For their First Amended Complaint against the Internet Corporation for Assigned Names and Numbers ("ICANN"), Plaintiffs allege as follows:

**NATURE OF THE ACTION**

1. 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. The relevant ICANN bylaws, and hence Plaintiffs’ contracts with ICANN, require: (1) a “Reconsideration” process, (2) an independent Ombudsman review process, (3) a specially-trained, expert Standing Panel from which panelists will be drawn to hear and decide the merits
of Plaintiffs’ disputes with ICANN pursuant to its bylaws’ “Independent Review Process” (“IRP”) and which would en banc and de novo hear any appeal from any such decision; (4) procedural rules of practice within IRP proceedings (“IRP Rules”), and (5) that ICANN pay all administrative costs of an IRP.

2. ICANN has breached all of the related contractual provisions (and its bylaws), as well as agreed modifications to several of the provisions, and has also misrepresented both the provisions and its intent to implement them, damaging each and all of the Plaintiffs. In fact, none of these supposed dispute resolution mechanisms have ever been implemented or followed by ICANN and are a sham whose design and actual effect is to deny all meaningful relief to claimants like the Plaintiffs who have disputes with ICANN.

THE PARTIES

3. Plaintiff Fegistry, LLC is a Washington limited liability company with its principal place of business in Washington.

4. Plaintiff Radix Domain Solutions PTE Ltd. is an Indian limited liability company with its principal place of business in India.

5. Plaintiff Domain Venture Partners PCC Ltd. is a Gibraltar limited liability company with its principal place of business in Gibraltar.

6. By their contracts with ICANN, Plaintiffs each effectively own and/or control independent applications to ICANN to own and operate the generic top-level domain (“gTLD”) “hotel” registry. By their additional contracts with ICANN, Plaintiffs each effectively own and/or control multiple Registry Agreements with ICANN, by which they operate various gTLD registries. Each of those agreements expressly and repeatedly incorporates ICANN’s Bylaws.

7. Defendant ICANN is a California public benefit corporation with its principal place of business in Los Angeles, California. ICANN is the entity responsible for governing the
entire internet global domain name system ("DNS"), including domain name and IP address allocations throughout the world. ICANN’s responsibilities include whether and how to add new gTLDs to the root zone of the internet DNS. For example, whether, through whom, and on what terms to allow "hotel" domain names such as hilton.hotel, westin.hotel, best.hotel, california.hotel, etc., to be registered and used on the internet for commerce, comment or any other legitimate purpose. ICANN currently governs more than one thousand gTLD registries that sell domain names for use on the internet, including legacy operations like .com and .org, and new gTLDs like .vacations, .viajes, .Google, .site, .London, .gay, .guitar, .horse, .hotels, and .hoteles. ICANN’s DNS governance covers virtually every web user and every website in the world, including those used personally, in the public sector, and in commerce. ICANN’s governance affects almost all aspects of private and public life, and trillions of dollars in commerce annually – including the vast majority of Plaintiffs’ business interests. The so-called Accountability Mechanisms in the ICANN bylaws and Plaintiffs’ contracts are checks on ICANN’s power and actions, as it is not overseen by any governmental entity.

8. The true identities of defendants sued as DOES I-X are unknown to Plaintiffs at this time. Plaintiffs will amend this Complaint when these Defendants’ true identities become known. Each Defendant, including ICANN and each DOE, were at all relevant times acting as agents or other jointly liable parties in doing and failing to do the acts and omissions alleged. Whether express or implied, every allegation made against ICANN in this complaint is also made against each defendant DOE.
JURISDICTION AND VENUE

9. This Court has personal jurisdiction over ICANN, and venue is appropriate in this Court. Defendant is a California public benefit corporation with its headquarters and principal place of business in Los Angeles County. In addition, a substantial part of the events giving rise to Plaintiffs’ claims occurred in Los Angeles County.

GENERAL ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

(Plaintiffs’ Original & Modified Contracts with ICANN & ICANN’s Related Misrepresentations)

10. Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE Ltd. and Domain Venture Partners PCC Ltd. each submitted their .hotel gTLD application contracts to ICANN in May 2012. ICANN accepted each on June 13, 2012. In each contract, Plaintiffs applied to ICANN for the rights to exclusively own and operate the new gTLD “.hotel.” Each contract required each Plaintiff to pay an application fee to ICANN of $185,000.00 and required each Plaintiff to pay consultant and technical fees of hundreds of thousands of dollars more to prepare each application and move through the application process. That contract also incorporated by reference the “dispute resolution process as set forth in the application.” [Exhibit A, June 4, 2012 ICANN New gTLD Applicant Guidebook, Module 6, para. 4 (emphasis supplied)]:

Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application.

11. Each of Plaintiffs’ application contracts also contained an ambiguous provision that purports to be either a release or a covenant not to sue (“CNTS”), or both, that also incorporates by reference ICANN’s bylaw alternative dispute resolution procedures (the so-called “Accountability Mechanisms”), which, where applicable, were to be used to resolve issues
and disputes that might arise with respect to the delegation of gTLDs. The release/CNTS provision, including its incorporation of ICANN’s ADR mechanisms, provides [Id., para. 6 (emphasis supplied)]:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s 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 FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT’S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN 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; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION.

12. Plaintiffs’ claims in this action are not within the scope of the release/CNTS 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. This language says nothing about claims related to any other ICANN activities, including, relevant here, things such as “bylaw compliance” or “ADR process mechanisms” or “dispute resolution provisions” or “fraud.” Further, as a matter of contractual construction, that the activities encompassed by the release/CNTS are specifically itemized

FIRST AMENDED COMPLAINT & DEMAND FOR JURY TRIAL
underscores an intent to cover only such items; if the intent was broad and not limited, supposdly 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. In turn, this action (at least so far) does not challenge ICANN’s wrongful intention to delegate of the .HOTEL gTLD. It also 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.

14. ICANN’s covenant not to sue language is also facially inapplicable here. It 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.

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 CNTS portion of the provision 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. However, and again, Plaintiffs’ claims in this action do not challenge a final ICANN delegation decision with respect to any application whatsoever and none of the damages sought are claimed to have been suffered due to any such final delegation decision. Instead, 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.

16. ICANN’s own admissions further refute any broad interpretation of the CNTS. 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 CNTS. The intent to preserve civil fora is further proven because the CNTS ADR scheme is permissive, not a 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 CNTS 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.
18. Further, the release/CNTS is unenforceable as a matter of law for several reasons. Thus, Plaintiffs allege, and will prove, that:

(i) The release language as a matter of law cannot be effective to bar claims for willful injuries (Cal. Civ. Code section 1668).

