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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FEGISTRY, LLC, RADIX DOMAIN SOLUTIONS PTE. LTD., and DOMAIN VENTURE PARTNERS PCC LIMITED,

Plaintiffs,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California public benefit corporation,

Defendant.

Case No. 20STCV42881

PLAINTIFFS' OPPOSITION TO DEFENDANT'S DEMURRER TO FIRST AMENDED COMPLAINT

Assigned to Hon. Craig D. Karlan

[Filed concurrently with Request for Judicial Notice]

Hearing Date: February 9, 2023
Time: 8:30 a.m.
Place: Dept. N

Complaint Filed: November 9, 2020
First Amended Complaint Filed: March 7, 2022

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I. INTRODUCTION

Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. LTD., and Doman Venture Partners PCC Limited (together, "Plaintiffs") hereby oppose Defendant ICANN's Demurrer. Plaintiffs' First Amended Complaint addresses each of the deficiencies identified in the Court's Order dated January 18, 2022 (the "Order"), and states detailed facts to support each claim.

For the sake of brevity, Plaintiffs generally incorporate the relevant facts -- chiefly those alleged in their Complaint -- into their Argument with references to the record.

II. ARGUMENT

A. The Covenant is Inapplicable to Plaintiffs' Claims, Because the Claims Do Not Relate to Review of gTLD Applications, Nor to Any Final Decision

Plaintiffs seek a judicial declaration as to their procedural rights under ICANN's Bylaws, only. Plaintiffs have not sought judicial review of any substantive ICANN decision relating to Plaintiff's applications. As alleged, "Plaintiffs bring this action to force ICANN to implement certain dispute resolution procedural mechanisms and safeguards specifically required by its bylaws (the ICANN "Accountability Mechanisms") which are incorporated into Plaintiffs' contracts with ICANN." (FAC, #1). Plaintiffs' quote the relevant contract language at FAC, #11 (the "Covenant"). The first sentence states a purported release of any claims related to ICANN's "review of this application … or the decision by ICANN to recommend, or not to recommend, the approval of [the] application." The second sentence states a purported covenant not to sue, specifically "NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ***ANY FINAL DECISION*** BY ICANN ***WITH RESPECT TO THE APPLICATION***, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE … ***WITH RESPECT TO THE APPLICATION***." (Emphasis added.)

Plaintiffs' claim for breach of contract specifies the alleged breaches, and none of those allegations touch upon ICANN's review of or decisions relating to Plaintiffs' TLD applications. (*See* FAC, #73-78). Plaintiffs' claims for fraud-in-the-inducement, deceit, grossly negligent misrepresentation, and gross negligence each specify the alleged representations that form the basis of each claim, and none of those touch upon Plaintiffs' applications. (*See* FAC, #85, 92, 102, 111-113). Plaintiffs' Corporation Code and UCL claims also do not touch upon Plaintiffs' applications. (*See* FAC, #120 *et seq*). As further alleged in summary (FAC, #12-15):

> [12.] Plaintiffs' claims in this action are not within the scope of the [Covenant] because, among other things, the provision is limited in scope to the itemized activities, none of which are challenged in this case. All of the itemized activities relate to the "review," "investigation," "verification," and "characterization of an application" and the decision to recommend it for approval or not. … [I]f the intent was broad and not limited, supposedly covering undescribed activities, there would be no need to itemize specific activities at all. If ICANN wanted to try to enforce a release and covenant not to sue that barred actions against it for violating its bylaws or other business torts with respect to such bylaws, it at a very minimum needed to make that perfectly clear. It did not, and Plaintiffs agreed to nothing like that.
>
> [13.] [This action] does not claim that ICANN did anything wrong related to its "review" of Plaintiffs' applications or its "investigation," "verification," and "characterization of any application," or any decision to recommend any application for approval or not. Rather, and again, all of Plaintiffs' claims are for ICANN's breach of its contractual obligations and fraud related to implementation of ICANN's bylaw-enshrined Accountability Mechanisms.
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> [14.] ICANN's covenant not to sue … only purports to bar court actions challenging a "FINAL DECISION WITH RESPECT TO THE APPLICATION." However, ICANN has not made any "Final Decision" with respect to the applications, as each of them are shown on ICANN's website to be in "On Hold" status because the applications all remain in a "contention set" that has not been resolved.[1/2]
>
> [15.] Moreover, "WITH RESPECT TO THE APPLICATION" is defined and means: THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD."

This language further confirms that the Covenant applies narrowly, only to specifically itemized court actions and the itemized monetary damages, and not to other court actions for different damages or for equitable relief. Plaintiffs' claims in this action do not challenge a final ICANN delegation decision with respect to any application whatsoever.[3] Plaintiffs only seek damages and equitable relief (including a public injunction) for breach of contract and fraud for ICANN's failure to implement the agreed Accountability Mechanisms.

