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INTERNET CORPORATION FOR ASSIGNED
8 NAMES AND NUMBERS

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11
12 FEGISTRY, LLC, RADIX DOMAIN
13 SOLUTIONS PTE. LTD., and DOMAIN
VENTURE PARTNERS PCC LIMITED,

14 Plaintiffs,

15 v.

16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS,

18 Defendant.

CASE NO. 20STCV42881

Assigned to Hon. Craig D. Karlan

**DEFENDANT ICANN'S NOTICE OF
DEMURRER AND DEMURRER TO
COMPLAINT OF REGISTRY, LLC,
RADIX DOMAIN SOLUTIONS PTE.
LTD., AND DOMAIN VENTURE
PARTNERS PCC LIMITED;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

[Declaration of Eric P. Enson, Request for
Judicial Notice, and [Proposed] Order
Filed Concurrently Herewith]

Date: T.B.D.
Time: T.B.D.
Dept: N

Complaint Filed: November 9, 2020

1 **DEMURRER**

2 Defendant the Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby
3 demurs to Plaintiffs Fegistry, LLC’s, Radix Domain Solutions PTE Ltd.’s, and Domain Venture
4 Partners PCC Limited’s (collectively, “Plaintiffs”) Complaint (“Complaint”) on each of the
5 following grounds:

6 **DEMURRER TO ALL CAUSES OF ACTION**

7 1. All causes of action fail to state facts sufficient to constitute a cause of action
8 against ICANN because the Complaint is barred by a covenant not to sue agreed to by the
9 Plaintiffs in 2012. Cal. Civ. Proc. Code § 430.10.

10 **DEMURRER TO FIRST CAUSE OF ACTION**

11 2. The first cause of action for breach of contract fails to state facts sufficient to
12 constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

13 **DEMURRER TO SECOND CAUSE OF ACTION**

14 3. The second cause of action for fraud-in-the-inducement under Civil Code Sections
15 1709 and 1710, *et seq.* fails to state facts sufficient to constitute a cause of action against ICANN.
16 Cal. Civ. Proc. Code § 430.10.

17 **DEMURRER TO THIRD CAUSE OF ACTION**

18 4. The third cause of action for deceit under Civil Code Sections 1709 and 1710, *et*
19 *seq.* fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc.
20 Code § 430.10.

21 **DEMURRER TO FOURTH CAUSE OF ACTION**

22 5. The fourth cause of action for grossly negligent misrepresentations fails to state
23 facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

24 **DEMURRER TO FIFTH CAUSE OF ACTION**

25 6. The fifth cause of action for gross negligence fails to state facts sufficient to
26 constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

27 **DEMURRER TO SIXTH CAUSE OF ACTION**

28 7. The sixth cause of action for public benefit corporation bylaw enforcement under

1 California Corporations Code Section 14623 fails to state facts sufficient to constitute a cause of
2 action against ICANN because Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code
3 § 430.10.

4 **DEMURRER TO SEVENTH CAUSE OF ACTION**

5 8. The seventh cause of action for false advertising law under California Business
6 and Professions Code Sections 17500 *et seq.* fails to state facts sufficient to constitute a cause of
7 action against ICANN, and Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code
8 § 430.10.

9 **DEMURRER TO EIGHTH CAUSE OF ACTION**

10 9. The eighth cause of action for unfair competition under California Business and
11 Professions Code Sections 17200 *et seq.* fails to state facts sufficient to constitute a cause of
12 action against ICANN, and Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code
13 § 430.10.

14 Dated: January 22, 2021

JONES DAY

15
16 By: /s/ Eric P. Enson
17 Eric P. Enson

18 Attorneys for Defendant
19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendant the Internet Corporation for Assigned Names and Numbers (“ICANN”) is a
4 non-profit public benefit corporation that oversees the technical coordination of the Internet’s
5 domain name system (“DNS”), which converts easily-remembered Internet domain names, such
6 as LACOURT.ORG, into numeric IP addresses recognized by computers. In 2012, ICANN
7 began accepting applications for the right to operate new generic top-level domains (“gTLDs”), in
8 connection with ICANN’s New gTLD Program. A gTLD is the portion of a domain name to the
9 right of the last dot, such as “.COM” and “.NET.”

10 Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. Ltd., and Domain Venture
11 Partners PCC Limited (collectively, “Plaintiffs”) each applied in 2012 to operate the .HOTEL
12 new gTLD. In their separate applications, Plaintiffs agreed to a covenant not to sue that requires
13 all claims arising out of, based upon, or relating to ICANN’s evaluation of their applications be
14 resolved not through litigation, but through ICANN’s unique alternative dispute resolution
15 mechanisms, referred to as ICANN’s “Accountability Mechanisms.” These Accountability
16 Mechanisms include the Independent Review Process (“IRP”) under which challenges to
17 ICANN’s actions and inactions are resolved by independent panelists administered by the
18 American Arbitration Association’s International Center for Dispute Resolution.