(ii) ICANN’s ADR process is not just a typical ADR process like an arbitration agreement 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, 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) ICANN’s ADR process is also, in actual practice, a sham because it includes no means to garner any testimony under oath, i.e., ICANN can simply lie in the discovery process, and it has been found by at least one panel to have done so (in the DotRegistry matter). More to the point, the 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. [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) (“[e]ach IRP Panel shall have the authority to . . . [d]eclare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, . . [and to] [r]ecommend that ICANN stay any action or decision, or take necessary interim action, . . .).]

19. And while ICANN’s bylaws state that ICANN will comply with panel decisions [Exhibit C, 4/11/13 ICANN Bylaws, Art. IV, Section 3.21 (“The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”); 6/18/18 ICANN Bylaws, Art. IV, Section 4.3(x) (“The IRP is intended as a final, binding arbitration process”)], ICANN has consistently refused to do so. Indeed, 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, one of the very bylaws about which Plaintiffs complain in this action. In other words, history has proven that ICANN’s promise (in the bylaw) to follow panel decisions is a rank lie. As such, ICANN’s ADR process is not only an insufficient process, but instead a process that supplies no meaningful relief at all, and for this reason too operates as a de facto release of rights. Moreover, ICANN’s refusal to act on the Standing Panel bylaw in the face of two IRP panel decisions obviously illustrates why court intervention is required here: Even if Plaintiffs litigate their procedural bylaw issues in the context of an ICANN-sponsored IRP and prevail, ICANN won’t abide by the decision, rendering Plaintiffs’ efforts futile. ICANN has absolutely proved this by its own conduct in the prior matters. So again, by insisting that Plaintiffs go forward with an IRP (under threat of its dismissal and concomitant loss of their gTLD applications altogether), ICANN has herded
Plaintiffs into a flawed process, violative of its own bylaws, while at the same time hiding behind a purported covenant not to sue whose enforcement would thus preclude review of ICANN’s related conduct altogether.

(iv) Finally, as to Plaintiffs, the release/CNTS was procured by fraud and is therefore unenforceable for that reason as well. ICANN’s misrepresentations, alleged below, were directly material to Plaintiffs and induced them to accept the CNTS and the ADR bylaw provisions, and the contracts more generally, and to do so several times over as the parties’ agreements were successively modified. ICANN has had almost 9 years to implement meaningful Reconsideration processes and Ombudsman review, to constitute the promised Standing Panel, implement the promised discovery and other rules, and to pay the promised fees. In 9 years, ICANN should have been able to create rules for and staff several universities and hospitals, let alone a single arbitration panel and some procedural rules. But ICANN has instead chosen to drag its feet in the face of admonitions from its own lawyers and experts that it should timely implement the bylaw ADR procedures, and at least two IRP decisions telling ICANN the same thing. ICANN has no excuse for failing to implement the Standing Panel and otherwise comply with its own bylaws for 9 years.

20. While Plaintiffs’ claims in this action are not within the factual scope of the release/CNTS provision, and that it is otherwise legally unenforceable, they agreed to the release/CNTS precisely because of the incorporated bylaw ADR processes. In other words, the supposed ADR process as incorporated into their contracts induced Plaintiffs to accept and agree to the release/CNTS (and, in part, to agree to the contracts as a whole) because the ADR process was supposed to provide a forum for the fair and meaningful resolution of disputes that might be within the scope of the release/CNTS.
21. Plaintiffs also agreed to the release/CNTS because of misrepresentations made by ICANN’s “Accountability and Transparency Review Team” (“ATRT”) to Plaintiffs before the execution of the original contracts, actually on 12/31/10, that (emphasis supplied):

D. Review mechanism(s) for Board decisions

23. As soon as possible, but no later than June 2011, the ICANN Board should implement Recommendation 2.7 of the 2009 Draft Implementation Plan for Improving Institutional Confidence which calls on ICANN to seek input from a committee of independent experts on the restructuring of the three review mechanisms - the Independent Review Panel (IRP), the Reconsideration Process and the Office of the Ombudsman. This should be a broad, comprehensive assessment of the accountability and transparency of the three existing mechanisms and of their inter-relation, if any (i.e., whether the three processes provide for a graduated review process), determining whether reducing costs, issuing timelier decisions, and covering a wider spectrum of issues would improve Board accountability. . . . Upon receipt of the final report of the independent experts, the Board should take actions on the recommendations as soon as practicable.

24. As soon as possible, but no later than the March 2011 ICANN meeting, the operations of the Office of Ombudsman and the relationship between the Office of the Ombudsman and the Board of Directors should be assessed and, to the extent they are not, should be brought into compliance with the relevant aspects of internationally recognized standards for: a) an Ombudsman function; and b) a Board supporting such a function under the Standards of Practice of the International Ombudsman Association.

25. As soon as possible, but no later than October 2011, the standard for Reconsideration requests should be clarified with respect to how it is applied and whether the standard covers all appropriate grounds for using the Reconsideration mechanism.

26. As soon as possible, but no later than October 2011 the ICANN Board, to improve transparency, should adopt a standard timeline and format for Reconsideration Requests and Board reconsideration outcomes that clearly identifies the status of deliberations and then, once decisions are made, articulates the rationale used to form those decisions.

[Exhibit D (12/31/10 ICANN ATRT Final Recommendations, pp. 6.)]

22. These representations by ICANN were made by ATRT team members Urs Gasser, Herbert Burkert, John Palfrey and Jonathan Zittrain. [ATRT Final Recommendations, p. 74.]

The ATRT was given specific authority to make its recommendations by ICANN’s governing board. [12/31/10 ATRT Final Recommendations, p. 79 (the ATRT was “selected by the Chair of
the ICANN Board and the Chair of the [ICANN] GAC [Governmental Advisory Committee] in order to perform a review of ICANN’s execution of its commitments.”).]

23. The ATRT representations were made via publication on ICANN’s internet site on or about 12/31/10 and thereby communicated to each of Plaintiffs’ principals, including Jay Westerdal, Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and to a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about the same date.

24. In originally contracting with ICANN in 2012, Plaintiffs relied on these 2010 ATRT representations as supposedly truthful statements that ICANN was serious about making its Accountability Mechanisms more fair and meaningful and that improvements would soon be in place. While Plaintiffs were unaware of it at that time, these ICANN representations were false, ICANN knew they were false when made, they were made with the intention to induce Plaintiffs (and others) to enter into their contracts with ICANN and to accept and agree to the release/CNTS, and Plaintiffs reasonably relied upon the representations in agreeing to the release/CNTS and their contracts with ICANN more generally.

25. Also, before the date of each Plaintiff’s original contract with ICANN, at least two prior iterations of its Accountability Mechanisms provided for both a Reconsideration process and an independent Ombudsman review. [Exhibit E, 12/8/11 ICANN Bylaws (excerpts), Art. IV, Sections 2, 9, 10, Art. V, Sections 1, 2, 3; 3/16/12 ICANN Bylaws (excerpts), Art. IV, Sections 2, 9, 10, Art. V, Sections 1, 2, 3.] Material here, the Reconsideration process set forth in the 3/16/12 bylaws provided, inter alia, that (emphasis supplied):

2. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
26. Also material here, before Plaintiffs originally contracted with ICANN, the
3/16/12 bylaw independent Ombudsman review process provided, inter alia, that (emphasis
supplied):

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to
   include such staff support as the Board determines is appropriate and feasible.

