure of the information claimed to be privileged as a confidential communication between attorney and client "in order to rule on the claim of privilege."

the space of the redaction, especially since the surrounding content does not seem to set the stage for any reference to legal advice.

14. With respect to the attachment to Annex 78 (the “ICANN Issues Scorecard”), the Panel requests a further showing from ICANN – beyond that the document relates to “contract negotiations” – that the Scorecard is privileged.

15. The Panel will not construe any information provided by ICANN in the course of these showings as constituting a broader waiver of attorney-client privilege.

16. The Panel invites ICANN to propose a deadline for making the requested showing. While mindful that counsel for ICANN are likely focused on the upcoming 14 January deadline for submitting ICANN’s Pre-Hearing Brief, the Panel encourages ICANN to respond either by or as soon as possible after that date, so that this issue can be promptly resolved without any material impact on subsequent deadlines.

### **Slack Communications**

17. In Procedural Order No. 13, the Panel preliminarily addressed Namecheap’s Motion to Compel electronically stored information from the Slack communication platform, stating: “The limited information before the Panel at this time does not give a clear picture of how ICANN personnel used Slack messages during the relevant period or whether such messages are likely to contain meaningfully relevant ESI beyond what ICANN has already produced.”

18. The Panel posed some questions to ICANN, which responded on 12 November 2021, stating that “ICANN does not regularly maintain an archive of communications made via Slack in its ordinary course of business. Rather, the ICANN Slack system has a default thirty-day retention period, after which all messages (in chats or channels) are permanently deleted” and “to the extent there were Slack communications in connection with the renewal negotiations or the decision not to include price controls in the 2019 Registry Agreements during the relevant time period, those communications do not exist today.” Namecheap replied on 18 November 2021, noting that ICANN had already produced a 12 July 2019 Slack communication identified during an interview with Russell Weinstein, meaning that it had been preserved long after the thirty-day retention period.

19. On 22 November 2021, the Panel posed an additional question to ICANN – whether ICANN’s Plus account allows ICANN to request that Slack export messages posted in public channels on ICANN’s Slack platform? ICANN responded on 24 November 2021, stating that ICANN it had “confirmed that there are no communications from the relevant time that have been retained” or that could be exported or produced.

20. Based on ICANN's assurances, there are no further Slack communications to be produced. The fact that Mr. Weinstein happened to save a single Slack communication does not mean that others exist. The Panel denies any relief with respect to Slack communications.

### Dennis Carlton Communications

#### **Procedural Background:**

21. On 19 November 2021, Namecheap requested that ICANN produce email exchanges and attachments between ICANN and "one of its go-to economists, Dennis Carlton." Namecheap specifically identified Document No. REV00023592, dated 22 January 2019, which was an attachment to Dennis Carlton's email of 22 January 2019. Namecheap noted that ICANN's privilege log identified this document as a "[d]raft memorandum prepared at the request of ICANN counsel reflecting legal advice from ICANN internal and external counsel re price control provisions in registry agreements."

22. ICANN responded on 24 November 2021, noting that "[i]n a precedential opinion, a recent IRP Panel ruled that California law, supplemented by U.S. federal law, applies to ICANN's claims for privilege. *Afilias Domains No. 3 Ltd. v. ICANN*, ICDR Case No. 01-18-0004-2702, Procedural Order No. 4, ¶ 33 (12 June 2020)." Citing California Evidence Code § 952, ICANN further observed that "[u]nder California law, communications are protected by the attorney-client privilege if they are 'transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons *other than who are present to further the interest of the client in the consultation* or those to whom disclosure is *reasonably necessary* for the transmission of information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.'" (Emphasis in original). ICANN then provided a string cite of cases for the principle that "California and federal courts have routinely held that communications between a client or its counsel and a consultant retained for the purpose of assisting the client or counsel in providing legal advice are protected by the attorney-client privilege." ICANN maintained that the communications with Mr. Carlton were protected by the attorney-client privilege for the following reasons:

- a. "Jones Day, as ICANN's outside counsel, as well as ICANN's in-house counsel, retained the services of Mr. Carlton, an economic consultant, for the express purpose of providing legal advice by Jones Day and by ICANN's in-house legal department relating to the contract negotiations for the .BIZ, .INFO, and .ORG



registry agreements. These communications were reasonably necessary to accomplish that purpose.”