19 Plaintiffs have claimed that ICANN improperly evaluated Plaintiffs’ .HOTEL
20 applications. To that end, Plaintiffs filed and are in the midst of an IRP challenging the decisions
21 ICANN made regarding the .HOTEL applications. When Plaintiffs did not get the interim relief
22 they sought in their IRP, they filed this lawsuit against ICANN in direct violation of their
23 agreement not to sue, asking this Court to manage and oversee ICANN’s Accountability
24 Mechanisms, including Plaintiffs’ currently-pending IRP. Indeed, the relief Plaintiffs seek in this
25 litigation is the exact same interim relief that they requested and were denied in the IRP, which is
26 why they are improperly seeking another venue to plead their case and are asking this Court to
27 intervene in ICANN’s Accountability Mechanisms.

28 Plaintiffs’ Complaint, however, is completely barred by the Covenant Not to Sue.

1 Furthermore, the Complaint fails to sufficiently allege any cause of action against ICANN.
2 Instead, the allegations in the Complaint are contradicted by ICANN’s Bylaws¹ or Plaintiffs’ own
3 allegations, they are conclusory and devoid of any factual support, or they demonstrate that
4 Plaintiffs lack standing to pursue their claims. Taken together or individually, these key flaws
5 require that the Complaint be dismissed with prejudice.

6 **SUMMARY OF PLAINTIFFS’ ALLEGATIONS**

7 ICANN is a California non-profit public benefit corporation that oversees the technical
8 coordination of the Internet’s DNS. (Compl. ¶ 7.) In 2012, Plaintiffs each applied to ICANN to
9 operate the .HOTEL gTLD. (*Id.* ¶ 6.) By submitting their applications, Plaintiffs agreed to a set
10 of terms and conditions contained in an Applicant Guidebook (“Guidebook”) that ICANN
11 adopted for the New gTLD Program. (*Id.* ¶ 92, RJN Ex. 2, RJN Ex. 4.)² A key provision of the
12 Guidebook, the Covenant Not to Sue (“Covenant”), requires applicants to pursue all claims
13 related to ICANN’s evaluation of applications through ICANN’s Accountability Mechanisms.
14 The Covenant expressly forbids lawsuits against ICANN:

15 Applicant hereby releases ICANN and the ICANN Affiliated
16 Parties from any and all claims by applicant that arise out of, are
17 based upon, or are in any way related to, any action, or failure to
18 act, by ICANN or any ICANN Affiliated Party in connection with
19 ICANN’s or an ICANN Affiliated Party’s review of this
20 application, investigation or verification, any characterization or
21 description of applicant or the information in this application, any
22 withdrawal of this application or the decision by ICANN to
23 recommend, or not to recommend, the approval of applicant’s
24 gTLD application. ***APPLICANT AGREES NOT TO
CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL
FORA, ANY FINAL DECISION MADE BY ICANN WITH
RESPECT TO THE APPLICATION, AND IRREVOCABLY
WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR
ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY
OTHER LEGAL CLAIM AGAINST ICANN AND ICANN
AFFILIATED PARTIES WITH RESPECT OF THE
APPLICATION . . . ; PROVIDED THAT, APPLICANT MAY***

25 ¹ References to the Bylaws are to those amended on November 28, 2019, unless stated otherwise.

26 ² ICANN’s concurrently-filed Request for Judicial Notice requests that the following documents,
27 each of which are not subject to dispute, be judicially noticed and considered by the Court in
28 evaluating ICANN’s demurrer: (1) ICANN’s Bylaws as amended November 28, 2019; (2) the
Applicant Guidebook, finalized on June 4, 2012; (3) the Emergency Panelist’s decision in the
pending IRP; (4) Plaintiffs’ IRP Request; and (5) ICANN’s Bylaws as amended March 16, 2012.

1 **UTILIZE ANY ACCOUNTABILITY MECHANISM SET**
2 **FORTH IN ICANN’S BYLAWS** FOR PURPOSES OF
3 CHALLENGING ANY FINAL DECISION MADE BY ICANN
4 WITH RESPECT TO THE APPLICATION.

5 (RJN Ex. 2, Module 6, § 6.6 (emphasis added, capitalization in original).)

6 ICANN’s Bylaws provide for several Accountability Mechanisms, including
7 Reconsideration Requests and the IRP. (Compl. ¶ 16, 24; RJN Ex. 1, Art. 4, §§ 4.2, 4.3.) A
8 Reconsideration Request allows “any person or entity materially affected by an action or inaction
9 of the ICANN Board or staff” to request “the review or reconsideration of that action or inaction.”
10 (RJN Ex. 1, Art. 4, § 4.2(a).) Reconsideration Requests are reviewed by a subset of the ICANN
11 Board, the Board Accountability Mechanisms Committee (“BAMC”), which makes
12 recommendations to the ICANN Board on the merits of the Reconsideration Request. (*Id.* Art. 4,
13 § 4.2(e).) In October 2016, the Bylaws were amended to require that Reconsideration Requests
14 be sent to ICANN’s Office of the Ombudsman for review, except that the Ombudsman must
15 recuse itself from matters “for which the Ombudsman has, in advance of filing the
16 Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . .
17 or involving the Ombudsman’s conduct in some way.” (*Id.*, Art. 4, § 4.2(l)(iii).) In the case of
18 such a recusal, the BAMC must “review the Reconsideration Request without involvement by the
19 Ombudsman.” (*Id.*, Art. 4, § 4.2(l)(iii).) As Plaintiffs allege, they have filed two Reconsideration
20 Requests regarding ICANN’s evaluation of their applications, one in August 2016 and one in
21 April 2018. (Compl. ¶ 16, n.4.)