2. The principal function of the Ombudsman shall be to provide an independent
   internal evaluation of complaints by members of the ICANN community who
   believe that the ICANN staff, Board or an ICANN constituent body has treated
   them unfairly. The Ombudsman shall serve as an objective advocate for fairness,
   and shall seek to evaluate and where possible resolve complaints about unfair or
   inappropriate treatment by ICANN staff, the Board, or ICANN constituent bodies,
   clarifying the issues and using conflict resolution tools such as negotiation,
   facilitation, and "shuttle diplomacy" to achieve these results.

3. The Office of Ombudsman shall:
   1. facilitate the fair, impartial, and timely resolution of problems and
      complaints that affected members of the ICANN community (excluding
      employees and vendors/suppliers of ICANN) may have with specific
      actions or failures to act by the Board or ICANN staff which have not
      otherwise become the subject of either the Reconsideration or Independent
      Review Policies.

27. These representations were made in ICANN bylaws duly enacted by ICANN’s
governing board which under law and in fact has the authority to control and run ICANN. [See,
e.g., Cal. Corp. Code sections 300(a), 5210.] At the time these representations were made on
12/8/11, ICANN’s governing board consisted of: Steve Crocker, George Sadowsky, Ram
Mohan, Mike Silber, Erika Mann, Bruce Tonkin, Suzanne Wolf, Kuo-Wei Wu, Gonzalo
Navarro, Ray Plzak, Bill Graham, Sebastien Bachollet, Heather Dryden, Judith Duavit Vazquez,
Bertrand de La Chapelle, Thomas Narten, Thomas Roessler, R. Ramaraj, Rod Beckstrom and,
possibly, Goran Mabry. At the time these representations were again made on 3/16/12,
ICANN’s governing board consisted of: Thomas Roessler, R. Ramaraj, Rod Beckstrom, Judith
Duavit Vazquez, Bertrand de La Chapelle, Thomas Narten, Francisco da Silva, Olga Madruga-
Forti, Bill Graham, Sebastien Bachollet, Heather Dryden, Gonzalo Navarro, Ray Plzak, Fadi
Chehade, Erika Mann, Bruce Tonkin, Suzanne Wolf, Kuo-Wei Wu, Steve Crocker, George
Sadowsky, Ram Mohan, Mike Silber, Cherine Chalabe, Chris Disspain and, possibly, Goran
Mabry.

28. These representations were made via publication on ICANN’s internet site on or
about 12/8/11 and 3/16/12 and thereby communicated to each of Plaintiffs’ principals, Jay
Westerdal, Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of
Plaintiff Radix, and a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about
the same date.

29. As alleged, the presence of the ATRT Final Recommendations and the 12/8/11 and
3/16/12 bylaw Reconsideration and independent Ombudsman review processes (and ICANN’s
whole supposed ADR process) induced Plaintiffs to accept and agree to the release/CNTS.
However, when Plaintiffs formally sought Reconsideration of their substantive dispute with
ICANN, ICANN breached its contracts (and its bylaws) with each Plaintiff by never providing a
fair and meaningful Reconsideration process, or any Reconsideration process at all. Similarly,
when Plaintiffs requested independent Ombudsman review of their dispute with ICANN, that too
was wholly refused based on the sham excuse that the Ombudsman supposedly had a “conflict of
interest.” No replacement Ombudsman was offered despite Plaintiffs’ requests.

30. Further, while Plaintiffs were unaware of it at the time, ICANN, knowingly, never
intended to comply with the Reconsideration or Ombudsman contractual (and bylaw) provisions
but both failed to disclose and misrepresented that intention to Plaintiffs. To the contrary, the
provisions were false and illusory in that ICANN knew it never intended to comply with them
but instead made them with the intention to induce Plaintiffs (and others) to enter into their
contracts with ICANN and to accept and agree to the release/CNTS, and Plaintiffs reasonably
relied upon ICANN’s misrepresentations in agreeing to the release/CNTS and their contracts with ICANN more generally.

31. That ICANN breached its Reconsideration obligations, and that they were false promises, is proven in part by the facts that (i) ICANN denied Plaintiffs any opportunity at all to Reconsideration of at least one disputed claim, and (ii) in ICANN’s supposedly fair and meaningful ADR process, all requests for Reconsideration are undertaken by the very same group of ICANN Board Members that rendered the original decision, without further input or oversight, and, predictably, that renders the Reconsideration process illusory.

32. That ICANN breached its independent Ombudsman review obligations, and that they were false promises, is proven in part by the facts that while Plaintiffs were formally entitled to independent Ombudsman review of their Reconsideration requests, ICANN never provided any such review for any party or any matter -- some 14 matters since 2017 -- including Plaintiffs’. Nor has ICANN provided an alternate Ombudsman as requested by Plaintiffs. Neither ICANN nor the Ombudsman has provided any intelligible reason for this flouting of Plaintiffs’ contractual rights (and ICANN’s bylaws) and the Ombudsman’s dereliction of duty, other than a vague and wholly unsupported claim of “conflict of interest.”

33. On April 11, 2013, after Plaintiffs and ICANN originally contracted as to the applications, but before Plaintiffs entered into any of their Registry Agreements with ICANN, ICANN offered a modification to each of Plaintiffs’ contracts. The modification came in the form of revisions to ICANN’s Accountability Mechanisms (i.e., to the related bylaws) as incorporated into each and all of Plaintiffs’ contracts with ICANN. Material to Plaintiffs’ claims in this action, the modification included revisions to the ADR provisions that would provide for the IRP process. [Exhibit C, 4/11/13 ICANN Bylaws (excerpts), Art. IV, Section 3.] The modification provided, in relevant part (emphasis supplied):
Section 3. INDEPENDENT REVIEW OF BOARD ACTION

In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.

There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

34. These representations were made in ICANN bylaws duly enacted by ICANN’s governing board which under law and in fact has the authority to control and run ICANN. [See, e.g., Cal. Corp. Code sections 300(a), 5210.] At the time these representations were made on April 11, 2013, ICANN’s governing board consisted of: Chris Disspain, Cherine Chalabe, Jonne Soininen, Mike Silber, Ram Mohan, George Sadowsky, Steve Crocker, Fadi Chehade, Erika Mann, Bruce Tonkin, Suzanne Wolf, Kuo-Wei Wu, Gonzalo Navarro, Ray Plzak, Olga Madruga-Forti, Bill Graham, Sebastien Bachollet, Heather Dryden, Judith Duavit Vasquez, Bertrand de La Chapelle, Thomas Narten, Francisco da Silva and, possibly, Goran Mabry.