- b. “[T]he communications occurred during the course of the attorney-client relationship and were not disclosed to any unnecessary third party. In fact, the only people included on the communications were: (1) members of ICANN’s in-house legal department (Ms. Stathos, ICANN’s Deputy General Counsel, and Mr. Halloran, ICANN’s Chief Data Protection Officer and Deputy General Counsel); (2) ICANN’s external legal counsel (Eric Enson and Jeff LeVee, both partners at Jones Day); and (3) Mr. Carlton and two members of his team at Compass Lexecon (economists Frederick Flyer and Joseph Goodman).”
- c. “[E]ach of the communications (and any attachments) reflect, seek, provide, or relate to the provision of legal advice by ICANN’s internal and external legal counsel.”

23. Namecheap countered on 13 December 2021, quoting *People ex rel. Dept. of Public Works v. Donovan*, 57 Cal.2d 346 (Cal. 1962) for the principle that “[t]he fact that an attorney has retained one or more independent agents to aid the attorney in connection with the litigation does not automatically qualify information discovered by the agents for protection by the privilege.” Namecheap maintained that notwithstanding ICANN’s assurances that Mr. Carlton’s expertise was reasonably necessary to accomplish ICANN’s purpose of negotiating the .org, .info, and .biz registry agreements, “ICANN has offered no explanation as to how Mr. Carlton’s services accomplished this goal.” Citing *U.S. v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1071 (N.D. Cal. 2002), Namecheap stated that “the analysis of whether privilege extends to third parties turns on whether the third party is facilitating the accurate and complete consultation between the attorney and the client; not simply that the third party was hired by counsel.” Namecheap argued that:

ICANN has not explained how Mr. Carlton’s services as an economic consultant aided ICANN’s attorneys in facilitating an accurate and complete consultation between ICANN and its attorneys. Instead, as is apparent from the description of the 22 January 2019 Draft Memorandum, Mr. Carlton was hired to provide his opinion as to elimination of price control provisions from the registry agreements. Mr. Carlton’s services are by no means necessary to interpret/translate the supposed legal advice by ICANN’s counsel.

Namecheap also cites *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961), which provides that “[i]f what is sought is not legal advice but only [expert opinion] . . . or the advice sought is the [expert’s] rather than the lawyer’s, no privilege exists.

24. ICANN replied on 21 December 2021. Responding to Namecheap's contention that ICANN had offered no explanation as to how Dr. Carlton's services were reasonably necessary for the accomplishment of the purpose for which counsel was retained, ICANN stated that "the entire purpose of the communications with ICANN's retained economic consultant was to facilitate the provision of legal advice by ICANN's internal and external legal counsel." In a footnote to this statement, ICANN offered that "[t]o the extent the Panel would benefit from additional information regarding how these communications were reasonably necessary for the facilitation of legal advice, ICANN is happy to provide an affidavit to that effect."

### **Panel Ruling:**

25. While the attorney-client privilege extends under California law to "confidential communications with one employed to assist the lawyer in the rendition of professional legal services," *Clavo v. Zarrabian*, 2003 WL 24272641 (C.D. Cal. Sept. 24, 2003), this does not necessarily end the inquiry. "[T]he attorney-client privilege does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice." *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 219 P.3d 736, 101 Cal.Rptr.3d 758 (2009). As previously noted, "the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice." *Id.* Further, "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." For example, "[i]f what is sought is not legal advice but only accounting service or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *U.S. v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

26. As previously noted, California does not permit in camera review of documents to assess a claim of privilege, and neither the ICDR Rules nor Interim Supplementary Procedures for the ICANN Independent Review Process (the "IRP Procedures") provide otherwise. However, California law does allow disclosure or examination of other information to evaluate the basis for the claim. *See, e.g., Costco*, 47 Cal.4th at 737; *Moeller v. Superior Court*, 16 Cal.4th 1124, 1135, 69 Cal.Rptr.2d 317, 947 P.2d 279 (1997).

27. Accordingly, the Panel accepts ICANN's proffer of an affidavit providing additional information explaining how the 2019 communications with Dr. Carlton were reasonably necessary for the facilitation of *legal* advice. The Panel expects the affidavit to make a more detailed showing than the statements in ICANN's correspondence on this issue to date. The Panel will not construe information that ICANN provides for this purpose as waiving the privilege.