22 The IRP is an alternative dispute resolution process through which an aggrieved party can
23 ask independent panelists to evaluate whether an ICANN action or inaction was inconsistent with
24 ICANN’s Articles of Incorporation (“Articles”) and Bylaws. (Compl. ¶ 24; RJN Ex. 1, Art. 4,
25 § 4.3(a).) In 2013, the Bylaws were amended to provide for a Standing Panel of independent
26 panelists to hear and resolve IRPs. (Compl. ¶¶ 12, 27.) The Bylaws require ICANN, “in
27 consultation with the Supporting Organizations and Advisory Committees, [to] initiate a four-step
28 process to establish the Standing Panel,” but the Bylaws do not set a deadline by which this
 extensive process must be complete. (RJN Ex. 1, Art. 4, § 4.3(j)(ii).) Indeed, the Bylaws

1 specifically contemplated that it would take time to form the Standing Panel, and they provide a
2 method by which IRP Claimants and ICANN are able to appoint an IRP Panel in the absence of a
3 Standing Panel: “the Claimant and ICANN shall each select a qualified panelist from outside the
4 Standing Panel and the two panelists selected by the parties shall select the third panelist.” (*Id.*,
5 Art. 4, § 4.3(k)(ii).) As Plaintiffs concede, ICANN is in the process of convening the Standing
6 Panel. (Compl. ¶¶ 32, 54, 64, 65.)

7 Due to another 2016 amendment, the Bylaws now require ICANN to “bear all the
8 administrative costs of maintaining the IRP mechanism, including compensation of Standing
9 Panel members.” (RJN Ex. 1, Art. 4, § 4.3(r).)

10 In addition to their Reconsideration Requests, Plaintiffs have challenged ICANN’s
11 processing of their .HOTEL applications in a currently-pending IRP. (Compl. ¶¶ 13, 16, 32.) In
12 their IRP, Plaintiffs recently moved for emergency relief seeking the exact same relief that
13 Plaintiffs seek in this lawsuit. (Compl. ¶¶ 32, 39.) Specifically, Plaintiffs requested, in part, that
14 an Emergency Panelist order ICANN to “appoint an independent ombudsman” to review
15 Plaintiffs’ Reconsideration Requests; “appoint and train a Standing Panel” to hear Plaintiffs’ IRP;
16 and “pay all costs of the Emergency Panel and of the IRP Panelists,” including IRP initiation fees.
17 (RJN Ex. 3 ¶ 61.) After thorough review of the extensive briefing and argument submitted by the
18 parties, the Emergency Panelist denied Plaintiffs’ request for appointment of an Ombudsman,
19 denied Plaintiffs’ request for appointment of a Standing Panel, and denied Plaintiffs’ request for
20 reimbursement of their initial filing fee. (RJN Ex. 3, ¶ 226(F), (G), (I).)

21 Hoping to re-litigate that result, Plaintiffs then filed this Complaint seeking the same relief
22 Plaintiffs already sought from and were denied by the Emergency Panelist in the IRP. (Compl.
23 ¶¶ 83–126.) Plaintiffs’ Complaint, however, is barred by the Covenant, does not sufficiently state
24 any causes of action against ICANN, and it should be dismissed with prejudice.

25 **LEGAL STANDARD**

26 A demurrer should be sustained “when [t]he pleading does not state facts sufficient to
27 constitute a cause of action.” *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505,
28 512 (2017) (citing Cal. Civ. Proc. Code, § 431.10(e)) (internal quotations omitted). “A general

1 demurrer searches the complaint for all defects going to the existence of a cause of action and
2 places at issue the legal merits of the action on assumed facts.” *Carman v. Alvord*, 31 Cal. 3d
3 318, 324 (1982) (citing *Banerian v. O’Malley*, 42 Cal. App. 3d 604, 610–11, (1974)). The court
4 “accepts as true all the material allegations of the complaint, but do[es] not assume the truth of
5 contentions, deductions or conclusions of fact or law.” *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at
6 512. The court may also consider matters which may be judicially noticed, and a “complaint
7 otherwise good on its face is subject to demurrer when facts judicially noticed render it
8 defective.” *Evans v. City of Berkeley*, 38 Cal. 4th 1, 6 (2006) (citing *Joslin v. H.A.S. Ins.*
9 *Brokerage*, 184 Cal.App.3d 369, 374, (1986); see Code Civ. Proc. § 430.30(a)). A demurrer
10 should be granted without leave to amend where “no amendment could cure the defect in the
11 complaint[.]” See *Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014).