ICANN argues that the FAC "continues to premise each of its causes of action on the pending IRP." (Demurrer, p.14:1-16). But all of the examples refer to Plaintiffs' procedural claims relating to ICANN's Accountability Mechanisms, and not to the substance of any ICANN decision with respect

[1] Exhibits are attached to the concurrently filed declaration of Mike Rodenbaugh. The Court is respectfully requested to take judicial notice of these documents and their contents.
[2] Exhibit A (ICANN application status webpages, showing Plaintiffs' applications are "On Hold".
[3] ICANN itself has argued that applications that it places in "on hold" status, have not been finally vetoed, and so an IRP is not warranted (Exhibit B, ¶ 3 (ICANN's Observations as to Scope of Panel Authority, June 6, 2016).

to the applications. ICANN's own admissions further explain its intent in drafting the Covenant, and refute any broad interpretation of the Covenant.[4] As alleged at FAC, #16-17 (emphasis added):

> [16.] One of ICANN's supposed "Guiding Principle[s]" in developing the Accountability Mechanisms is that the "[a]ccountability structures should not preclude any party from filing suit against ICANN in a court of competent jurisdiction." [Exhibit B, 10/26/12 Report by ICANN Accountability Structures Expert Panel ("ASEP"), p. 6]. That confirms that ICANN knows that there is a specie of claims not encompassed by the [Covenant]. The intent to preserve civil fora is further proven because the [Covenant] ADR scheme is permissive, not mandatory: *APPLICANT **MAY** UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION*.
>
> [17.] The limited scope of the provision is also confirmed by ICANN's own position taken in two prior ADR IRP proceedings, that it was not required by such panel decisions to implement the Standing Panel bylaw, one of the bylaws about which Plaintiffs complain here. As ICANN has refused to follow the IRP decisions regarding these procedural mechanisms (or to otherwise implement them as intended), its attempt to foreclose judicial review by use of the [Covenant] would leave Plaintiffs (and every other ICANN gTLD registry applicant) without any remedy at all to enforce ICANN's bylaws. That would also render ICANN's ADR "Core Principle" meaningless and its years'-long promises to implement the bylaw Accountability Mechanisms illusory.[5]

Whether an exculpatory clause covers a given claim "turns primarily on contractual interpretation, [and] each case will turn on its own facts." *E.g.*, *Burnett*, 123 Cal. App. 4th at 1066; *Huverserian v. Catalina, Scuba Luv, Inc*., 184 Cal. App. 4th 1462, 1467-1469 (2010) (claims held to be outside scope of release: "To be effective, such a release 'must be clear, unambiguous, and explicit in expressing the intent of the parties.'"); *Queen Villas Homeowners Ass'n v. TCB Property Mgmt*, 149 Cal App. 4th 1, 5-6 (2007) ("exculpatory clauses are construed against the released party"); *Stewart v. Seward*, 148 Cal. App. 4th 1513, 1524 (2007 (waiver must be knowing, clear and unambiguous); *see also, e.g., Knutsson v. KTLA, LLC*, 228 Cal. App. 4th 1118, 1130 (2014) (party cannot be required to arbitrate a claim not agreed to be arbitrated); *Granite Rock Co. v. Int'l*

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[4] ICANN further argues that the *Ruby Glen* court dismissed a purportedly similar lawsuit "on the sole ground that the Covenant bars all 'claims related to ICANN's processing and consideration of a gTLD application.'" (Demurrer, n.6). Thus, that case did not involve procedural claims about ICANN's Accountability Mechanisms, and so it is inapposite. It is also inapposite because the court recognized expressly that that case did *not* allege willful torts such as fraud or fraud-in-the-inducement, nor any violation of a public interest, which are all alleged here, and questioned the Covenant's enforceability as to such claims. *Ruby Glen*, 2016 WL 6966329, *5 (C.D. Cal. Nov. 28, 2016). In this respect, *Ruby Glen* actually supports Plaintiffs, not ICANN. Indeed, Judge Halm of this Court noted this *exact* point, and held that under Section 1668 ICANN's Covenant cannot bar claims for at least willfully inflicted injuries, such as those alleged to have been caused by fraud, fraud-in-the-inducement or gross negligence. *DOT CONNECT AFRICA TRUST v. ICANN*, 2017 WL 5956975, at *1, 5 (Los Angeles Co. Sup. Ct., Aug. 9, 2017) ("The Court finds DCA raises a triable question of material fact as to whether ICANN committed fraud by indicating it would follow its Bylaws and Articles of Incorporation . . . .").

[5] S*ee also,* FAC #19 discussing the two prior IRP decisions and relevant Bylaws.

Brotherhood of Teamsters, 561 U.S. 287, 297 (2010 (order to arbitrate proper only if parties agreed to arbitrate "that dispute").

All that is material to the present motion, however, is that the Covenant contains potential ambiguities, which raise issues of fact not susceptible to disposition on demurrer.

> A court determining whether a contract is ambiguous must first consider extrinsic evidence offered to prove the parties' mutual intention. … A court cannot determine based on only the four corners of a document, without provisionally considering any extrinsic evidence offered by the parties, that the meaning of the document is clear and unambiguous. …
>
> For a court to take judicial notice of the meaning of a document submitted by a demurring party based on the document alone, without allowing the parties an opportunity to present extrinsic evidence of the meaning of the document, would be improper. A court ruling on a demurrer therefore cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer.

Fremont Indem. Co. v. Fremont Gen. Corp., 148 Cal. App. 4th 97, 114-115 (2007) (reversing demurrer when court declined to give the parties an opportunity to present extrinsic evidence of the meaning of a contract) (*citing cases, e.g., Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co.* 69 Cal.2d 33, 37–39, (1968) (requiring court to consider extrinsic evidence in interpreting a contract provision: "[t]he fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms.")). Finally, if the Covenant contains any ambiguity, then it must be construed against ICANN which drafted and proffered it. Cal. Civ. Code, § 1654. Therefore, this court is respectfully requested to allow more complete discovery to be had, and then to allow the parties to brief the issue and provide extrinsic evidence in support of their positions.

