

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

Namecheap, Inc.

Claimant,
and -

Case Number: 01-20-0000-6787 -

Internet Corporation for Assigned Names
and Numbers (ICANN)

Respondent.

PROCEDURAL ORDER NO. 18

1. This Procedural Order concerns (a) the 25 February 2022 objections of Respondent Internet Corporation for Assigned Names and Numbers (“ICANN”) to the 8 February 2022 request of Claimant Namecheap, Inc. (“Namecheap”) for leave to submit rebuttal materials; and (b) the results of the Panel’s *in camera* review of the draft 2019 report of Dr. Dennis Carlton, which ICANN submitted for the Panel’s review on 25 February 2022, pursuant to the Panel’s directions in Procedural Order No. 17.

A. ICANN’s Objections to Namecheap’s Rebuttal Evidence

2. Procedural Order No. 2, which was issued on 27 October 2020, set forth the basic schedule and procedures for submission of evidence and argument in this Independent Review Process (“IRP”). That Order included a deadline for Namecheap to submit a Pre-Hearing Brief and supporting materials, including supporting witness statements, evidentiary exhibits, and legal authorities. It also set a deadline for ICANN to submit a responsive Pre-Hearing Brief and witness statements, evidentiary exhibits, and legal authorities.

4. Procedural Order No. 2 further stated, in paragraph 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.

5. The deadlines for submissions have been adjusted several times, but the basic structure has remained the same: an initial round of merits submissions, followed by an opportunity for Namecheap to request leave to submit limited rebuttal evidence, and an opportunity for ICANN to object to such evidence.

6. Pursuant to the revised timetable in Procedural Order No. 14, Namecheap made its initial merits submission on 30 November 2021, which included (a) a 134-page Pre-Hearing Brief; (b) an 88-page Expert Report from two economists, Professor Dr. Frank Verboven and Dr. Gregor Langus; (c) a 62-page Expert Report from Mr. Jeffrey J. Neuman concerning the formation of ICANN and its role regarding registry agreements for generic Top-Level Domains (“gTLDs”); (d) 30 Annexes (Annexes 90-119); and (e) 117 Reference Materials (RM 75 to 191).

7. ICANN made its initial merits submission on 14 January 2022, which included (a) a 79-page Pre-Hearing Brief; (b) an Expert Report from Dr. Dennis Carlton; (c) Witness Statements from three ICANN fact witnesses; (d) 28 evidentiary exhibits (R-28 to R-55); and (e) two legal authorities (RLA-4 and 5).

8. On 8 February 2022, Namecheap sought leave to submit the following rebuttal materials: (a) a 55-page rebuttal brief; (b) an affidavit of Hillan Klein, Namecheap’s COO, concerning Namecheap’s profits from providing “complementary services,” as summarized in an accompanying spreadsheet; (c) a 46-page Rebuttal Expert Report of Drs. Verboven and Langus, which responded to Dr. Carlton’s expert report; (d) 8 additional annexes (Annex 123 to 130); and (e) 11 additional Reference Materials (RM 192 to 202).

9. On 11 February 2022, the Panel sent the parties an email concerning the agenda for the 14 February prehearing conference, which made the following comments about Namecheap’s request for limited rebuttal:

The Panel considers Namecheap’s request to go beyond the scope contemplated by paragraph 15 of Procedural Order No. 2, which was limited to “limited rebuttal witness statements and evidentiary exhibits to

address unanticipated factual allegations in Respondent’s Prehearing Brief,” and did not contemplate a reply brief on the merits. Nevertheless, the Panel’s inclination is to allow the rebuttal submission, while providing ICANN with additional time to respond to Namecheap’s 55-page submission. (The timeframe established under the scheduling order did not anticipate that ICANN would have to respond to a lengthy reply brief on the merits.) ICANN should be prepared to address the timing of its response, in the event it plans to submit one.