12 ARGUMENT

13 **I. THE COVENANT BARS PLAINTIFFS’ CLAIMS.**

14 When Plaintiffs submitted their applications for .HOTEL, they agreed to be bound by the
15 Covenant, which prohibits applicants from suing ICANN in court for any claims that “arise out
16 of, are based upon, or are in any way related to” ICANN’s review of the new gTLD application.
17 (RJN Ex. 2, Module 6, § 6.6.) A written release, such as the Covenant, extinguishes any claim
18 covered by its terms. *Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1366–67 (1996).

19 In *Ruby Glen, LLC v. ICANN*, the United States District Court for the Central District of
20 California dismissed a similar lawsuit filed by a gTLD applicant against ICANN on the sole
21 ground that the Covenant bars all “claims related to ICANN’s processing and consideration of a
22 gTLD application.” No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS 163710, at *10–11 (C.D.
23 Cal. Nov. 28, 2016); see also *Commercial Connect v. ICANN*, No. 3:16CV-00012-JHM, 2016
24 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016) (holding that the Covenant is
25 enforceable, “clear and comprehensive.”). The Ninth Circuit affirmed, finding that the
26 applicant’s entire lawsuit was barred by the Covenant. See *Ruby Glen, LLC v. ICANN*, 740 F.
27 App’x 118 (C.D. Cal. Oct. 15, 2018) (“The district court properly dismissed the FAC on the
28 grounds that Ruby Glen’s claims are barred by the covenant not to sue contained in the Applicant

1 Guidebook.”).

2 Here, as in *Ruby Glen*, each of Plaintiffs’ claims, no matter how styled, boil down to a
3 challenge of ICANN’s review and processing of Plaintiffs’ .HOTEL applications. For example,
4 Plaintiffs’ Complaint expressly premises each of its causes of action on the pending IRP, in which
5 “Plaintiffs have substantively challenged ICANN’s decision-making and review process related
6 to the delegation of the .hotel gTLD.” (Compl. ¶ 13; *see also id.* at ¶ 32 (acknowledging that
7 Plaintiffs’ pending IRP relates to whether ICANN can “delegate the .hotel gTLD to Plaintiffs’
8 competitor”), ¶ 36 (“[I]n the pending IRP, each Plaintiff seeks substantive relief related to
9 ICANN’s allegedly improper gTLD delegation decisions and processes.”).) Even the injuries
10 Plaintiffs allege, and the relief Plaintiffs seek, relate to ICANN’s evaluation of the .HOTEL
11 applications. (Compl. ¶ 75 (“Plaintiffs have not received the benefit of their contractual
12 bargain”); ¶ 80 (“[T]he improper delegation of the .hotel gTLD would cause Plaintiffs
13 inestimable and irreparable financial damage and lost commercial opportunities.”); Prayer for
14 Relief 1, Compl. ¶ 29 (seeking “meaningful, independent Ombudsman review of Plaintiffs’
15 Requests for Reconsideration, [and] constitution of the expert, community-chosen Standing Panel
16 to adjudicate Plaintiffs’ IRP complaint” both of which are predicated on ICANN’s evaluation of
17 Plaintiffs’ .HOTEL applications). Regardless of whether Plaintiffs allegedly are asserting
18 “procedural” claims in this lawsuit (Compl. ¶ 13), all of Plaintiffs’ claims, both procedural and
19 substantive, “arise out of, are based upon, [and] relate[] to” ICANN’s review of Plaintiffs’
20 applications for .HOTEL and are barred by the Covenant. (RJN Ex. 2, Module 6, § 6.6.)

21 Plaintiffs are likely to argue that the Covenant is not enforceable under Section 1668 of
22 California’s Civil Code (“Section 1668”) or because it is unconscionable. These arguments
23 should fail. Section 1668 does not apply to the Covenant because that section only invalidates
24 clauses that “*exempt* anyone from responsibility for his own fraud, or willful injury to the person
25 or property of another[.]” Cal. Civ. Code § 1668 (emphasis added). The Covenant, however,
26 explicitly provides for the use of ICANN’s Accountability Mechanisms to resolve disputes
27 regarding ICANN’s processing of gTLD applications. (RJN Ex. 2, Module 6.6.) Thus, the
28 Covenant does not exempt ICANN from responsibility, making Section 1668 inapplicable, as

1 both the District Court and Ninth Circuit found in the *Ruby Glen* matter. *Ruby Glen*, 2016 U.S.
2 Dist. LEXIS 163710, at *10–11 (“Therefore, in the circumstances alleged in the FAC, and based
3 on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant
4 not to sue.”); *Ruby Glen*, 740 F. App’x at 118 (“[T]he covenant not to sue does not exempt
5 ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling
6 outside the scope of section 1668.”).³ Nor is the Covenant procedurally or substantively
7 unconscionable, as the *Ruby Glen* courts also confirmed. *Ruby Glen*, 2016 U.S. Dist. LEXIS
8 163710, at *14 (“Under the totality of the circumstances, the Court concludes that the covenant
9 not to sue is, at most, minimally procedurally unconscionable.”); *Ruby Glen*, 740 F. App’x at
10 118–19 (“Even assuming that the adhesive nature of the Guidebook renders the covenant not to
11 sue procedurally unconscionable, it is not substantively unconscionable.”).