B. The Covenant Is Unenforceable Because the IRP Exempts ICANN from Liability; an IRP Panel Cannot Force ICANN to Do Anything

As alleged at FAC 18:

> (ii) ICANN's ADR process is not just a typical ADR process like an arbitration agreement [would provide,] but instead actually releases all substantive rights and denies all related relief by preventing their adjudication in any forum (and so is also subject to Cal. Civ. Code section 1668). More specifically, for example, under ICANN's Independent Review Process ["IRP"], arbitrators *only* have the power to decide whether ICANN has violated any of its articles of incorporation or its bylaws. [E.g., **Exhibit C**, 4/11/13 ICANN Bylaws (excerpts), Art. IV, Section 3.11; 6/18/18 ICANN Bylaws (excerpts), Art. IV, Sections 4.3(o)(iii), (iv).] As such, the arbitrators have no power, in example, to determine that ICANN has breached any contract or committed any fraud in any manner. In other words, once applicants (like Plaintiffs) become subject to the ADR provisions they *cannot* get any relief whatsoever for any claims of any species other than whether ICANN violated its articles or bylaws. Any other rights of an applicant are thus *de facto* waived and released, and applicants (like Plaintiffs) are unable to

> get any substantial relief whatsoever. This, of course, starkly contrasts to typical ADR agreements in which the ADR proceeding supplies a forum for the application and adjudication of substantive claims under substantive law, but which do not by fiat simply do away with such claims and law.
>
> (iii) [T]he [IRP] process is a sham because the arbitrators have no power whatsoever to require ICANN to do anything at all, even in cases where it violates its articles of incorporation or bylaws. Instead, the arbitrators' only power is to decide if there was a violation, and it is left to ICANN whether it will comply.

ICANN argues that the IRP panel does not even have the authority to *recommend* that ICANN do anything on a permanent basis, since the Bylaws only permit a declaration (e.g., Yes or No) whether ICANN violated its Bylaws.[6] *E.g.*:

> the plain text of the Bylaws, which govern this and all IRP proceedings[,] unambiguously provide that IRP final declarations are "final" and "precedential" (not "binding"), and which "charge[]" an IRP panel with the option of providing one and only one kind of relief to an IRP claimant, namely "declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[7]

Furthermore, ICANN has shown disdain for IRP panel declarations by simply ignoring them, twice as to the very issue at the heart of this litigation. As alleged at FAC, #19:

> ICANN has refused to comply with two separate IRP panel decisions rendered as far back as 2015 and 2017 (in the *.Africa* matter and in the *.Islam* matter) stating that ICANN is and has been required to implement the IRP Standing Panel bylaw.

ICANN states: "No prior IRP panel has ordered ICANN to put a Standing Panel in place or set any timeframe for ICANN to do so." (Demurrer, p.14:27-28). That is because no IRP panel has the authority to do any such thing, or to order ICANN to do anything at all.

Because the IRP cannot offer any relief other than a bare declaration which ICANN is free to ignore, the IRP exempts ICANN from liability for anything at all. Therefore, any interpretation of the Covenant that (despite its permissive language) would force claimants to the IRP makes the Covenant unenforceable as a matter of law pursuant to Cal. Civ. Code §1668 ("All contracts which … exempt any one from responsibility for his own fraud, or willful injury … or violation of law, whether willful or negligent, are against the policy of law.") *See, e.g., OTO, LLC v. Kho*, 8 Cal.5th 111, 135-137 (2013) (employee arbitration agreement was unenforceable because it foreclosed possibility of

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[6] The Bylaws provide only that an IRP Panel can "[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered." (*Id.*, § 4.3(o)(iv)).

[7] Exhibit C, ¶ 6 (ICANN's … Observations as to Scope of Panel Authority, May 13, 2016, ¶ 12 ("In short, this IRP Panel does not have the authority to award affirmative relief or to require ICANN to undertake specific conduct."); *citing,* Exhibit D, *Vistaprint Limited v. ICANN*, Final IRP Declaration ¶ 149.

meaningful relief); *Frittelli, Inc. v. 350 North Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) ("Even when such exculpatory clauses have no impact upon the public interest, they are 'strictly construed against the person relying upon them.'") (citations omitted); *Gentry v. Superior Court*, 42 Cal.4th 443, 453-455 (2007) (class action arbitration waiver was in practice tantamount to an exculpatory agreement); *Manderville v. PCG&S Group, Inc.*, 146 Cal. App. 4th 1486, 1499-1502 (2007) (holding release unenforceable as against fraud-in-the-inducement claims); *Low v. Altus Finance SA*, 136 F. Supp.2d 1113, 1118-1119 (C.D. Cal. 2001) ("in light of the disputed scope and validity of the release, the Court finds that dismissal based on motions challenging the mere pleadings would be premature and inappropriate").

C. *The Covenant Cannot Bar Unknown Claims*

Cal. Civ. Code § 1542 precludes the waiver of unknown claims – such as those based on fraud, and/or post-contract conduct -- unless the protections of the section are expressly relinquished. In order to effectively waive the protections of § 1542, the language of the statute must be included in any agreement, and the parties to the agreement must acknowledge that they are waiving the rights and benefits of the statute. That language is not present in the Covenant, and there is no such acknowledgement. Therefore, the Covenant cannot result in waiver of such unknown claims under any circumstances, as a matter of law. Cal. Civ. Code §§ 1541, 1542; *Casey v. Proctor*, 59 Cal.2d 97, 109-115 (1963); *Mellus v. Potter*, 91 Cal. App. 700, 703-704 (1928). At least, whether the Covenant intended to include unknown claims is a factual issue. *Leaf v. City of San Mateo*, 104 Cal. App. 3d 398, 411 (1980).

