

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal
ICANN Independent Review

NAMECHEAP, INC.,

Claimant

and

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),

Respondent

ICDR Case No. 01-20-0000-6787

EMERGENCY RELIEF PROCEDURAL ORDER NO. 1
Procedures and Schedule

Gary L. Benton,
Emergency Arbitrator

Date
3 MARCH 2020

EMERGENCY RELIEF PROCEDURAL ORDER NO. 1

This Emergency Relief Procedural Order (“**ER Procedural Order No. 1**” or “**ER PO 1**”) establishes certain procedures applicable to the Emergency Measures of Protection (“emergency relief”) application made under the ICDR International Arbitration Rules (effective June 1, 2014) (the “**ICDR Rules**”), Article 6, in this ICANN Independent Review, including the schedule for consideration of the application for emergency relief.

This ER PO 1 is issued after consultation with the parties on the matters addressed herein. Such consultation was made during the course of the Emergency Relief Preparatory Conference (“ER Preparatory Conference”) conducted by teleconference and attended by all parties, through counsel, on 3 March 2020, in accordance with the ICDR Rules.

The application of this ER PO 1 is limited to the consideration of the Article 6 emergency relief application and will not be binding as to the proceeding conducted by the Independent Review Panel.

I - THE PARTIES AND COUNSEL

A. Claimant

1. Claimant is Namecheap, Inc. (“Claimant” or “Namecheap”), identified as a corporation organized under the laws of Arizona, USA.

Claimant is represented by Flip Petillion, Esq. and Jan Janssen, Esq. of the law firm Petillion in Huizingen, Belgium.

B. Respondent

2. Respondent is Internet Corporation For Assigned Names And Numbers (ICANN), a corporation organized under the laws of California, USA.

Respondent is represented by Jeffrey A. Le Vee, Esq., Kelly M. Ozurovich., Esq. and Eric P. Enson, Esq. of the law firm Jones Day in Los Angeles, California. Casandra Furey, Esq., Associate General Counsel of ICANN, was also present for the ER Preparatory Conference.

II - COMMENCEMENT OF THE INDEPENDENT REVIEW, PLEADINGS, AND PRELIMINARY MATTERS

3. The Independent Review was commenced by the submission of Claimant’s form Notice of Independent Review dated 25 February 2020 (“**IRP Notice**”). The IRP Notice was submitted with Claimant’s Request for Independent Review Process By Namecheap, Claimant Namecheap’s Request for Emergency Arbitrator and Interim Measures of Protection and supporting submissions.
4. The Emergency Arbitrator, Gary L. Benton, was duly appointed by the ICDR in accordance with the ICDR Rules, Article 6. The Emergency Arbitrator confirmed to the parties that he is independent and impartial and has requested that the parties disclose any known conflict considerations to the ICDR.
5. As noted, a telephonic ER Preparatory Conference was conducted on 3 March 2020. The ICDR

offered the parties the opportunity for transcription of the ER Preparatory Conference. No requests were made.

6. In addition to preliminary remarks by the Emergency Arbitrator and brief presentations by counsel for the parties, key items addressed at the Preparatory Conference are reported below. The Emergency Arbitrator confirmed that this proceeding will be guided, as required by the applicable rules and practice, by principles of fairness, efficiency and accessibility. The Emergency Arbitrator also welcomed, with respect to party autonomy and flexibility, proposals by the parties, particularly joint proposals, to advance the proceeding.
7. As described in Claimant's submissions, the dispute giving rise to this Independent Review arises from alleged breaches of the ICANN Articles of Incorporation and Bylaws with respect to the renewal of the registry agreements for the .org, .info and .biz generic top-level domains, particularly with respect to price cap provisions and with respect to the potential change of ownership and operation of .org from a non-profit to a for-profit entity.
8. In the application for emergency relief, Claimant seeks an order requiring ICANN (1) to 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) to take all actions that are necessary to prevent the .org registry operator from charging fees that exceed the maximum fees that were applicable before the execution of the 30 June 2019 .org registry agreement.
9. Respondent has not yet submitted formal responses to Claimant's submissions. In the ER Preparatory Conference, Respondent confirmed that it intended to defend against the claims and the application for emergency relief, including raising issues as to Claimant's standing.
10. The schedule for submission of Respondent's opposition to the application for emergency relief was addressed in the ER Preparatory Conference and is set forth herein. No schedule for submission of additional pleadings has been set.
11. In the course of the ER Preparatory Conference, Respondent's counsel responded to the Arbitrator's inquiries with respect to the timing status of the pending California Attorney General's investigation.
12. No other parallel litigations, arbitrations or other proceedings were reported. At present, the parties are unaware of any planned requests for consolidation or requests to make amicus submissions.
11. It is acknowledged that Claimant's counsel reported difficulty with telephone audio reception during the ER Preparatory Conference teleconference. Accordingly, both parties are requested to review this Order for accuracy as to their understanding of events and to immediately report any concerns to the Emergency Arbitrator.