12 Because Plaintiffs’ entire lawsuit is barred by the Covenant, leave to amend would be
13 futile. Thus, this court should sustain ICANN’s demurrer with prejudice. *See Cansino*, 224 Cal.
14 App. 4th at 1468 (dismissal with prejudice appropriate where “no amendment could cure the
15 defect in the complaint.”).

16 **II. EACH OF PLAINTIFFS’ CAUSES OF ACTION FAILS TO STATE A CLAIM.**

17 Even if the Covenant did not bar Plaintiffs’ entire Complaint, the Complaint must be
18 dismissed for the independent reason that each of Plaintiffs’ causes of action fails to state a claim.

19 **A. Plaintiffs’ Breach of Contract Claim (Count One) Fails As A Matter Of Law.**

20 “The standard elements of a claim for breach of contract are: ‘(1) the contract,
21 (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage
22’” *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008) (citation
23 omitted). Thus, to state a claim for breach of contract, Plaintiffs’ Complaint must identify the
24

25 ³ Plaintiffs are likely to rely on *DotConnect Africa Trust v. Internet Corp. for Assigned Names*
26 *and Numbers* (“ICANN”), 2017 WL 5956975, at *3 (Cal. Super. Ct. Aug. 9, 2017), in which the
27 Superior Court ruled that the Covenant did not bar fraud claims pursuant to Section 1668. It is
28 ICANN’s view, however, that the findings of the *Ruby Glen* courts that the Covenant is not an
exculpatory provision, making Section 1668 inapplicable, are the better-reasoned decisions. In
any event, Plaintiffs’ alleged fraud claims are dressed-up breach of contract claims and deficient
as a matter of law, as set forth below.

1 contract at issue as well as the specific provisions that ICANN allegedly breached. *See Holcomb*
2 *v. Wells Fargo Bank, N.A.*, 155 Cal. App. 4th 490, 501 (2007) (“Without specifying the nature of
3 the contract, nor the specific terms Holcomb claims the bank had breached, the complaint fails to
4 adequately state a cause of action for breach of contract.”); *Donahue v. Apple, Inc.*, 871 F. Supp.
5 2d 913, 930 (N.D. Cal. 2012) (holding that a “complaint must identify the specific provision of
6 the contract allegedly breached by the defendant.” (citing *Progressive West Ins. Co. v. Superior*
7 *Court*, 135 Cal. App. 4th 263, 281 (2005))).

8 Plaintiffs’ Complaint, however, does not sufficiently identify the contract at issue or the
9 provisions that ICANN allegedly breached. Instead, Plaintiffs make vague references to a vast
10 number of Bylaws provisions (some of which have citations, others of which do not) and to the
11 338-page Guidebook. The most clarity Plaintiffs provide is the assertion that they “each
12 contracted with ICANN to apply for the rights to exclusively operate the new gTLD ‘.hotel,’” and
13 that “[e]ach such contract incorporates by reference ICANN’s bylaw Accountability Mechanisms.
14 . . .” (Compl. ¶ 12.) Plaintiffs also claim that “ICANN’s bylaws form part of its contractual
15 terms with each Plaintiff.” (Compl. ¶ 84.) But even with these allegations it remains unclear if
16 the alleged contract is found in the .HOTEL applications, the Guidebook, the Bylaws or some
17 combination thereof. As such, ICANN cannot meaningfully respond to the breach of contract
18 claim, and it should therefore be dismissed. *See Holcomb*, 155 Cal. App. 4th at 501 (affirming
19 trial court’s order sustaining demurrer where the plaintiff failed to specify the nature of the
20 contracts and the specific terms that the defendant allegedly breached).

21 To the extent that Plaintiffs are alleging that ICANN’s Bylaws formed a contract with
22 Plaintiffs via Plaintiffs’ applications for .HOTEL, which is the most generous reading of the
23 Complaint, such a breach of contract claim fails for several reasons. First, the Bylaws provisions
24 that Plaintiffs claim were breached—*i.e.*, those regarding a Standing Panel, Ombudsman review
25 of Reconsideration Requests, and payment of IRP fees—were not in the Bylaws at the time
26 Plaintiffs submitted their .HOTEL applications in 2012, but were added in the 2013 and 2016
27 amendments to the Bylaws. (Compl. ¶¶ 12, 45, 59; *see generally*, RJN Ex. 5.) Thus, these
28 provisions could not be part of any agreement that ICANN and Plaintiffs entered into in 2012.

1 Second, Plaintiffs do not sufficiently allege facts indicating that ICANN’s Bylaws were
2 expressly incorporated into Plaintiffs’ applications for .HOTEL. While the Guidebook does state
3 that ICANN’s Accountability Mechanisms must be invoked for disputes about ICANN’s
4 evaluation of applications, there is no Guidebook provision stating that the Bylaws are expressly
5 incorporated therein and are part of an agreement between ICANN and applicants. (*See generally*
6 *RJN Ex. 2.*) The District Court for the Central District of California considered this precise issue
7 and held that ICANN is only contractually bound by the obligations to which it agreed in the
8 application documents, not other extraneous materials, such as Bylaws provisions. *See Image*
9 *Online Design, Inc. v. ICANN*, No. CV 12-08968 DDP (JCx), 2013 U.S. Dist. LEXIS 16896, at
10 *9, 11 (C.D. Cal. Feb. 7, 2013).