D. The Covenant Was Not Intended to Enshrine the Accountability Mechanisms of 2012

Near the end of the Covenant, it refers to "ICANN's Bylaws": "*APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS."* This proviso was never intended to enshrine for all time the Bylaws' Accountability Mechanisms as of 2012 when the application contracts were executed, as ICANN argues. (Demurrer, *e.g.*, p.12:19-23, p.16-17). In fact, ICANN makes very clear its intent that its Accountability Mechanisms are those stated in Bylaws in effect at the time an IRP claim is brought, and not by any prior version of the Bylaws. For example, in its routine IRP updates, ICANN states "IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016, while "IRP proceedings initiated on or after 1 October

2016 are subject to the Bylaws as of 1 October 2016."[8] Indeed, in this very case, ICANN states that the Bylaws in place in 2018 govern Plaintiff's Reconsideration request filed in 2018, and that the Bylaws in place in 2016 govern Plaintiff's Reconsideration request filed in 2016. (Demurrer, p.18:7-15). Moreover, ICANN's IRP Supplementary Rules were created and imposed upon Plaintiffs and all other claimants, effective May 1, 2018[9] – even though they were not mentioned in the Covenant or in the Bylaws in 2012. ICANN cannot be allowed to argue, on the one hand, that its 2018 Supplementary Rules are binding on Plaintiffs now, even though they were not mentioned in Bylaws as of 2012; and on the other hand, that ICANN is not bound by the Standing Panel and other procedural rights Bylaws that came into effect after 2012.

In fact, the Applicant Guidebook, which includes the Covenant and comprises the entire application contract between these parties, expressly provides that ICANN can unilaterally change the terms of both the Guidebook and any resulting Registry Agreement, via adoption of any new ICANN policy.[10] Moreover, as to one dispute resolution policy outlined in the Guidebook, ICANN specifically stated that the version of ***that*** policy in effect at time of contracting, would govern such dispute.[11] That is quite different from the Covenant, which contains no such rule. ICANN knew the difference, and intended for any updated Bylaws to govern future disputes barred by the Covenant, else they would have stated otherwise.

The Registry Agreements incorporate by reference the Bylaws twelve times, and further provide for unilateral changes by ICANN. For example, Sec. 2.1 provides that Plaintiffs are bound by "the Registry Services Evaluation Policy …, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws").[12] ICANN's unilateral changes to the Bylaws are anticipated by ICANN, and by all parties in contract with ICANN, who must accept them or else terminate their contracts. ICANN cannot cherry-pick which portions of which Bylaws it wants to comply with.

ICANN cannot have it both ways. The Accountability Mechanisms set forth in the Bylaws, as of the time such a mechanism is invoked, govern that case. Here, the Plaintiffs' IRP was brought in

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[8] Exhibit E, n.4, Cooperative Engagement and Independent Review Processes Status Update (20 Nov 2019).
[9] Exhibit F, p.1, Interim Supplementary ICANN IRP Procedures.
[10] ICANN Ex. 2, Applicant Guidebook, p.5-11 ("gTLD registry operators are obligated to comply with both existing consensus policies and those that are developed in the future.").
[11] *Id.*, p.P-11 ("(a) ICANN may from time to time, in accordance with its Bylaws, modify this [dispute resolution] Procedure." (b) The version of this Procedure that is applicable to a dispute resolution proceeding is the version that was in effect on the day when the relevant application for a new gTLD is submitted.").
[12] *Id.*, Draft Registry Agreement p.3 (p.231 of .pdf).

2019, and thus the 2018 Bylaws are authoritative as they were then in effect. Those Bylaws (and all iterations since 2013) require a Standing Panel and the other procedural mechanisms that Plaintiffs' seek to force ICANN to provide via this action. Without this court's intervention, it is likely that ICANN will *never* implement the Standing Panel, and so IRP claimants will never have its benefit, nor any right to appeal any IRP decision.[13]

E. ICANN's Mission Is to Act in the Public Interest; Plaintiffs' Claims Seek to Force ICANN to Do So by Complying with Its Bylaws

As alleged in their FAC, Plaintiffs are suing in part to enforce the public interest, i.e., to enforce rights against a "public benefit corporation" uniquely charged with one of the most critical roles on the internet, materially affecting literally every public and private internet user in the world, and trillions of dollars in global commerce. (FAC, ¶¶ 7, 101, 111, 120-124, 117-119). Indeed, ICANN itself admits in its bylaws that "ICANN must operate in a manner consistent with these Bylaws for the benefit of the internet community as a whole, . . . in conformity with . . . law, through open and transparent processes."[14]

Here, Plaintiffs seek specific performance and public injunctive relief. (FAC, Prayer for Relief, paras. 2, 3.)[15] ICANN's purported Covenant, if enforced, would amount to an unlawful waiver of law intended to protect the public or to enforce such rights in civil court. Cal. Civ. Code sections 1668, 3513. These statutes prohibit "contractual releases of future liability for ordinary negligence when 'the 'public interest' is involved . . . . " *Frittelli*, 202 Cal. App. 4th at 43; *see also, e.g., Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 95 (1960) (stating rule and finding a public interest); *Hiroshima v Bank of Italy*, 78 Cal. App. 362, 377 (1926) (stating rule; invalidating banking waiver based on public interest).