35. These representations were made via publication on ICANN’s internet site on or about April 11, 2013 and communicated thereby to each of Plaintiffs’ principals, Jay Westerdal,
Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about the same date.

36. While they were not obligated to do so, Plaintiffs accepted and agreed to the modification and supplied legally sufficient (and considerable) consideration for it, in part because the ADR revisions being offered were promised to make the ADR process more protective and meaningful for parties such as Plaintiffs and to provide them with greater rights, such as to the Standing Panel of expert arbitrators with de novo appeal rights.

37. While no consideration for the modification was necessary given that it was a written amendment to a written contract, Plaintiffs in fact gave in return substantial consideration in that they accepted new terms promulgated and offered by ICANN and accepted new and often more burdensome obligations. [Cf. 3/16/2012 ICANN Bylaw, Art. IV, Sections 2, 3 with 4/11/13 ICANN Bylaw Art. IV, Sections 2, 3 (additional notice, filing and information requirements, time limits, granting ICANN greater powers to approve panel arbitrators, but stripping arbitration panels of some power to force ICANN compliance with panel decisions).] Plaintiffs also forbore in the assertion of their rights not to accept the offered modification, and to sue.

38. The presence of the new, more robust ADR protections induced Plaintiffs to accept and agree again to the release/CNTS rather than reject it, seek rescission and sue because, as alleged, the modification was supposed to make the ADR process more fair and meaningful for Plaintiffs.

39. Plaintiffs were also induced to accept the April 11, 2013, contractual modification (and bylaw revisions) based on representations made by ICANN’s Accountability Structures Expert Panel (“ASEP”) on October 26, 2012, and communicated to Plaintiffs on or about the
same date, that, among other things, the coming revisions to ICANN’s bylaw Accountability
Mechanisms would (emphasis supplied):

* “Create stability through building of precedent.”
* “Where possible, reduce burden and costs to those accessing structures.”
* “That the Accountability structures should not preclude any party from filing suit against ICANN in court of competent jurisdiction.”

40. ICANN’s ASEP also recommended on the same date that (emphasis supplied):

**Independent Review - Omnibus Standing Panel**

* “The ASEP recommends establishing an omnibus standing panel of six-to-nine members, taking account of geographic diversity.”
* “Each IRP panel will be selected from among the omnibus standing panel members.”
* “The declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.”

[Exhibit B, 10/26/12 ICANN Report by Accountability Structures Expert Panel, pp. 5, 29, 48.]

41. These ASEP representations were made by ASEP expert members Mervyn E. King, Graham McDonald and Richard Moran. [Id., p. 53-55.] The ASEP was given specific authority to make its recommendations by ICANN’s governing board, with the strong presumption those recommendations would be adopted.

42. These ASEP representations were made via publication on ICANN’s internet site on or about 10/26/12 and thereby communicated to each of Plaintiffs’ principals, Jay Westerdal, Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about the same date.

43. Plaintiffs were also induced to accept the April 11, 2013, contractual modification based on representations made by ICANN’s in-house counsel Amy Stathos, Esq., Deputy
General Counsel of ICANN, and Samantha Eisner, Senior Counsel of ICANN, just days before, on April 8, 2013, that the impending bylaw revisions were (emphasis supplied):

* geared towards instituting more predictability into the processes, and certainty in ICANN’s decision making, . . . .”

* The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the recommendations are expected to result in less costly and time consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms.

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Immediate Adoption Is Important for Scalability

Now that initial evaluation results for new gTLD applications are being released, it is of utmost importance that the enhanced Reconsideration and Independent Review processes be put into place. The ASEP recommendations provide more clarity for the community on scope and standing, and will allow for more scalability in proceedings, the ability for summary disposition of claims, the consolidation of proceedings where appropriate, the institution of page limitations, and more predictability on timing. To the extent that decisions arising out of the New gTLD Program result in initiation of Reconsideration or Independent Review proceedings, having the new Bylaws in place will provide consistency to those seeking reconsideration or independent review.

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Independent Review Process -- Creation of Standing Panel

ICANN has coordinated with the current IRP Provider, the International Centre for Dispute Resolution (ICDR) to determine how to best create the standing panel. The ICDR is in the process of recommending a fee structure that can help mitigate costs within the proceedings. As the ICDR is working to identify panelists for ICANN consideration, and finalizing fee structure recommendations, we recommend that the Bylaws can now be implemented.

[Exhibit F, 4/8/13 ICANN Board Briefing Materials, p. 4-5.]

44. As alleged, all of these misrepresentations were made by ICANN’s in-house lawyers, Amy Stathos, Esq., Deputy General Counsel of ICANN and Samantha Eisner, Senior
Counsel of ICANN, starting on 4/8/13 and were posted on the internet on ICANN’s website. These misrepresentations were communicated thereby to each of Plaintiffs’ principals, Jay Westerdal, Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about the same date.

45. However, while Plaintiffs have formally demanded implementation and use of the Standing Panel and their appeal rights since at least 2018, ICANN breached the modified contracts (and its bylaws) with each Plaintiff by never implementing the Standing Panel or any appeal process for any party or any matter, including Plaintiffs’. Still today, there is no Standing Panel, and ICANN has done almost nothing to further the implementation process for at least the past two years.

46. Further, while Plaintiffs were unaware of it at that time, ICANN, knowingly, never intended to comply with the contractual modification (or its revised bylaws) but both failed to disclose and misrepresented that intention to Plaintiffs. To the contrary, the modification (and related bylaw revisions) were and are false and illusory and ICANN knew it never intended to comply with them but made them with the intention to induce Plaintiffs (and others) to enter into modified contracts with ICANN, pay more in fees to ICANN, and to again accept and agree to the release/CNTS. Plaintiffs reasonably relied upon ICANN’s representations in again accepting and agreeing to the release/CNTS and the modified contracts more generally.

47. That ICANN breached its Standing Panel obligations is proven in part by the facts, \textit{inter alia}, that (i) ICANN has had over 9 years to implement the process that it admits should have taken only 6 months but has not done so, and (ii) there is still no appeal mechanism whatsoever.
48. On June 18, 2018, after Plaintiffs and ICANN originally contracted in their applications and after those original contracts were modified at least once, and after entering various Registry Agreements, ICANN offered another modification to each of Plaintiffs’ contracts. The modification came in the form of additional revisions to ICANN’s ADR provisions (i.e., to the related bylaws) as incorporated into Plaintiffs’ contracts with ICANN. Material to Plaintiffs’ claims in this action, the modification again included revisions to the ADR provisions that would provide for the IRP related to ICANN actions, new rules of procedure and for the payment of IRP-related costs by ICANN. [Exhibit C, 6/18/18 ICANN Bylaws (excerpts), Art. IV, Section 3.] The modification provided in relevant part (emphasis supplied):

(i) Each IRP Panel shall conduct an objective, de novo examination of the Dispute.