11 Third, Plaintiffs lack standing to pursue a claim that ICANN has breached its Bylaws.
12 ICANN is a public benefit corporation, and only officers, directors, the corporation or a member
13 thereof, the attorney general or a person with an interest in an asset the corporation holds in
14 charitable trust have standing to sue for breach of the corporation’s foundational documents. Cal.
15 Corp. Code § 5142; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (1987). Plaintiffs, as
16 gTLD applicants, do not fit into any of these categories.

17 Fourth, even if the Bylaws did comprise a contract between Plaintiffs and ICANN, which
18 they do not, ICANN has not breached its Bylaws. While Plaintiffs claim that ICANN violated the
19 Bylaws because ICANN: (1) “has not constituted the Standing Panel”; (2) has not provided “for
20 any meaningful Ombudsman review or input into Request for Reconsideration decisions”; and
21 (3) has not “paid IRP fees” (Compl. ¶ 85), each of these claims lacks merit.

22 As to the Standing Panel, nothing in the Bylaws requires ICANN to convene a Standing
23 Panel by a specific date. Instead, the Bylaws clearly anticipate that a Standing Panel will *not* be
24 convened immediately, likely because of the extensive process for convening the Standing Panel,
25 which requires significant involvement of ICANN’s Supporting Organizations and Advisory
26 Committees. (*RJN Ex. 1, Art. 4, § 4.3(j)(ii).*) To the extent there is any doubt on this point, the
27 Bylaws explicitly provide a mechanism for an IRP Claimant and ICANN to appoint an IRP Panel
28 in the absence of a Standing Panel:

1 In the event that a Standing Panel is not in place when an IRP Panel
2 must be convened for a given proceeding or is in place but does not
3 have capacity due to other IRP commitments or the requisite
4 diversity of skill and experience needed for a particular IRP
5 proceeding, the Claimant and ICANN shall each select a qualified
6 panelist from outside the Standing Panel and the two panelists
7 selected by the parties shall select the third panelist.

8 (*Id.*, Art. 4, § 4.3(k)(ii).) It is therefore impossible for ICANN to have breached the Bylaws by
9 failing to convene a Standing Panel on Plaintiffs’ preferred timetable. *See Kim v. Westmorre*
10 *Partners, Inc.*, 201 Cal. App. 4th 267, 282 (2011) (“When a plaintiff attaches a written agreement
11 to his complaint, and incorporates it by reference into his cause of action, the terms of that written
12 agreement take precedence over any contradictory allegations in the body of the complaint.”). In
13 any event, Plaintiffs’ own allegations concede, and the Emergency Panelist found, that ICANN is
14 in the process of convening a Standing Panel, and is complying with the required process.
15 (Compl. ¶¶ 32, 54, 64, 65; RJN Ex. 3 ¶ 210.)

16 Plaintiffs’ claim that ICANN violated its Bylaws by not providing Ombudsman review of
17 Plaintiffs’ two Reconsideration Requests fails as well, as the IRP Emergency Panelist also found.
18 (Compl. ¶ 23; Decision ¶ 131 (“the Emergency Panelist determines that there has been no
19 violation by the Ombudsman or by the Board of ICANN’s Articles, Bylaws or other policies. . .
20 .”) As to Plaintiffs’ August 2016 Reconsideration Request, the Bylaws operative at that time did
21 not require Ombudsman review of Reconsideration Requests. (RJN Ex. 3 ¶ 122, n.157.) That
22 requirement was not added to the Bylaws until the 2016 amendments. (*Id.*) As to Plaintiffs’
23 April 2018 Reconsideration Request, the Ombudsman recused itself, as the Bylaws require it to
24 do, because the Ombudsman had previously taken a position on the matter. (RJN Ex. 1, Art. 4,
25 § 4.2(l)(iii).) As such, the BAMC “review[ed] the Reconsideration Request without involvement
26 by the Ombudsman” in accordance with the Bylaws (*Id.*; RJN Ex. 3 ¶ 131.)

27 Finally, Plaintiffs admit that ICANN reimbursed Plaintiffs \$18,000 for the Emergency
28 Panelists’ fees, but challenge ICANN’s decision not to reimburse Plaintiffs for the \$3,750 fee to
initiate the IRP. ICANN’s Bylaws, however, only require ICANN to “bear all the administrative
costs of *maintaining* the IRP mechanism, including compensation of Standing Panel members.”
(*Id.*, Art. 4, § 4.3(r) (emphasis added).) The Bylaws thus are clear that ICANN is to bear the

1 administrative costs of maintaining the IRP (*i.e.*, enabling the IRP to continue), not initiating the
2 IRP (*i.e.*, causing an IRP to begin), as the Emergency Panelist found. (RJN Ex. 3 ¶ 225.)