In *Tunkl*, the California Supreme Court identified six characteristics of transactions that are in

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[13] ICANN has again raised the Emergency IRP Panel decision from August 7, 2020, which granted Plaintiffs' substantive request for emergency relief, but denied Plaintiffs' procedural requests for imposition of a Standing Panel, etc. (Demurrer, p.11-12, Ex. 3). The Panelist was very clear in his opinion that "Claimants have raised serious concerns about the delays associated with implementation of the Standing Panel, first recognized by the Emergency Panelist in the [.*Africa*] case. …. These delays raise the prospect that ICANN, by not moving forward for such a long period, has risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws." (*Id.*, ¶ 207). "Even in view of the legitimate concerns raised above, the Emergency Panelist nonetheless finds that Claimants' interim relief request – that ICANN be required to appoint immediately the Standing Panel – is premature." (*Id.*, ¶ 209). "Given the process involved in constituting the Standing Panel, including involvement of committees and the ICANN community, as described by ICANN above, the balance of hardships, on the whole and as of the time of this Decision, do not tip decidedly toward Claimants on this request." (*Id.*, ¶ 210). It has now been two and a half more years since that finding, and nearly ten years since the 2013 Bylaws were enacted. And still ICANN has not created a Standing Panel, nor offered any timetable for it.

[14] ICANN Ex. 1, Art. 1.2(a)); *see also, e.g.*, Bylaw 1.2(b)(ii) and (iv) (two of ICANN's "Core Values" that refer to its "public interest" mandate, including specifically with respect to the New gTLD Program).

[15] For the protection of the public, corporate bylaws simply may not contravene the law nor be applied unreasonably in practice. *E.g., Braude v. Automobile Club of So. Cal.*, 178 Cal. App. 3d 994, 1010-1014, 1014-1015 (1978) (non-profit corporation bylaws implicated public interest; invalidating a bylaw being applied unreasonably and unfairly -- "Corporations have no power to create bylaws that are unreasonable in their application."); *Olincy v. Merle Norman Cosmetics, Inc.*, 200 Cal. App. 2d 260, 266-267 (1962) (bylaws must be reasonable).

the public interest, and not subject to exculpatory provisions such as the Covenant.[16] With respect to ICANN and its New gTLD Application and Registry Agreements, *all of these factors apply*. The internet generally, and the DNS specifically, are "generally thought suitable for public regulation." Indeed, until 2016, ICANN was overseen by the U.S. Government. Obviously, ICANN is "performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public." (FAC, ¶ 7). ICANN also is "willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." The DNS is open to all, and TLD contracts are available to anyone meeting the standards of the Guidebook. ICANN "possesses a decisive advantage of bargaining strength against any member of the public who seeks his services." ICANN has monopoly power in regulating the DNS, there is no other provider of DNS root services. ICANN "confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence." Applicants are required to accept the Module 6 application contract without possibility of negotiation, and the Covenant provides no such option for protection against ICANN's negligence. And finally, gTLD operators' TLD businesses are under the control of ICANN, and subject to risk of carelessness by ICANN. With the flip of a switch, ICANN can entirely disable a TLD upon which an operators' business is based, and in which valuable domain names and websites are owned by the general public.

There is no question that ICANN, and its core agreements at issue here, are designed to operate in the public interest. Therefore, Cal. Civ. Code § 1668 prohibits enforcement of the Covenant contained in the application agreements.

F. The Covenant Is Unenforceable as It Was Procured Via Fraud and Is Illusory

The purported Covenant is unenforceable because it was extracted by ICANN's fraud. (FAC, ¶¶ 13, 18(iv), 84-98). ICANN's misrepresentations were directly material to Plaintiffs and induced them to accept the Covenant and the incorporated Accountability Mechanisms, and the agreements

[16] "A transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." 60 Cal. 2d at 98-101.

more generally, and to do so seeral times over as the parties' agreements were successively modified. (*Ibid*). *DOT CONNECT AFRICA TRUST*, 2017 WL 5956975, at *1 (ICANN's Covenant does not bar claims for fraud).

In general, neither releases nor ADR agreements are enforceable if they have been obtained by fraud, deception, misrepresentation, duress, or undue influence. *E.g., Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 973-979 (1997); *see also* Cal. Civ. Code § 1689(b)(1) (fraud and rescission); Cal. Civ. Proc. Code § 1281, 1282(b) (rescission and avoidance of arbitration agreements). *Engalla* is controlling. There, plaintiffs claimed that an arbitration agreement was extracted by fraudulent promises about timing and other procedures contained in the agreement. 15 Cal.4th at 960. The court held that the defendant's failure to choose an arbitrator in 144 days, and related conduct, was evidence of fraud (15 Cal.4th at 979-80-82; emphasis supplied):

> A defrauded party has the right to rescind a contract … , even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. … [The Engallas] must show that … there was substantial delay in the selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations. *Here, there is ample evidence … that Kaiser breached its arbitration agreement by repeatedly delaying timely appointment of an available [arbitrators]. In sum, we conclude there is evidence to support the Engallas' claims that Kaiser fraudulently induced Engalla to enter the arbitration agreement in that it misrepresented the speed of its arbitration program.*