(ii) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(iii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iv) For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP Panel shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.

(j) Standing Panel

(i) There shall be an omnibus standing panel of at least seven members (the “Standing Panel”) each of whom shall possess significant relevant legal expertise in one or more of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and/or arbitration. Each member of the Standing Panel shall also have knowledge, developed over time, regarding the DNS and ICANN’s Mission, work, policies, practices, and procedures. Members of the Standing Panel shall receive at a minimum, training provided by ICANN on the workings and management of the Internet’s unique identifiers and other appropriate training as recommended by the IRP Implementation Oversight Team (described in Section 4.3(n)(i)).

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(k) IRP Panel
(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

(ii) The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider’s rules shall apply to selection of the third panelist.

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(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP (“Rules of Procedure”) that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems appropriate to fulfill the Purposes of the IRP, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements . . . .
49. These representations by ICANN were made in ICANN bylaws duly enacted by ICANN’s governing board which under law and in fact has the authority to control and run ICANN. [See, e.g., Cal. Corp. Code sections 300(a), 5210.] At the time these representations were made on 6/18/18, ICANN’s governing board consisted of: George Sadowsky, Ram Mohan, Mike Silber, Lousewies van der Laan, Jonne Soininen, Matthew Shears, Kaveh Ranjbar, Akinori Maemura, Manal Ismail, Avri Doria, Sarah Deutsch, Becky Burr, Harald Alvestrand, Leon Sanchez, Maarten Bottreman and, possibly, Goran Mabry.

50. These representations were made via publication on ICANN’s internet site on or about June 18, 2018 and communicated to each of Plaintiffs’ principals, Jay Westerdal, Chief Executive Officer of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and a predecessor-in-interest of Plaintiff Domain Venture Partners, on or about the same date.

51. Again, while they were not obligated to do so, Plaintiffs accepted and agreed to the modification and supplied legally-sufficient (and considerable) consideration for it, in part because the ADR revisions being offered were promised to make the ADR process more protective and meaningful for parties such as Plaintiffs and to provide them with greater rights, such as to the Standing Panel of expert arbitrators and appeal rights, and new and more fair rules of procedure for IRP proceedings.

52. While no consideration for the modification was necessary given that it was a written amendment to a written contract, Plaintiffs in fact gave in return substantial consideration in that they accepted new terms promulgated and offered by ICANN and accepted new and often more burdensome obligations. [Cf. 3/16/2012 ICANN Bylaw, Arts. IV, Sections 2, 3 with 6/18/18 ICANN Bylaw Arts. IV, Sections 2, 3 (additional notice, filing and informant requirements, time limits, granting ICANN greater powers to approve panel arbitrators, but
Plaintiffs also forbore in the assertion of their rights not to accept the offered modification and to sue.

53. The presence of the new, more robust ADR protections induced Plaintiffs to accept and agree again (a third time) to the release/CNTS rather than reject it, seek rescission and sue, because, as alleged, the modification was supposed to make the ADR process more fair and meaningful for Plaintiffs.

54. However, while Plaintiffs have formally demanded implementation and use of the Standing Panel, their appeal rights, the new procedural rules, and payment of fees since at least 2018, ICANN breached its contracts (and its bylaws) with each Plaintiff by never implementing the Standing Panel or any appeal process for any party or any matter, including Plaintiffs’.

Plaintiffs have also never gotten the benefit of the promised new rules of procedure and ICANN continues to pay the IRP administrative fees.

55. Further, while Plaintiffs were unaware of it at that time, ICANN, knowingly, never intended to comply with this contractual modification (or its revised bylaws) but both failed to disclose and misrepresented that intention to Plaintiffs. To the contrary, the modification (and related bylaw revisions) were and are false and illusory and ICANN knew it never intended to comply with them but made them with the intention to induce Plaintiffs (and others) to enter into modified contracts with ICANN, pay more in fees to ICANN, and to again accept and agree to the release/CNTS, and Plaintiffs reasonably relied upon ICANN’s misrepresentations in again accepting and agreeing to the release/CNTS and the modified contracts more generally.

56. That ICANN breached its Standing Panel and appeal obligations is proven in part by the facts that (i) ICANN has had over 9 years to implement these processes that it admits should have taken only 6 months, and (ii) Plaintiffs still have no Standing Panel or appeal
mechanism whatsoever. Still today, there is no Standing Panel and ICANN has done almost
nothing to further the implementation process for at least the past two years.

57. Also starting on June 18, 2018, ICANN misrepresented in its ADR bylaws that its
Accountability Mechanisms would afford “meaningful, affordable and accessible expert review”
and deference to prior IRP precedents. The mechanisms would (emphasis supplied):

(i)  Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.

(ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions . . . .

(iii) Ensure that ICANN is accountable to the global Internet community and Claimants . . . .

(vi) Reduce Disputes by creating precedent to guide and inform [ICANN] and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

[Exhibit C, 6/18/18 ICANN Bylaws (excerpts), Art. IV, Section 4.3(a).]

58. As stated, these representations were made by ICANN itself in its ADR bylaws
(6/18/18 ICANN Bylaws, Art. IV), having been duly enacted by its governing board. These
misrepresentations were made via publication on ICANN’s internet site on or about 6/18/18 and
thereby communicated to each of Plaintiffs’ principals, Jay Westerdal, Chief Executive Officer
of Plaintiff Fegistry, Shweta Asher, Vice President of Plaintiff Radix, and to a predecessor-in-
interest of Plaintiff Domain Venture Partners, on or about the same date.
59. Parenthetically, on information and belief, ICANN’s failure to appoint the
Standing Panel has to date saved it some $2.7 million in Standing Panel fees in thirteen IRP
cases arising from the new gTLD Program.

**Plaintiffs’ Injuries & Damages**

60. As a direct and proximate result of ICANN’s breaches of contract, its intentional
or grossly negligent misrepresentations, its intentional misfeasance and gross negligence in
performance of its contractual and bylaw obligations, and its other unfair and unlawful acts,
Plaintiffs have each been injured and damaged contractually, practically, financially and
irreparably.

61. First, Plaintiffs have not received the benefit of their contractual bargain.

62. Second, Plaintiffs are left to pursue claims against ICANN within its toothless,
flawed and non-compliant dispute resolution framework, without critical procedural safeguards
but at greater expense.

63. Third, within that framework Plaintiffs are left without any, much less meaningful
and independent, Ombudsman review of their issues made subject to Reconsideration, which
causes Plaintiffs irreparable harm by materially compromising the process, its fundamental
quality and its substantive outcome, in addition to also causing more protracted proceedings and
far greater expense.