28. Separately, the Panel notes that Dr. Carlton has been identified by ICANN as a witness for the hearing. Dr. Carlton also features prominently in Namecheap's Pre-Hearing Brief, including not only references to a non-privileged study that Dr. Carlton conducted for ICANN in 2009, but also his activities on behalf of ICANN in 2019. This potentially raises the issue whether – assuming the 2019 communications are privileged – Dr. Carlton may nonetheless be examined on some level about his activities on behalf of ICANN in 2019, without delving into the actual content of his communications with ICANN's counsel. The Panel invites ICANN to comment on this point in the context of the following passage from the *Costco* case:

Knowledge which is not otherwise privileged does not become so merely by being communicated to an attorney. Obviously, a client may be examined on deposition or at trial as to the facts of the case, whether or not he has communicated them to his attorney. While the privilege fully covers communications as such, it does not extend to subject matter otherwise unprivileged merely because that subject matter has been communicated to the attorney.

*Costco*, 47 Cal.4th at 742-43, quoting *Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 397, 15 Cal.Rptr. 90, 364 P.2d 266 (1961).

29. The Panel further invites ICANN to propose a date by which to submit the requested affidavit and the response to the question posed in this section of the Order, keeping in mind the scheduling concerns noted in Paragraph 16 of this Order.

### **Namecheap's Request Regarding ICANN Witnesses**

#### **Procedural Background:**

30. Namecheap submitted its Pre-Hearing Brief and witness statements on 30 November 2021, as provided in Procedural Order No. 14. In the cover email to its submission, Namecheap made the following request:

In view of the scant record and the latest disclosure of documents, Namecheap considers that, in the interest of the resolution of this IRP, it is important to invite certain people appearing in these documents ((ex-) staff, Board members or contractors) for examination at the evidentiary hearing. Our local bar rules do not allow us to contact these people at our sole initiative. We propose to have a procedural hearing on this question.

31. ICANN responded the same day, stating:

As for Namecheap's request "to invite certain people appearing in [ICANN's] documents ((ex-)staff, Board members or contractors) for

examination at the evidentiary hearing,” the applicable rules allow Namecheap to examine at the IRP hearing only those witnesses who have presented a witness statement. *See* ICDR Rules, Article 23(4). Namecheap may not contact or examine at the hearing any current or former ICANN staff or Board member, unless that staff or Board member submits a witness statement in this IRP. This is, in essence, no different than having Namecheap seek discovery (depositions) that is clearly prohibited by the rules.

Moreover, Rule 5A of the Interim Supplementary Procedures provides, “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.” This provision further confirms that Namecheap may not unilaterally “invite” ICANN’s current and former staff, Board members, or contractors for examination during the IRP hearing as such testimony inevitably would constitute new arguments and new evidence.

Namecheap has had an enormous amount of time to identify its witnesses. It cannot, on the date that it was required to identify those witnesses, punt on its obligation and propose to violate the procedures that are in effect for this IRP by hoping that the Panel will require some (currently unidentified) persons to testify at the hearing even though the parties did not identify those persons in advance as required by the rules. No other IRP claimant has ever asked for such relief, nor has any prior IRP Panel ever authorized such relief.

Pursuant to Procedural Order No. 14, the deadline for Namecheap to identify its fact and expert witnesses was today, 30 November. The only witnesses Namecheap identified were its expert witnesses, and those experts will be the only witnesses Namecheap should be entitled to present. Any request to augment Namecheap’s witness list is now untimely as well as inappropriate.

32. In emails on 30 November and 2 December 2021, the Panel scheduled a case management conference and directed that Namecheap identify the witnesses whose appearance it was seeking at the final evidentiary hearing. On 14 December 2021, Namecheap provided the following list:

Cherine Chalaby, Past Chair, ICANN  
Becky Burr, Director, ICANN Board  
Matthew Shears, Director, ICANN Board

Russell Weinstein, ICANN, Vice President, Global Domains Division (“GDD”) Accounts and Services  
Amy Stathos, ICANN, Deputy General Counsel  
Vinciane Koenigsfeld, ICANN, Vice President, Board Operations  
Karla Hakansson, ICANN, GDD Programs Director  
Karen Lentz, ICANN, Vice President, Policy Research and Stakeholder Programs  
Cyrus Namazi, former ICANN, Vice President, GDD  
Dennis Carlton, Senior Managing Director, Compass Lexecon (ICANN contractor)