10. At the 14 February prehearing conference, the Panel explained that it was granting leave for Namecheap to submit its rebuttal brief, but that ICANN could object to Namecheap’s rebuttal evidence if it wished. The Panel noted that it was in ICANN’s interest to submit any objections as soon as possible, so that ICANN would know which evidence it would need to address. The Panel also requested that ICANN propose a date by which it would submit a reply to Namecheap’s rebuttal brief. After considering further submissions by both sides, the Panel set 9 March 2022 as the deadline for ICANN to submit its reply.

11. On 25 February 2022, ICANN submitted its objections to Namecheap’s request for leave to submit rebuttal evidence. ICANN asserted that leave should be denied as to all of Namecheap’s rebuttal evidence, including all additional annexes and reference materials, as well as the Affidavit of Hillan Klein and Rebuttal Expert Report of Drs. Verboven and Langus. ICANN argued that Namecheap had failed to meet the standard in Procedural Order No. 2, which requires a showing that the rebuttal evidence addresses “unanticipated factual allegations” in ICANN’s submission. ICANN also argued that the Rebuttal Expert Report did not respond to any “factual” allegations, as it replied to Dr. Carlton’s expert opinions, rather than to any specific facts.

12. The Panel agrees that at least some portions of Namecheap’s rebuttal submission go beyond the scope contemplated by Procedural Order No. 2. As noted in the Panel’s 11 February email, that order did not contemplate a rebuttal brief, except to support the submission of rebuttal evidence. Further, Hillan Klein’s new affidavit goes to the issue of standing, which has been the subject of extensive prior submissions (as discussed in Procedural Order No. 8), and does not involve “unanticipated” factual allegations.

13. At the same time, the Panel notes that Namecheap’s rebuttal evidence is fairly limited. The Klein affidavit is only two pages, and the accompanying spreadsheet

is also only two pages. Namecheap submitted 8 new Annexes and 11 new Reference Materials, which is a fraction of its initial submission (30 Annexes and 117 Reference Materials). While Namecheap should arguably have submitted some of those materials earlier, Namecheap appears to have included the bulk of its supporting materials and arguments in its initial submission.

14. Given the limited new materials, the Panel does not view it as unduly burdensome to require ICANN to respond. Indeed, ICANN has already expressed preliminary views on some of the new materials, arguing that they do not support Namecheap's position. Further, ICANN received Namecheap's rebuttal submission on 8 February, or one month before the current 9 March 2022 due date of ICANN's reply brief (a deadline, which, as discussed below, the Panel is now extending to 14 March 2022). Further, the new materials are discussed in Namecheap's Rebuttal Brief that ICANN will address in its reply.

15. As to Namecheap's Rebuttal Expert Report, the Panel recognizes that the reference to unanticipated "factual" allegations in Procedural Order No. 2 is not clear as to whether it includes new expert opinions. The Panel considers it helpful, however, to receive more information about the expert opinions of both sides before the hearing. Accordingly, the Panel accepts Namecheap's Rebuttal Expert Report, and will provide ICANN's expert with a reasonable opportunity to provide responsive comments.

16. ICANN's Reply to Namecheap's Rebuttal Brief is presently due on 9 March 2022. ICANN previously requested that this deadline be set for 14 March 2022. Having allowed Namecheap's additional rebuttal evidence, the Panel now also allows ICANN until 14 March 2022 to submit its reply brief, as well as any supporting materials, such as new evidentiary exhibits or rebuttal expert reports or witness statements for the purpose of responding to new materials included in Namecheap's rebuttal submission. The Panel also notes that the experts of both sides will have an opportunity to provide further comments on one another's views at the merits hearing.