3 **B. Plaintiffs Fail To State A Claim For Fraud, Deceit, And Grossly Negligent**
4 **Misrepresentation (Counts Two Through Four).**

5 **1. Plaintiffs fail to allege specific facts to support their claims for fraud in**
6 **the inducement and deceit (Counts Two and Three).**

7 To allege a cause of action for fraud in the inducement and deceit, Plaintiffs must allege
8 “(1) misrepresentation, (2) knowledge of falsity, (3) intent to induce reliance on the
9 misrepresentation, (4) justifiable reliance on the misrepresentation, and (5) resulting damages.”
10 *Cansino*, 224 Cal. App. 4th at 1469. Fraud in the inducement is a “subset of the tort of fraud”
11 that occurs when the “the promisor knows what he is signing but his consent is induced by
12 fraud[.]” *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 294-95 (2005) (citation
13 omitted). “Undeniably, fraudulent inducement occurs before a contract is signed.” *SI 59 LLC v.*
14 *Variel Warner Ventures, LLC*, 29 Cal. App. 5th 146, 152 (2018), review denied (Feb. 13, 2019).

15 California case law makes clear that “[f]raud must be pleaded with specificity, to provide
16 the defendants with the fullest possible details of the charge so they are able to prepare a defense
17 to this serious attack. To withstand a demurrer, the *facts* constituting every element of the fraud
18 must be alleged with particularity, and the claim cannot be salvaged by references to the general
19 policy favoring the liberal construction of pleadings.” *Goldrich v. Natural Y Surgical Specialties,*
20 *Inc.*, 25 Cal. App. 4th 772, 782 (1994) (emphasis in original); *see also Tindell v. Murphy*, 22 Cal.
21 App. 5th 1239, 1249 (2018) (“[A] general pleading of the legal conclusion of fraud is
22 insufficient.”). Additionally, “when a plaintiff asserts fraud against a corporation, the plaintiff
23 must ‘allege the names of the persons who made the allegedly fraudulent representations, their
24 authority to speak, to whom they spoke, what they said or wrote, and when it was said or
25 written.’” *Cansino*, 224 Cal. App. 4th at 1469 (citation omitted). Plaintiffs’ claims do not meet
26 this standard because they fail to allege any element with specificity, and because their own
27 allegations demonstrate that their fraud claims are deficient.

28 First, Plaintiffs’ fraud in the inducement claim fails because each and every alleged
misrepresentation identified by Plaintiffs *occurred after* Plaintiffs submitted their .HOTEL

1 applications in 2012. For example, Plaintiffs allege that the Accountability Mechanism Bylaws
2 provisions Plaintiffs are seeking to enforce were “promised by the ICANN Board and bylaws in
3 critical respects since 2013, and in specific detail since 2016.” (Compl. ¶ 12.) Likewise,
4 Plaintiffs allege that the Bylaws section providing for a Standing Panel has “been in effect since
5 April 2013,” (Compl. ¶ 45), and an ICANN statement about the Standing Panel was made “on
6 April 8, 2013.” (Compl. ¶ 50.) Plaintiffs, however, had already submitted their .HOTEL
7 applications, in 2012, long before these alleged misrepresentations were made. Accordingly,
8 these alleged misrepresentations could not have intended to induce, or actually induced, Plaintiffs
9 to enter into any contract with ICANN in 2012. *SI 59 LLC*, 29 Cal. App. 5th at 152 (fraudulent
10 inducement “occurs before a contract is signed.”).

11 Plaintiffs make further vague claims that ICANN has made “repeated and continuing
12 representations” at “varying times,” including “very public statements” and “pronouncements”
13 made by ICANN’s “experts and attorneys” (Compl. ¶ 82; *see also id.* at ¶ 19, 27, 90, 96); but
14 Plaintiffs absolutely fail to identify what the statements even said, when any of these statements
15 were made, or who made them. These conclusory allegations are thus insufficient to state a claim
16 for fraud or deceit. *Goldrich*, 25 Cal. App. 4th at 782–83 (sustaining demurrer where the
17 “conclusory allegations offer[ed] no facts at all and it is impossible to determine what was said or
18 by whom or in what manner.”).

19 Second, even if the Bylaws provisions that Plaintiffs seek to enforce had been publicized
20 and in effect before Plaintiffs submitted their applications, they still could not be fraudulent or
21 deceitful because ICANN has followed these Bylaws provisions. As demonstrated above,
22 ICANN has complied with each of these Bylaws provisions because: (1) the Bylaws do not
23 require ICANN to convene a Standing Panel by a specific date, and ICANN is in the process of
24 constituting a Standing Panel; (2) Plaintiffs’ first Reconsideration Request did not qualify for
25 Ombudsman review and the Ombudsman properly recused itself from the second Reconsideration
26 Request; and (3) the Bylaws require ICANN only to pay IRP fees for maintaining (not initiating)
27 the IRP, which is what ICANN did here. There can be no misrepresentation associated with
28 ICANN’s Bylaws when ICANN has acted in accordance with its Bylaws.