33. The case management conference was conducted on 15 December 2021, at 8:30 am PT, by Zoom videoconference. The following individuals participated:

Flip J. Petillion (Petillion, Huizingen, Belgium), counsel for Namecheap  
Jan Janssen (Petillion, Huizingen, Belgium), counsel for Namecheap  
Jeffrey A. LeVeé (Jones Day, Los Angeles, CA), counsel for ICANN  
Kelly Watne (Jones Day, Los Angeles, CA), counsel for ICANN  
Casandra Furey, Associate General Counsel, ICANN  
Amy Stathos, Deputy General Counsel, ICANN  
Glenn P. Hendrix, Panel Chair  
Grant L. Kim, Panel Member  
Christof Siefarth, Panel Member  
Tom Simotas, International Centre for Dispute Resolution (“ICDR”)<sup>2</sup>

The conference was adjourned at approximately 9:30 am Pacific Time. By agreement of the parties, the conference was recorded.

34. On 16 December 2021, Namecheap requested leave from the Panel to set out its position more fully in a legal brief. ICANN responded the following day that it did not believe that further briefing was necessary “because the Interim Supplementary Procedures are explicit and dispositive of the issue,” but added that if the “Panel believes that further briefing from Namecheap would be beneficial, ICANN requests that the briefing be limited to this issue only, contain a page limit, and that ICANN be given an opportunity to respond.”

35. On 20 December 2021, ICANN presented its list of witnesses, as provided in Procedural Order No. 14:

Russell Weinstein, ICANN, Vice President, GDD Accounts and Services  
J. Beckwith Burr, ICANN Board member  
Maarten Botterman, Chair of the ICANN Board

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<sup>2</sup> Mr. Simotas participated only at the outset of the conference.

Dr. Dennis Carlton, ICANN expert witness

Three of these witnesses – Mr. Weinstein, Ms. Burr and Dr. Carlton – were among the ten individuals identified in Namecheap’s list of requested witnesses.

36. On 23 December 2021, Namecheap sent an email stating: “We acknowledge receipt of ICANN’s list of witnesses. Namecheap considers that ICANN’s list of witnesses is insufficient to make a correct and sufficiently complete appraisal of the material facts in this IRP. We respectfully request leave to set out our position more fully after ICANN has submitted its witness statements.”

37. On the same date, the Panel responded to Namecheap’s 16 December 2021 request to submit a brief, advising the parties by email that the Panel had “concluded that further submissions from the parties may be helpful on certain points; however, ... such submissions should be focused on specific questions posed by the Panel.”

**Panel Ruling:**

38. Namecheap’s request implicates several issues:

- a. Whether an IRP Panel has the power to require that a party produce designated witnesses?
- b. Whether Rule 5A of the IRP Procedures precludes direct witness testimony in any form other than written witness statements?
- c. Whether Namecheap’s designation of these witnesses was timely?
- d. Whether – even if the foregoing questions are resolved in Namecheap’s favor – the Panel *should* compel ICANN to produce any or all the requested witnesses?

39. The Panel will not render a final ruling in this Order. Instead, the Panel will outline some preliminary thoughts and invite the parties to submit briefs.

40. In arguing that the Panel may require ICANN to produce designated witnesses, Namecheap notes that this proceeding should be treated as an international arbitration. The Panel agrees. Procedural Order No. 1 in this matter provides:

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.

41. During the case management conference on 15 December 2021, Namecheap noted that Section 7 of the Federal Arbitration Act (“FAA”) grants arbitrators the authority to “summon in writing any person to attend before them . . . as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.” 9 U.S.C. § 9. Further, the CIACA, in Section 1297.271, provides: “The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence.”

42. In addition, the ICDR International Arbitration Rules (“ICDR Rules”), which apply here except to the extent they may be inconsistent with the IRP Procedures,<sup>3</sup> provide in Article 26 that “[t]he tribunal may require any witness to appear at a hearing.”<sup>4</sup>

43. The power of an international arbitral tribunal to require witnesses to appear at a hearing is generally understood to extend to witnesses controlled by one of the parties. As stated in a leading treatise:

Even where neither national law nor applicable institutional rules expressly provide that an arbitral tribunal may order the parties to produce a witness at the arbitral hearing the better view is that a tribunal presumptively possesses the power to order a party to produce witnesses within its control for examination at an evidentiary hearing. The classic

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<sup>3</sup> 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.” *See also* Procedural Order No. 1, ¶ 10.