64. Fourth, Plaintiffs suffer the absence of specially trained and community-chosen
expert Standing Panelists to resolve their issues (which even ICANN admits are critical), and
they are denied their right of de novo appeal to the en banc Standing Panel. Instead, Plaintiffs
are left with untrained and partisan panelists and partisan processes, and no appeal at all. This,
again, causes Plaintiffs irreparable harm by materially compromising the process, its
fundamental quality and its substantive outcome, in addition to also causing more protracted proceedings and far greater expense.

65. Fifth, had ICANN properly implemented the Reconsideration, Ombudsman review, Standing Panel and new procedural rules’ bylaws, Plaintiffs’ competitor would not have been presumptively delegated the .hotel gTLD because (i) the entire ADR process would have been fair and meaningful instead of a sham, and a meaningful process would led to a different result, and (ii) the Standing Panel and ICANN would have had to adhere to IRP precedents that would also require delegation of the .hotel gTLD to Plaintiffs.

66. Finally, the intended and improper delegation of the .hotel gTLD causes Plaintiffs inestimable and irreparable financial damage and lost commercial opportunities.

67. A portion of Plaintiffs’ related injuries are qualitative and inestimable -- the value of fairness of proceedings and quality of adjudication and outcome is not capable of quantification. And it would not be debatable if ICANN actually created the Accountability Mechanisms that it enacted in its own bylaws. And of course, Plaintiffs have had to pay more because ICANN is supposed to pay for the Standing Panel if it existed. Plaintiffs also suffer under the greater expense of potentially unnecessary litigation caused by decisions that a bylaw-compliant Standing Panel might make differently, which decisions are not subject to appellate review because there is no Standing Panel. The lack of a Standing Panel results in less or no adherence to panel precedents, and so again, less certainty of outcome and greater expense where none would be incurred at all if effective Reconsideration and independent Ombudsman review processes were in place and the Standing Panel was properly constituted. Plaintiffs are left with a toothless and flawed dispute resolution process that ignores many specific and admittedly critical features of ICANN’s so-called Accountability Mechanisms, and causes greater expense. At the same time, Plaintiffs are also left to labor under ICANN’s purported, related

FIRST AMENDED COMPLAINT & DEMAND FOR JURY TRIAL  Case No. 20STCV42881
release/CNTS to the extent these may be applicable to a given issue or dispute. In other words, ICANN wants to keep people out of court and in its dispute resolution process, but it doesn’t want to follow its own bylaws to even create that process.

68. Because at their core Plaintiffs’ injuries and damages are chiefly qualitative and irremediable rather than quantitative, and because it may not even be possible to quantify many such injuries and damages, Plaintiffs have no adequate remedy at law. As such, Plaintiffs seek specific performance of the contractual bylaws’ provisions regarding ICANN’s so-called Accountability Mechanisms. Moreover, Plaintiffs seek both mandatory and prohibitory public injunctions directing ICANN and its officers to implement the promised dispute resolution procedures and safeguards prior to adjudicating Plaintiffs’ substantive claims thereunder.

**Plaintiffs’ Injury & Their Discovery of the Falsity of ICANN’s Representations**

69. Plaintiffs were injured by ICANN’s breaches and misrepresentations at approximately the same time in 2018 when they were denied Reconsideration and independent Ombudsman review and were thereafter forced into a pending IRP.

70. Each Plaintiff discovered ICANN’s fraud at about the same time, although each’s discovery may have been at different specific times. While Plaintiffs’ may have become aware of ICANN’s misrepresentations at varying times, all Plaintiffs relied on ICANN’s repeated and continuing representations and promises of performance and renewed promises of performance, i.e., of implementation and adherence to its Accountability Mechanisms bylaws. ICANN, moreover, continues to make such promises even up until today. Plaintiffs discovered ICANN’s true intent as it affected Plaintiffs when they repeatedly requested and were denied implementation and use of the bylaw Accountability Mechanisms before and in their 2019 IRP. Prior to that time, Plaintiffs relied on ICANN’s plainly stated, supposed intent to implement the Accountability Mechanisms. They relied on its very public statements to that effect. They relied
on its enactment of bylaws to that effect. They relied on its successive revision and amendment of those bylaw, each time stating more detailed descriptions of the procedural mechanisms and safeguards, and their fundamental importance to ICANN’s mission, and describing the implementation efforts as ongoing and imminent.

71. Plaintiffs relied on ICANN’s seriatim misrepresentations, including its experts’ (ATRT and ASEP) and attorney’s (in-house counsel) pronouncements that the Accountability Mechanisms bylaws should and would be implemented expeditiously and as expressed. Plaintiffs did not and could not have previously discovered that ICANN had no real intention of compliance because ICANN continually misrepresented its intentions, stating repeatedly that compliance was both important to ICANN and its mission, and imminent. In sum, ICANN concealed its true intentions by continuing to make exactly contrary -- equally misleading -- misrepresentations, precluding Plaintiffs’ discovery of the true facts. Together with Plaintiffs’ participation in ICANN’s ultimately flawed dispute resolution process, ICANN’s concealment of the related, true facts not only prevented discovery of Plaintiffs’ claims, but also requires equitable tolling of any intervening statute of limitations, if any.

FIRST CAUSE OF ACTION
(Breach of Contracts & Modified Contracts)

72. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

73. As alleged above in Paragraphs 25 and 26, Plaintiffs’ original contracts with ICANN (and ICANN’s then-effective 3/16/12 bylaws) required that ICANN provide both Reconsideration and independent Ombudsman review processes, pursuant to bylaws Articles IV and V.

74. As alleged above in Paragraphs 31 and 32, and although superseded by Plaintiffs’ modified contracts with ICANN, ICANN breached these original contractual obligations (i) by
failing to provide any legitimate and fair Reconsideration process to Plaintiffs despite their
repeated requests, or (ii) by providing a process that was a sham that was designed to and did
provide no meaningful relief at all, and (iii) by providing no independent Ombudsman review at
all. Thus, ICANN breached its March 16, 2012, bylaws Arts. IV and V as incorporated into
Plaintiffs’ original contracts with ICANN.

75. As alleged above in Paragraphs 33 and 39, and although they were superseded by
the second modification of Plaintiffs’ contracts with ICANN, ICANN also breached its first
modified contracts with Plaintiffs (and ICANN’s April 11, 2013, revised bylaws, Arts. VI and
V), which required that ICANN provide a Reconsideration process, an independent Ombudsman
review process and a Standing Panel of experts to hear Plaintiffs’ IRP dispute with ICANN and
to hear any appeal, and to pay all related administrative fees.

76. As alleged above in Paragraph 43, ICANN breached these contractual obligations
by (i) not providing a fair and meaningful Reconsideration process, (ii) not providing any
independent Ombudsman review process, (iii) not providing the Standing Panel or any appeal
process, and (iv) by failing to pay related administrative fees totaling thousands of dollars,
despite Plaintiffs’ repeated requests.