In this case, as alleged, ICANN has had 10 years to implement meaningful Reconsideration, Ombudsman review, constitute the promised Standing Panel (with *en banc* appellate review), and to pay the promised fees. (FAC, *passim*). In 10 years, ICANN has only dragged its feet in the face of both public promises that it would timely implement the bylaw procedures, and prior IRP panel decisions faulting ICANN for failing to do so. (FAC, *passim*). Under *Engalla*, Plaintiffs allegations of fraud-in-the-inducement -- and 10 years of delay vs. 144 days in *Engalla* -- at minimum, raise issues of fact precluding any demurrer. *See also, e.g., Lynch v. Crittenden & Co.*, 18 Cal. App. 4th 802, 809-11 (1993) (allegation of fraud-in-the-inducement precluded arbitration); *Magness Petroleum Co. v. Warren Resources of Calif.*, 103 Cal. App. 4th 901, 909 (2002) (arbitrator selection mechanism must be followed); *Moseley v. Electronic & Missile Facilities*, 374 U.S. 167, 170-71 (1963) (fraud issue must be resolved first; misrepresentation "goes to the arbitration clause itself").

III. OPPOSITION TO DEMURRERS TO SPECIFIC CAUSES OF ACTION

A. The Demurrer to Plaintiffs' Breach of Contract Claim Is Meritless

ICANN initially claims that Plaintiffs have not attached a copy of the contract or terms breached. (Demurrer, p.16). That is wrong, and frivolous. Plaintiffs referenced the contract at FAC ¶

10, included it as Exhibit A, and liberally copied key provisions from it throughout. Module 6 of the Applicant Guidebook is the application contract between the parties, as alleged. It is the agreement that all applicants were required to sign, without any negotiation possible, in order to file their applications. ICANN knows this, as it drafted and executed the contracts.

ICANN next argues that ICANN's Bylaws are not expressly incorporated into the Guidebook. (*Id.*). But in the very next sentence it admits that "the Guidebook does state that ICANN's Accountability Mechanisms must be invoked for disputes." As those mechanisms are in the Bylaws, and "the Bylaws" are expressly mentioned in the Covenant,[17] those Bylaws are expressly incorporated into the contract. ICANN relies on an inapposite case that did not involve the 2012 Guidebook or any sort of Covenant, nor even the Bylaws as ICANN states. (Demurrer, p.16:23). Instead, it involved a completely different application contract from 2000. *See, Image Online Design, v. ICANN*, 2013 U.S. Dist. LEXIS 16896 (C.D. Cal. Feb. 7, 2013).

That court did note the general principle that "[a] secondary document becomes part of a contract as though recited verbatim when it is incorporated into the contract by reference." *Id.*, (*citing, Republic Bank v. Marine Nat. Bank,* 45 Cal.App.4th 919, 923 (1996)); *see also, e.g., Engalla,* 15 Cal.4th at 961 (ADR provisions incorporated by reference); *Republic Bank v. Marine Nat. Bank*, 45 Cal.App.4th 919, 923 (1996) (same); *Janda v. Community Hosp. of Madera,* 16 F.Supp.2d 1181, 1186-1189 (1998) (same; hospital bylaws incorporated by reference). Given the express reference to the bylaws in the CNTS, there is at very least a related issue of fact as to incorporation. *See Huverserian*, 184 Cal. App. 4th at 1468-1469.

ICANN's argument that the allegedly breached Bylaws did not exist when Plaintiffs submitted their applications in 2012 is wrong and ignores the express allegations of the FAC. In fact, those 2012 Bylaws included both Reconsideration and Ombudsman provisions that form the basis for some of Plaintiff's procedural claims. (FAC, ¶¶ 25-32). Moreover, as argued above,[18] the Covenant was not intended by ICANN or anyone else to limit future claimants to the Accountability Mechanisms as they were stated in the 2012 Bylaws. The Registry Agreements define "ICANN's Bylaws" to include those "as may be amended from time to time" – and there is no justification to argue that the Covenant means anything different.

ICANN argues alternatively that, "ICANN has not breached its Bylaws." (Demurrer, p.17). Of course, that is an ultimate question of fact not subject to demurrer. ICANN contradicts Plaintiffs'

[17] *See* FAC, ¶ 11 ("*APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS*") (emphasis in original)).
[18] *See supra,* § II.D.

allegations which must be taken as true. *Evans v. City of Berkeley*, 38 Cal.4th 1, 6 (2006). Plaintiffs have alleged many ways in which ICANN has breached its Bylaws. (*E.g.*, FAC, ¶¶ 72-83). A reasonable trier of fact could easily find that ICANN breached its Bylaws by taking ten years to still not implement them, denying claimants any right to appeal IRP decisions along the way, *inter alia*. The intent of the Bylaws provision quoted by ICANN at p.17:22 is certainly questionable, particularly in light of the contemporaneous memo from ICANN's counsel stating that the Standing Panel would be in place within six months from 2013. (FAC, ¶¶ 43 ("***Immediate Adoption is Important for Scalability"***) (emphasis in original)).[19] Plaintiffs have alleged, reasonably, that the proviso was to allow only for a reasonable period in which to create the panel and for occasional situations when it was unavailable. The proviso was never intended to give ICANN a 10-year pass, nor to allow it to *never* appoint a panel at all. Clearly, ICANN's proffered interpretation would be an unreasonable construction of the Bylaws, rendering the Standing Panel and appeal provisions illusory -- a construction to be avoided. *Mancini v. Patrizi*, 87 Cal. App. 435, 439-440 (1927).