III - PLACE OF THE ARBITRATION / REVIEW

12. It is stipulated that, in accordance with the place of review request in the IRP Notice, the place of arbitration (seat) is Los Angeles, California, USA.

IV - LANGUAGE

13. The language of the arbitration is English. The parties do not anticipate the need for translators in the course of this ICDR Rules, Article 6 proceeding.

V - ARBITRATION CLAUSE AND APPLICABLE LAW AND RULES

14. It is stipulated this Independent Review is made in accordance with the ICANN Articles of Incorporation dated October 2016 and the ICANN Bylaws dated 28 November 2019, in particular, Section 4.3 of the Bylaws. The parties have agreed that these versions of the Articles of Incorporation and the Bylaws are deemed the governing documents with respect to the Independent Review and the emergency relief sought.
15. It is stipulated that California law is the substantive law governing the interpretation of the Articles of Incorporation and Bylaws and the substantive law governing the issues in this Independent Review, including this ICDR Rules Article 6 proceeding.
16. The Emergency Arbitrator will proceed on the basis that the procedural law applicable to this proceeding is the U.S. Federal Arbitration Act. To the extent either party is of the view that a different procedural law applies and a determination thereon is material to the outcome of any issue addressed in the course of this Article 6 proceeding, they will be allowed to present their position accordingly.
17. As provided by ICANN, and as stipulated, the ICDR International Arbitration Rules, contained within the ICDR Dispute Resolution Procedures, as amended and in effect as of 1 July 2014, and as supplemented by the Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP) adopted 25 October 2018, shall apply to this Article 6 proceeding.

VI - EMERGENCY RELIEF APPLICATION SCHEDULE

18. Respondent confirmed that it is planning to make a determination of the pending change of control request on 20 March 2020, although it has sought to extend the date for a month. Respondent has agreed to notify counsel, the ICDR and Emergency Arbitrator immediately if the date is extended so that adjustments may be made to the briefing and hearing schedule provided herein.
19. Subject to the above, as agreed by the parties, Respondent's opposition to application for emergency relief will be submitted by Wednesday, 11 March 2020.
20. No Reply or Rejoinder is anticipated; however, the parties may, following an attempt to confer, request leave to submit a short Reply (and Rejoinder) if deemed necessary. The Emergency Arbitrator will be inclined to grant leave as to any new matters raised.
21. As agreed by the parties, the hearing on the application for emergency relief will be conducted by teleconference on Saturday, 14 March 2020 at 8:30 am Pacific time. As agreed by the parties, the hearing will be limited to oral argument; no live witness testimony is anticipated. The parties have agreed the hearing will be conducted by Zoom teleconference (audio only); connection details will be provided to the parties hereafter.
22. Unless the parties agree to alternate scheduling, it is anticipated that the Emergency Arbitrator's decision on Claimant's application for emergency relief shall be issued on or before 20 March 2020.
23. No interim orders with respect to the emergency relief requested have been requested or are in place pending the scheduled hearing and subsequent decision by the Emergency Arbitrator; however, Respondent has agreed to notify opposing counsel, the ICDR and the Emergency Arbitrator immediately if Respondent alters its plans and intends to take any material action in advance of 20 March 2020 or the planned issuance of the Emergency Arbitrator's decision.

24. Claimant's counsel expressed an interest in having a transcription of the hearing on the emergency application. Counsel shall confer on engaging a stenographer or making other arrangements. Costs shall be incurred as agreed between the parties. Any transcription shall be made available to both opposing counsel and the Emergency Arbitrator at the same time it is made available to the party engaging the stenographer.

VII - ADDITIONAL PROCEDURES

25. In addition to the applicable statutory provisions, the ICDR Rules, the ICANN Interim Supplementary Procedures and any otherwise applicable procedural rules, or in variance of such rules as may be the case, the following particular rules and procedures shall apply in the arbitration.