B. 2019 Draft Report of Dr. Dennis Carlton

17. Procedural Order No. 17 directed ICANN to submit a draft report prepared by Dr. Carlton in 2019 for the Panel's *in camera* review. The Panel found that Dr. Carlton's 2019 report appears to concern "the subject matter about which he is a prospective witness," and that by presenting Dr. Carlton as a testifying expert in this IRP, "ICANN has potentially exposed Dr. Carlton's prior report on a similar subject to disclosure, notwithstanding the attorney-client privilege." (Procedural Order No. 17,

¶ 19; see *id.*, ¶¶ 7, 12-18, citing *Nat'l Steel Prod. Co. v. Superior Ct.*, 164 Cal. App. 3d 476, 482-88 (Ct. App. 1985).)

18. The Panel found that Dr. Carlton's 2019 report appeared to be subject to the work product privilege, but that this privilege is conditional. The Panel further indicated that in conducting an *in camera* review, it would apply the following three-step process set forth by the California Court of Appeal in *National Steel*.

First the [Panel] should determine if the report, in whole or part, "... reflects an attorney's impressions, conclusions, opinions, or legal research or theories" The work product that this definition represents is absolutely privileged; it cannot be discovered under any circumstances. The [Panel] need go no further in [its] analysis unless all or easily severable portions of the report do not so reflect the thoughts of an attorney.

Steps two and three of the *in camera* inspection are applicable only to those portions of the report that are not absolutely privileged. In step two the [Panel] should determine whether the report, in whole or part, is advisory or not.... The portions of the report that are advisory are protected by the conditional work-product privilege; the portions that are not advisory are discoverable if easily severable.

Finally, in step three, which is applicable only to advisory portions of the report that are not absolutely privileged, if any, the [Panel] should determine whether other good cause for discovery outweighs the principles supporting the conditional work product privilege.

(Procedural Order No. 17, ¶ 21, quoting *Nat'l Steel*, 164 Cal. App. 3d at 489-90 (citations omitted).)

19. On 25 February 2022, ICANN submitted the 2019 Carlton report to the Panel for *in camera* review. In a letter to the Panel, ICANN argued that the report is "absolutely privileged" under the first step of the *National Steel* test because it reflects "attorney impressions, opinions and theories" regarding the "issues that Dr. Carlton should examine." ICANN cited *Nat'l Steel*, 164 Cal. App. 3d at 489, as well as *DeLuca v. State Fish Co.*, 217 Cal. App. 4th 671, fn. 21 (2013), and Section 2018.030(a) of the California Code of Civil Procedure.

20. The Panel has reviewed the 2019 Carlton report and applied the three-step

National Steel process. As to the first step, the Panel finds no reference to any privileged “mental impressions” of counsel in the 2019 Carlton report. The report mentions that ICANN asked Dr. Carlton to analyze two issues, but those issues are general in nature. Moreover, the 2019 Carlton report states that Dr. Carlton was asked to opine on two issues by “ICANN,” and does not refer to ICANN’s counsel.

21. The Panel recognizes that a detailed list of issues may, in some circumstances, reveal counsel’s mental impressions as to legal strategy and the strengths and weaknesses of a case. Here, however, the issues are somewhat general and would naturally occur to a person without legal training who is knowledgeable about the Domain Name System. The Panel does not see how the two high-level issues can reasonably be characterized as revealing a specific legal strategy or mental impressions of counsel.

22. If ICANN’s position were adopted, it would mean that any expert report prepared in response to a request from counsel would be absolutely privileged because any report must necessarily reveal the issues that the expert was asked to address. ICANN cites no legal authority that adopts such an expansive view of “mental impressions.” *National Steel* and *DeLuca* simply state the general rule, without holding or suggesting that such high-level issues are absolutely privileged. Moreover, the court in *National Steel* ordered *in camera* review of a similar report prepared at the request of counsel. That decision does not indicate the results of the *in camera* review, but there would be no point in ordering such review if the general issues to be addressed were automatically deemed to be absolutely privileged.