Likewise, whether ICANN breached its Bylaws as to the Ombudsman review, Reconsideration process, or the IRP fees, are all questions of fact. Plaintiffs have stated ample allegations alleging such breaches within the First Cause of Action, as required by the court's Order re ICANN's first demurrer. Those ICANN actions and representations inform both the meaning of the relevant Bylaws and the parties' intent in contracting under them. *See, Singh v. Singh*, 114 Cal. App. 4th 1264, 1294 (2004) (corporate bylaws construed as contractual provisions); *Olincy*, 200 Cal. App. 2d at 266-267 (bylaws must be reasonable and applied reasonably). At a minimum, they raise factual issues and the need for parol, precluding disposition on demurrer.

Moreover, Plaintiffs allege that each successive Bylaw amendment created a newly modified contract. (*E.g.*, FAC, ¶¶ 82). This is supported by the above argument and evidence[20] proving that "ICANN's Bylaws" as referenced in the Covenant, is defined by ICANN in the Registry Agreements to mean "Bylaws as may be amended from time to time" – and so there is no justification for a court to define it differently in the Covenant. Moreover, in the Guidebook as to a specific dispute procedure, ICANN made clear that any future disputes would be governed by the procedure in place at the time of the application – but made no such proviso in the Covenant. This proves that ICANN could have done so, but chose not to.

The written contractual modifications here required no consideration from the Plaintiffs, as

[19] *See also supra*, n.13 (The Emergency Panelist stating two and half years ago: "These delays raise the prospect that ICANN, by not moving forward for such a long period, has risked breaching the commitment that it made through its Bylaws on this point, starting with the 2013 Bylaws.")).

[20] *See supra*, § II.D.

they were anticipated in their contracts to be unilaterally imposed by ICANN. *See also*, Cal. Civ. Code sections 1697, 1698(a). Even so, the modifications (i) were accepted by Plaintiffs although they had no duty to accept them, and (ii) created more onerous and in some cases new and additional obligations for Plaintiffs,[21] either of which constituted legally sufficient consideration for the modifications. Such modifications occurred, and each Plaintiff's successive new contracts arose, at least on April 11, 2013, October 1, 2016 and July 22, 2017. ICANN, moreover, has itself applied the newly enacted bylaw provisions to its contractual relationships with Plaintiffs.[22]

B. The Deceit, Fraud-In-The-Inducement and Grossly Negligent Misrepresentation Cause Demurrers Are Also Meritless

Plaintiffs have amply identified ICANN's misrepresentations made to them, including who made them and when they were made, how they were made, and by what authority they were made. (FAC, ¶¶ 21-28, 33-35, 39-44, 48-50, 57-58, 85-86, 92, 102-103). In sum, Plaintiffs have more than complied with the specificity in pleading requirements, especially as relaxed in cases like this one where the defendant made the misrepresentations itself, has full access to the related details, and the pleadings identify the subject matter plainly. *E.g., Daniels v. Select Portfolio, Inc*., 246 Cal. App. 4th 1150, 1166-1169 (2016) (reversing sustaining of demurrer); *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*, 245 Cal. App. 4th 821, 838-841 (2016) (same).

Plaintiffs have also alleged specific facts indicating that ICANN knew those representations were false when made. (FAC,¶¶ 87, 88, 94, 100, 105). The plain allegations and evidence show that ICANN has failed to implement the bylaw ADR mechanisms for some 10 years. That period alone shows, presumptively, that its promises were knowingly false. *E.g., Engalla*, 15 Cal.4th at 979-80, 981-82 (144-day delay was evidence of fraud). ICANN has repeatedly promised that the mechanisms' implementation was imminent, but took no action. ICANN has also ignored the statements by its own attorneys and experts that implementation was essential and should be expeditious, suggesting knowing falsity. ICANN has also refused to even acknowledge, let alone follow, prior IRP panel rulings faulting its delay. This proves that ICANN knew it was acting contrary to its public statements and IRP panel directives, and had no intention of implementing the bylaws until Plaintiffs' challenged them.

[21] *Compare*, 2012 ICANN Bylaw Art. 4.2 *with* 2013 ICANN Bylaw Art. 4.2, among other things, imposing additional notice, filing and information requirements for Reconsideration requests, limiting the time to file such requests, and giving ICANN greater powers in addressing them; *compare also*, 2012 ICANN Bylaw Art 4.3 *with* 2013 Art. 4.3 (among other things, imposing additional filing and information requirements in IRP proceedings, limiting the time to file them, giving ICANN powers to approve panel arbitrators, and stripping IRP panels of power to require ICANN compliance with decisions).

[22] *See, e.g.*, Demurrer, 18:10-13 (admitting that a new Ombudsman bylaw applied to a dispute that arose after the bylaw's enactment), 17:15-27 (arguing that the *post-2012* Standing Panel bylaw was not breached).