A. Notices, Communications and Submissions

26. As agreed by the parties, all notices and written communications addressed by a party to Emergency Arbitrator, including all written submissions, briefs and supporting documents submitted, shall be sent directly to Emergency Arbitrator. Copies shall be sent simultaneously to the other parties and to the ICDR. Written notifications and communications from the Emergency Arbitrator to the parties shall also be copied to the ICDR.
27. Only communications containing a request addressed to the Emergency Arbitrator shall be sent to the Emergency Arbitrator (and the ICDR). For the sake of clarity, communications between the parties, including any documents produced or otherwise exchanged by the parties, shall not be addressed, copied or sent to the Emergency Arbitrator or the ICDR unless submitted in support of a request or other submission addressed to the Emergency Arbitrator.

B. Means of Communication. Service. Confidentiality. Cybersecurity and Data Protections

28. All correspondence or requests addressed to the Emergency Arbitrator and all written submissions, briefs or memorials shall be communicated by email (or by cloud or FTP transmission). No hard copies should be provided to the Emergency Arbitrator unless expressly requested.
- (a) All briefs shall be provided in PDF format. The parties may submit additional copies in MS Word format if desired. (The Emergency Arbitrator does not invite the submission of a Draft Decision.)
- (b) Unless agreed otherwise by the Parties and the Emergency Arbitrator, email communications shall be unencrypted. The parties may encrypt other transmissions so long as such transmissions are readily accessible for viewing and download.
- (c) The Emergency Arbitrator has invited the parties consider the need for Confidentiality Orders or similar protections. None are requested at this time. Should the need arise, the parties should confer to try to reach agreement on a stipulated order.
- (d) The Emergency Arbitrator has invited the parties to consider the need for specific cybersecurity, privacy or data protections. No special considerations are requested at this time. Consistent with ICDR policy, the parties have agreed to notify opposing counsel, the ICDR and the Emergency Arbitrator within 24 hours in the event of any data breach related to this proceeding.

C. Evidentiary Disclosures and Experts

29. No evidentiary disclosures have been requested for purposes of the application for emergency relief. The parties reserved the right to make such requests at a later date.
30. The parties do not presently anticipate submitting expert witness testimony for purposes of the application for emergency relief.

VIII - TIMING

31. Written notifications and communications will be considered on time if sent by email or if uploaded to an appropriate FTP site by the sending party with access notification provided prior to the expiry of the relevant time limit or deadline.
32. Except as may be otherwise ordered by the Tribunal, time limits and deadlines shall expire at 23:59 (11:59 p.m.) Pacific Time on the date of the relevant time limit or deadline.
33. Short and reasonable extensions or modifications of time limits or deadlines (other than as to hearing-related dates) may be agreed between the parties without requesting consent from the Emergency Arbitrator. Applications for extensions or modifications of time limits which are not agreed between the parties should whenever possible be made to the Emergency Arbitrator at least two business days prior to the expiry of the time limit or deadline in question, in the form of a written communication explaining why the extension is required and for what period of time.

IX - AWARD AND COSTS

34. As provided by the procedures and stipulated by the parties, the Emergency Arbitrator shall issue a reasoned Decision in writing. It is anticipated that Decision shall be made public in accordance with ICANN procedures.
35. Claimant has made a request for costs with respect to the application for emergency relief. As stipulated by the parties, cost awards shall be reserved for determination by the IRP panel.

X - CONCILIATION OR MEDIATION

36. The Emergency Arbitrator invited the parties to address directly with the ICDR (not the Emergency Arbitrator) any interest in conciliation or mediation. The Emergency Arbitrator is amenable to revising scheduling as may be jointly requested by the parties to accommodate such procedures.

XI - MODIFICATIONS

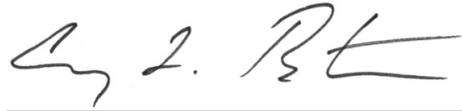
37. The provisions of this ER PO 1 and of any other procedural decision rendered in this Article 6 proceeding may be varied or modified by the Emergency Arbitrator after consultation with the parties.

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38. The parties are requested to submit any proposed correction or objections to this ER PO 1 within three days from the issuance date below.

Place of the arbitration: Los Angeles, California, USA

Date: 3 March 2020

A handwritten signature in black ink, appearing to read "G. L. Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

Gary L. Benton, Emergency Arbitrator