77. As alleged above in Paragraphs 48, 56, 57 and 58, ICANN also breached its
second modified (operative) contracts with Plaintiffs (and ICANN’s June 18, 2018, revised
bylaws, Arts. IV and V), which require that ICANN provide a Reconsideration process, an
independent Ombudsman review process, and a Standing Panel of experts to hear Plaintiffs’ IRP
dispute with ICANN and any appeal de novo, to promulgate new rules of procedure and to pay
related fees. Regarding the Standing Panel requirement in specific, ICANN has claimed that it
has, essentially, an escape clause proviso that allows ICANN to put off implementing the
Standing Panel indefinitely rather than allowing ICANN a reasonable time to get the Standing
Panel in place or to use another process when actually needed. ICANN’s claim is refuted by (i) ICANN’s own contemporaneous admissions and those of its lawyers and experts regarding the immediate need for and the importance of the Standing Panel, (ii) ICANN’s successive refinement of the related bylaws and its continuing promises of imminent implementation of the Standing Panel, and (iii) the two IRP prior decisions finding ICANN lacking for having failed to implement the Standing Panel. These ICANN representations and actions inform both the meaning of that bylaw and the parties’ intent in contracting under it. Plaintiffs allege that the supposed proviso was to allow a reasonable time for panel implementation (promised by ICANN to have started in 2013). The supposed proviso was never intended to give ICANN a 9-year pass or to allow it to never appoint a panel at all. ICANN’s proffered interpretation would be an unreasonable construction of the bylaw, rendering the Standing Panel provision illusory.

78. As alleged above in Paragraph 56, ICANN breached its contractual obligations (i) by failing to provide a meaningful and fair Reconsideration process, (ii) by failing to provide an independent Ombudsman review process, (iii) by failing to constitute the Standing Panel or any appeal process, (iv) by failing to promulgate and institute new, more fair rules of procedure for IRP proceedings, and (v) by failing to pay IRP-related fees.

79. Moreover, Plaintiffs each reasonably relied upon ICANN’s 3/16/12, 4/11/13 and 6/18/18 promises to their detriment, changed their respective positions accordingly by accepting ICANN’s promises and different and more burdensome obligations to it, and by foregoing suit for breach of contract or rescission, and so ICANN is estopped from denying its promises or from finally complying with them.

80. As a direct and proximate result of ICANN’s breaches, Plaintiffs have been injured and damaged in that (i) they have been denied the specific benefits of their bargain with ICANN, (ii) they have been denied benefits for which they paid substantial monies, (iii) they have been
denied the promised fair and meaningful Reconsideration and independent Ombudsman review processes, (iv) they have been denied the Standing Panel and any appeal process, and (v) they have been denied the promised rules of procedure, (vi) which, on information and belief, would have led to a fairer and far less expensive proceedings, and (vii) which would have led to a different, more favorable, outcome in Plaintiffs’ substantive dispute with ICANN regarding the delegation of the .hotel gTLD. Plaintiffs have also been denied ICANN’s promise to pay IRP administrative fees.

81. As alleged above in Paragraph 10, Plaintiffs supplied legally sufficient consideration for their original contract with ICANN, including gTLD application fees of $185,000.00 each, expert and consultant fees, and reciprocal promises and related obligations. While they were not obligated to do so, Plaintiffs also accepted and agreed to the first contractual modification offered by ICANN and supplied legally-sufficient (and considerable) consideration for it, in part because the Accountability Mechanisms being offered were promised to make the ADR process more protective and meaningful for parties such as Plaintiffs and provide them with greater rights, such as to the Standing Panel of expert arbitrators and appeal rights.

82. As alleged above in Paragraphs 36, 37, 51 and 52, while no consideration for the two contractual modifications was necessary given that each was a written modification to a written contract, Plaintiffs in fact gave in return substantial consideration in that they accepted new terms promulgated and offered by ICANN, accepted new and often more burdensome obligations, and also forbore in the assertion of their rights not to accept the offered modification and to sue.

83. Plaintiffs have performed all of the obligations they are required to perform under their contracts with ICANN and their modified contracts with ICANN, save for those that have
been excused by ICANN’s material breaches. All conditions precedent to ICANN’s performance have been satisfied.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

SECOND CAUSE OF ACTION
(Fraud-in-the-Inducement -- Deceit, Civil Code Section 1709, 1710, et seq. -- Release/CNTS)

84. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

85. As alleged above in Paragraphs 21-28, 33-35, 39-44, 48-50, 57-58, ICANN made several material misrepresentations to Plaintiffs regarding ICANN’s Accountability Mechanisms, i.e., ICANN misrepresented the following bylaws and related matters:

* The 12/31/10 ATRT Final Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraph 21, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 22, 23.

* ICANN’s 3/16/12 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 25, 26, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 27, 28.

* ICANN’s 10/26/12 ASEP Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 39, 40, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 41, 42.

* The 4/8/13 ICANN in-house counsel misrepresentations which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first
contractual modification. The specific misrepresentations at issue are those italicized in Paragraph 43, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 43, 44.

* ICANN’s 4/11/13 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first contractual modification, and which promised a Standing Panel, appeal rights and ICANN’s payment of IRP fees. The specific misrepresentations at issue are those italicized in Paragraph 33, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 43, 44.

* ICANN’s 6/18/18 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the second contractual modification, and which promised a Standing Panel, appeal rights, new rules of procedure and ICANN’s payment of IRP-related fees. The specific misrepresentations at issue are those italicized in Paragraphs 48, 57, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 49, 50, 58.

86. As alleged above in Paragraphs 24, 29-32, 38-39, 43, 46, 53, 55, all such misrepresentations were specifically designed and made to induce (and did induce) Plaintiffs to accept and agree to several specific terms contained in their original and modified contracts with ICANN, specifically the release/CNTS and each of the bylaw ADR provisions at issue.

ICANN’s 12/31/10 (ATRT), 12/8/11 (bylaw) and 3/16/12 (bylaw) misrepresentations were made before Plaintiffs entered into their original contracts with ICANN in May-June 2012. ICANN’s subsequent misrepresentations, 4/8/13 (in-house counsel) and 4/11/13 (bylaw), were all made before or at the time of the first contractual modification was accepted by Plaintiffs. And ICANN’s subsequent misrepresentations, 6/18/18 (bylaws) were all made before or at the time of the second contractual modification was accepted by Plaintiffs.
87. Each such misrepresentation was false when made by ICANN and ICANN knew of that falsity, in that, *inter alia*, ICANN had already decided not to implement real and meaningful Reconsideration and independent Ombudsman procedures, the promised Standing Panel, the procedural rules, or to pay IRP-related fees. The proof that ICANN knew that each of its misrepresentations were false when made to Plaintiffs is both direct and circumstantial, even absent significant discovery. First, as to the Reconsideration and independent Ombudsman procedures, at the time ICANN first made the misrepresentations to Plaintiffs it had already failed to implement the procedures for several years, proof that it never intended to do so. Second, in the decade since making the misrepresentations, ICANN has continued to deny Reconsideration or has provided only sham Reconsideration, never *once* changing its initial decisions. Similarly, and as alleged, as to independent Ombudsman review, ICANN has never once provided such a review to any party; the Ombudsman has recused himself from every single matter since inception of the new gTLD program.