23. As to the second step, the Panel finds that the 2019 Carlton report is advisory in nature, but as noted above, there is nothing from the face of the report to indicate that it was prepared in response to a request from ICANN’s legal counsel, and nothing in the content of the report to suggest that it was prepared for the purpose of assisting ICANN’s counsel to provide legal advice to ICANN. Nevertheless, the Panel will accept the representations in Amy Stathos’ sworn declaration that this was the report’s purpose. Accordingly, the Panel proceeds to the third step, which involves whether good cause for discovery outweighs the principles supporting the conditional work product privilege.

24. ICANN argues that the 2019 Carlton report has little or no relevance to this IRP because (a) most of the report concerns a different gTLD than the three gTLDs at issue in this IRP (.BIZ, .INFO, and .ORG); and (b) the portions that concern those three gTLDs are not on the same subjects as Dr. Carlton’s expert report in this IRP, which

concerns “an analysis of the opinions of Dr. Verboven and Dr. Langus and the expression of an opinion on whether Namecheap has been, or is likely to be, materially harmed by the transition of the .BIZ, .INFO and .ORG registries to the Base Registry Agreement.”

25. The Panel is not persuaded by either argument. While most of the report discusses the .COM gTLD, it does so in the context of the likely impact of the recent relaxation of controls on prices for the .COM gTLD. That issue is related to the issues addressed in Dr. Carlton’s report in this IRP, which include the likely impact of removal of price controls on the .BIZ, .INFO, and .ORG gTLDs. Indeed, in the report submitted in this IRP, Dr. Carlton specifically addresses whether price controls on .COM will constrain the prices charged for .BIZ, .INFO, and .ORG, even without price controls in the Registry Agreements for those three gTLDs.

26. Similarly, the portion of the 2019 Carlton report that addresses the impact of removing price controls on .BIZ, .INFO, and .ORG is relevant to the issues in Dr. Carlton’s report in this IRP. Dr. Carlton has opined in this IRP that removing those price controls will likely have no material impact on Namecheap for various reasons. ICANN argues that the 2019 Carlton report supports that position. Regardless of whether that view is correct, Namecheap is entitled to review Dr. Carlton’s prior report on a similar topic and draw its own conclusions as to whether the prior report supports or impeaches Dr. Carlton’s opinions in this IRP.

27. Thus, the Panel finds that there is good cause to provide Namecheap with the opportunity to review the 2019 Carlton report. Good cause is underscored by the emphasis in ICANN’s Bylaws on a “transparent” decision-making process. According to the declaration of Amy Stathos, ICANN’s Deputy General Counsel, the 2019 Carlton report was provided to Cyrus Namazi, who at the time was the Vice President of ICANN’s Global Domains Division. (Declaration of Amy Stathos, ¶ 3.) Mr. Namazi executed the .ORG, .INFO and .BIZ registry agreements on ICANN’s behalf. He also supervised the ICANN team in the registry agreement negotiations. Section 4.3(vii) of the Bylaws states that the purposes of an IRP include securing “the accessible, transparent, and efficient, consistent, and just resolution of Disputes.” Requiring ICANN to disclose the 2019 Carlton report to Namecheap is consistent with that purpose.

28. The Panel finds that the good cause for disclosure of the 2019 Carlton report “outweighs the principles supporting the conditional work-product privilege.” As noted above, the report does not reveal any legal strategy or privileged mental impressions of counsel. Moreover, in view of its timing and content, the 2019 Carlton

Report was apparently prepared for the purpose of providing advice to ICANN related to its decision to remove price controls from the Registry Agreements for the .BIZ, .INFO, and .ORG gTLDs. Thus, any interest related to the conditional work product privilege is outweighed by the good cause for disclosure

29. For the above reasons, ICANN is ordered to produce the 2019 Carlton report to Namecheap, in full, within the business day following receipt of this decision.

Conclusion

30. The Panel has unanimously agreed upon the terms of this Procedural Order, which is signed by the Chair on behalf of the Panel at the request of his co-panelists.

As at Los Angeles, California, USA

4 March 2022

FOR THE PANEL:



Glenn P. Hendrix

Chair