1 Third, while Plaintiffs make the conclusory statement that “ICANN and its agents knew of
2 [the statements’] falsity, in that, *inter alia*, ICANN never intended to implement an effective
3 Ombudsman procedure, the promised Standing Panel, nor to pay IRP fees,” (Compl. ¶¶ 91, 97),
4 Plaintiffs completely fail to allege any facts demonstrating that ICANN knew any statements
5 were false or, even, that such statements were false. Conclusory allegations of this kind are
6 simply insufficient to state a claim for fraud in the inducement or deceit. *See Goldrich*, 25 Cal.
7 App. 4th at 782 (finding that Plaintiffs must plead “the *facts* constituting every element of the
8 fraud . . . with particularity”).

9 Finally, the Complaint makes clear that Plaintiffs’ claims for fraud in the inducement and
10 deceit are predicated entirely on the alleged breach of contract claim, and thereby merely re-
11 named as fraud claims. Reframing breach of contract claims “in the traditional words of fraud,
12 without any supporting facts” is “simply not enough” to state a claim for fraud and are just a
13 repeat of Plaintiffs’ complaints about ICANN’s evaluation of Plaintiffs’ .HOTEL applications.
14 *See Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 782 (1994).

15 **2. As with their other fraud claims, Plaintiffs have failed to allege a**
16 **grossly negligent misrepresentation (Count 4).**

17 The elements of negligent misrepresentation are the same as a cause of action for fraud,
18 “except there is no requirement of intent to induce reliance.” *Cadlo v. Owens-Illinois, Inc.*, 125
19 Cal. App. 4th 513, 519 (2004). As with a claim for fraud, a cause of action for negligent
20 misrepresentation “must be factually and specifically alleged,” and the “policy of liberal
21 construction of pleadings is not generally invoked to sustain a misrepresentation pleading
22 defective in any material respect.” *Cadlo*, 125 Cal. App. 4th at 519.

23 Plaintiffs’ claim for grossly negligent misrepresentation is predicated on the same conduct
24 as the claims for fraud and deceit (*see* Compl. ¶¶ 102–106), and therefore fails for the same
25 reasons. And, again, Plaintiffs make only conclusory allegations when reciting the elements of a
26 claim for negligent misrepresentation, which is insufficient to state a claim. *See Cadlo*, 125 Cal.
27 App. 4th at 519 (holding that negligent misrepresentation must be pled with specificity).

28 **C. Plaintiffs Fail To State A Claim For Gross Negligence (Count Five).**

Plaintiffs claim that ICANN “was grossly negligent in the performance of its promises

1 made to Plaintiffs in their contracts.” (Compl. ¶ 108.) Plaintiffs’ allegations, however, are
2 plainly insufficient to state a cause of action for gross negligence.

3 Gross negligence “is pleaded by alleging the traditional elements of negligence”—duty,
4 breach, causation, and damages—and alleging that the defendant engaged in “extreme conduct.”
5 *Fritelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 52 (2011). Additionally, “[i]t is a
6 well established legal principle that conduct causing a breach of contract becomes tortious only
7 when it also violates a duty wholly independent of the contract.” *Venezuela v. ADT Sec. Services,*
8 *Inc.*, 820 F. Supp. 2d 1061, 1069 (C.D. Cal. 2010) (citing *Erlich v. Menezes*, 21 Cal. 4th 543, 551
9 (1999)). Plaintiffs have not alleged that ICANN owed Plaintiffs any legally-recognized duty, and
10 have not alleged that ICANN engaged in any extreme conduct. Plaintiffs’ negligence claim
11 should therefore be dismissed.

12 **D. Plaintiffs’ Do Not Have Standing To Bring A Public Benefit Bylaws**
13 **Enforcement Proceeding (Count Six).**

14 Plaintiffs’ cause of action for enforcement of ICANN’s Bylaws fails as a matter of law
15 because Plaintiffs lack standing to pursue such a claim. The California Corporations Code is
16 clear that only specific individuals can enforce a public benefit corporation’s Bylaws: “A benefit
17 enforcement proceeding may be commenced or maintained only” by (1) the benefit corporation;
18 (2) a shareholder or directors; (3) a person that owns 5% or more of equity interests in “an entity
19 of which the benefit corporation is a subsidiary,” or (4) “[o]ther persons as have been specified in
20 the articles or bylaws of the benefit corporation.” Cal. Corp. Code § 14623.

21 Plaintiffs claim that because they qualify as IRP Claimants for purposes of ICANN’s IRP,
22 they likewise qualify to bring a claim in court for enforcement of ICANN’s Bylaws. (Compl.
23 ¶¶ 115–116.) An IRP Claimant, however, is defined under the Bylaws only as an entity that can
24 institute *an IRP* against ICANN if that entity “has been materially affected by a Dispute.” (RJN
25 Ex. 1, Art. 4, § 4.3(b)(i).) As Plaintiffs concede, the IRP is a separate process “prescribed by the
26 ICANN bylaws that allows for independent third-party review of ICANN Board or staff actions
27 (or inactions).” (Compl. ¶ 24.) An IRP Claimant is *not* defined as an entity that can bring a
28 claim in court under Section 14623. In fact, the Guidebook to which Plaintiffs agreed prohibits