Plaintiffs' have addressed ICANN's argument about post-application misrepresentations, above.[23] Each new representation in the Bylaws, still unfulfilled today, constituted a new contract modification, as the parties anticipated at the time of the applications. The 2012 Bylaws were not intended to provide the rules for disputes brought in 2019. As ICANN itself as argued repeatedly, and the Guidebook and Registry Agreements make clear, the Bylaws in effect at the time of a dispute provide the procedure for that dispute. Misrepresentations about ICANN's intent were fraudulent and/or grossly negligent promises, which induced Plaintiffs to accept those modifications. *See, e.g., R Power Biofuels LLC v. Chemex LLC,* 2017 WL 1164296, at *11 (N.D. Cal., March 29, 2017) (overruling motion to dismiss); *Lewis v. McClure,* 127 Cal. App. 439, 444-449 (1932) (contractual modification supported fraud-in-the-inducement claim); *Lee v. Fed. St. L.A., LLC,* 2016 WL 2354835, at *9 (C.D. Cal., May 3, 2016) (fraudulent inducement into contract amendment); *Intelligraphics, Inc. v. Marvell Semiconductor, Inc*., 2008 WL 3200212, at *11 (N.D. Cal., Aug. 6, 2008) (same).

ICANN's misrepresentations both predate and post-date Plaintiffs' 2012 Applications. The prior misrepresentations include ICANN's bylaws themselves which provided for legitimate Reconsideration and Ombuds processes prior to 2012, as well as extra-contractual statements addressing the bylaws, coming amendments and implementation timing – including the ATRT Final Recommendations issued in December 2010. (E.g., FAC, paras. 21-24, 29, 71, 85-86, 92-93, 102-03). And, the misrepresentations that post-date Plaintiffs' original Applications were made at or before each successive contractual modification. *R Power Biofuels*, 2017 WL 1164296, at *7, 9-11; *Lewis*, 127 Cal. App. at 444-449; *Lee v. Fed. St. L.A., LLC*, 2016 WL 2354835, at *9; *Intelligraphics, Inc.*, 2008 WL 3200212, at *11.

ICANN argues that it committed no fraud because it actually complied with its contractual obligations. (Demurrer, 19-20). But that contradicts Plaintiffs' express allegations that must be taken as true. ICANN again argues facts not susceptible to demurrer.

C. Plaintiffs Gross Negligence Cause Of Action Is Properly Pled

Plaintiffs have pled all the elements of a gross negligence cause of action. (FAC, ¶¶ 109-116). Moreover, as ICANN's years'-long failures support a claim for intentional fraud as a matter of law under *Engalla,* they also support an alternative claim for gross negligence. Fraud is almost by definition "extreme"; it can be criminal. Cal. Penal Code section 532(a). As alleged, ICANN has lied publicly about the imminent implementation of the promised Accountability Mechanisms for almost 9

[23] *See supra,* § II.D.

years. It has flouted its bylaws in contravention of the admonitions and promises of its own lawyers and experts, prior IRP panels, and the law -- all "extreme" and grossly negligent conduct. ICANN had a duty to draft reasonable bylaws and to implement them reasonably.[24] It has failed entirely to do so.

D. Plaintiffs Have Standing Under Public Benefit Corporation Law

California law permits Public Benefit Corporation bylaw enforcement by "persons as have been specified in the articles or bylaws of the benefit corporation." Cal. Corp. Code § 14623. As alleged (FAC, ¶¶ 120-124), ICANN's bylaws specify that the Plaintiffs are members of a class of persons that are entitled to review of the bylaw Accountability Mechanisms because Plaintiffs have been "materially affected by an action or inaction of the ICANN Board or Staff," including action taken under or in contravention of ICANN's bylaws. Bylaws, Arts. 4.2(a), 4.2(u), 4.3(b)(i). Thus, ICANN's bylaws specify that Plaintiffs are in a class of persons entitled to enforce the bylaws. Cal. Corp. Code § 14623. Standing should be liberally interpreted in the case of public benefit corporations like ICANN, who are required by law and in their bylaws to conduct all activities in the public interest.[25]

E. Plaintiffs' Unfair Competition Law Cause Is Adequately Pled

As a matter of law, ICANN's Covenant cannot bar Plaintiffs' claims for public injunctive relief under the Unfair Competition Law. Cal. Bus. & Prof. Code sections 17200, 17203 (authorizing injunctive relief), 17500, 17535 (authorizing injunctive relief); *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 315-316 (2003) (such claims are inarbitrable as a matter of law); *Warren-Guthrie v. Health Net*, 84 Cal. App. 4th 804, 817 (2000) (same).[26]

Plaintiffs' surviving underlying causes of action serve as legally sufficient Section 17200 predicates. *Cal-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 179-181 (1999). Further, Plaintiffs have standing under the UCL as they relied on ICANN's misrepresentations and have "lost money or property" as a result. (FAC, page 50). *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 317, 327-328 (2011) (plaintiffs who have "lost money or property" have standing under UCL). As alleged (FAC, Prayer for Relief, ¶¶ 4, 5], Plaintiffs would not have contracted with ICANN, nor continued to contract with it successively, but for its misrepresentations; Plaintiffs would not have paid $185,000 in application fees and more, or forgone enforcement of their rights.

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[24] *See supra*, n.15.

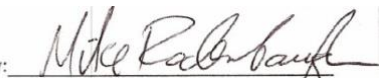
[25] *See supra*, § II.E.

[26] Even if the Covenant was enforceable, moreover, Plaintiffs would still be entitled to seek the provisional relief they are seeking in this Court -- the enforcement of ICANN's ADR bylaws which Plaintiffs were forced to utilize to attempt to resolve their substantive dispute with ICANN. Cal. C.C.P. section 1281.8; *see also id.*, sections 1297.91-1297.94.

IV. CONCLUSION

Plaintiffs respectfully request that the Court overrule ICANN's demurrer in its entirety, or in the alternative that Plaintiffs be granted leave to amend in accord with the Court's order.

Respectfully submitted, January 27, 2023

By: 

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