<sup>4</sup> This is consistent with the International Bar Association Rules on Taking Evidence in International Arbitration (the “IBA Rules”), which provide that “[i]f a Party wishes to present evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself.” IBA Rules, Rule 4.9.

examples of such witnesses are corporate officers, directors, or senior employees of a party to the arbitration. This power derives from the tribunal's inherent authority to conduct and regulate the taking of evidence in the arbitration and the parties' duties of cooperation, even absent express provisions to this effect in national law, the parties' arbitration agreement, or any applicable institutional rules.

GARY B. BORN, *INT'L COMM. ARB.*, § 16.02[E][b], at 2351 (2d Ed. 2014); *see also* IBA Rules, Rule 4.10 ("At any time before the arbitration is concluded, the Arbitral Tribunal may order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered.").

44. Nevertheless, it is hardly routine for an arbitral tribunal to require that a particular witness be designated or authorize the parties to request that their adversary produce designated witnesses. Indeed, the same commentator quoted in the preceding paragraph has observed that a tribunal should exercise this power "[o]nly exceptionally." GARY B. BORN, *INT'L ARBITRATION: LAW & PRACTICE*, § 8.07 (2012). Furthermore, while oral direct testimony is generally permitted in international arbitration, such testimony is usually preceded by written witness statements.

45. More importantly, IRP proceedings are *sui generis*, and the IRP Procedures prevail over any general arbitration practice.

46. Rule 5A of the IRP Procedures provides:

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 has demonstrated 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.

All hearings shall be limited to argument only unless the IRP Panel determines that a the [sic] party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

47. ICANN offers a reasonable interpretation of this provision – that presenting oral testimony in the absence of a written witness statement would constitute introducing “new arguments and new evidence.” The requirement that “[a]ll evidence, including witness statements, be submitted in writing 15 days in advance of any hearing” might also be read to preclude witness testimony at the hearing, including oral testimony, in the absence of a timely filed witness statement. In addition, ICANN noted during the case management conference that no witness has ever testified in an IRP hearing without a prior written witness statement. Namecheap did not contradict ICANN on this point.<sup>5</sup>

48. Yet Rule 5A could also be interpreted differently to preclude only the submission of new *written* evidence at the hearing – including both documents and written witness statements – without necessarily prohibiting new oral evidence. Furthermore, the reference in the following excerpt from Rule 5A to “the time and financial expense of witness testimony *and* cross examination” might be interpreted to contemplate (or at least not preclude) the possibility of oral direct testimony (not just oral cross-examination) in limited circumstances:

All hearings shall be limited to argument only unless the IRP Panel determines that a the [sic] party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination.

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<sup>5</sup> Namecheap did comment, however, that no party had previously raised the issue, and thus no Panel had ever ruled on it.

49. The Panel will not decide the proper interpretation of Rule 5A in this Order, but rather invites the parties to brief whether the IRP Procedures foreclose the possibility of the Panel ordering a party to provide for, or to use its best efforts to provide for, the appearance for oral testimony at a hearing of a person for whom a written witness statement has not been offered.

50. The Panel also requests briefing on the following issues:

- a. Whether Namecheap's designation of these witnesses is untimely in view of 1) the requirement in Procedural Order No. 14 that Claimant "identify fact and expert witnesses" by no later than 30 November 2021; and 2) Procedural Order No. 2, which was agreed upon by the parties and which provides only for written direct witness statements?
- b. As to *each individual witness*, whether (and, for Namecheap, how) the requested oral testimony is: (1) necessary for a fair resolution of the claim; (2) 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 witness testimony and cross examination? Namecheap's showing shall include, but shall not be limited to, an explanation of why testimony from the individual witness is likely to be material to the outcome of this case and would not be merely cumulative of testimony from the witnesses already identified by ICANN.

51. The parties are requested to provide a proposed briefing schedule, subject to the following guidance: Namecheap shall submit the initial brief, which should be submitted reasonably promptly after ICANN submits its written witness statements, which are due on 14 January 2022; and briefing shall be completed before the initial prehearing conference set for 14 February 2022.

**As at Los Angeles, California, USA  
7 January 2022**

**FOR THE PANEL:**



**Glenn P. Hendrix  
Chair**