88. ICANN also knew that its Standing Panel, procedural rules implementation and fee payment misrepresentations were false when made to Plaintiffs because ICANN’s board had already decided not to implement these procedures as promised despite (supposedly) having acknowledged their critical importance and the need for immediate implementation. Circumstantially, ICANN then continued to fail to implement these procedures for some 9 years (up until the present) despite its representations that implementation was critical and would be imminent, despite the recommendations of its technical panels and attorneys, and despite the fact that ICANN has represented that implementation should take just some 6 months. That ICANN represented that implementation would occur in about 6 months when this action was filed in March 2020 further underscores the proof of its lies. In fact, ICANN has done nothing to implement the Standing Panel in the past two years. ICANN was supposed to implement these
procedures as a specific, 2016, condition of its agreement to divorce itself from U.S. Government oversight, but has not. ICANN misled the global internet community and the U.S. Government, as it has refused to implement the promised procedures.

89. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its agents’ misrepresentations and subsequent misrepresentations, to Plaintiffs’ detriment. In reliance on the misrepresentations, in example, Plaintiffs contracted with ICANN and accepted the bylaw Accountability Mechanisms and the purported, related release/CNTS, continued in their contracts with ICANN including in its dispute resolution processes, and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued both their financial and work efforts and outlays. Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP administrative fees that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

90. As a direct and proximate result of ICANN’s fraudulent misrepresentations, Plaintiffs have been injured and damaged in that (i) they have been denied the specific benefits of their bargain with ICANN, (ii) they have been denied the benefits for which they paid substantial monies, (iii) they have been denied the promised fair and meaningful Reconsideration and independent Ombudsman review processes, (iv) they have been denied the Standing Panel and any appeal process, and (v) they have been denied the promised rules of procedure, (vi) all of which, on information and belief, would have led to a fairer and far less expensive proceedings, and (vii) which would have led to a different, favorable, outcome in Plaintiffs’ substantive dispute with ICANN regarding the delegation of the .hotel gTLD.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.
THIRD CAUSE OF ACTION
(Deceit, Civil Code Section 1709, 1710, et seq.)

91. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

92. As alleged above in Paragraphs 21-28, 33-35, 39-44, 48-50, 57-58, ICANN made several material misrepresentations to Plaintiffs regarding ICANN’s Accountability Mechanisms, i.e., ICANN misrepresented the following bylaws and related matters. However, ICANN never intended to and, after contracting with Plaintiffs, has never performed on its representations in fact. Thus, ICANN has failed to make good on its representations made in the:

* The 12/31/10 ATRT Final Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraph 21, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 22, 23.

* ICANN’s 3/16/12 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 25, 26, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 27, 28.

* ICANN’s 10/26/12 ASEP Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 39, 40, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 41, 42.

* The 4/8/13 ICANN in-house counsel misrepresentations which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first contractual modification. The specific misrepresentations at issue are those italicized in
Paragraph 43, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 43, 44.

* ICANN’s 4/11/13 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first contractual modification, and which promised a Standing Panel, appeal rights and ICANN’s payment of IRP fees. The specific misrepresentations at issue are those italicized in Paragraph 33, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 34, 35.

* ICANN’s 6/18/18 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the second contractual modification, and which promised a Standing Panel, appeal rights, new rules of procedure and ICANN’s payment of IRP-related fees. The specific misrepresentations at issue are those italicized in Paragraphs 48, 57, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 49-50, 58.

93. As alleged above in Paragraphs 24, 29-32, 38-39, 43, 46, 53, 55, all such misrepresentations were specifically designed and made to induce (and did induce) Plaintiffs to accept and agree to several specific terms contained in their original and modified contracts with ICANN, specifically the release/CNTS and each of the bylaw ADR provisions at issue.

ICANN’s 12/31/10 (ATRT), 12/8/11 (bylaw) and 3/16/12 (bylaw) misrepresentations were made before Plaintiffs entered into their original contracts with ICANN in May-June 2012. ICANN’s subsequent misrepresentations, 4/8/13 (in-house counsel) and 4/11/13 (bylaw), were all made before or at the time of the first contractual modification was accepted by Plaintiffs. And ICANN’s subsequent misrepresentations, 6/18/18 (bylaws) were all made before or at the time of the second contractual modification was accepted by Plaintiffs.
94. Each such misrepresentation was false when made by ICANN and ICANN knew of that falsity, in that, *inter alia*, ICANN had already decided not to implement real and meaningful Reconsideration and independent Ombudsman procedures, the promised Standing Panel, the procedural rules, or to pay IRP-related fees. The proof that ICANN knew that each of its misrepresentations were false when made to Plaintiffs is both direct and circumstantial, even absent discovery. First, as to the Reconsideration and independent Ombudsman procedures, at the time ICANN first made the misrepresentations to Plaintiffs it had already failed to implement the procedures for several years, proof that it never intended to do so. Second, in the decade since making the misrepresentations, ICANN has continued to deny Reconsideration or has provided only sham Reconsideration, rarely if ever changing its initial decisions. Similarly, and as alleged, as to independent Ombudsman review, ICANN has never once provided such a review to any gTLD applicant; the Ombudsman has recused himself from every single matter since inception of the new gTLD program.

95. ICANN also knew that its Standing Panel, procedural rules implementation and fee payment misrepresentations were false when made to Plaintiffs because ICANN’s Board had already decided not to implement these procedures as promised despite (supposedly) having acknowledged their critical importance and the need for immediate implementation. Circumstantially, ICANN then continued to fail to implement these procedures for some 9 years (up until the present) despite its representations that implementation was critical and would be imminent, despite the recommendations of its technical panels and attorneys, and despite the fact that ICANN has represented that implementation should take just some 6 months. That ICANN represented that implementation would occur in about 6 months when this action was filed in March 2020 further underscores the proof of its lies. In fact, ICANN has done nothing to implement the Standing Panel in the past two years. ICANN was supposed to implement these
procedures as a specific, 2016, condition of its agreement to divorce itself from U.S. Government oversight, but has not. ICANN misled the global internet community and the U.S. Government, as it has refused to implement the promised procedures.

96. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its agents’ misrepresentations and subsequent misrepresentations, to Plaintiffs’ detriment. In reliance on the misrepresentations, in example, Plaintiffs contracted with ICANN and accepted the bylaw Accountability Mechanisms and the purported, related release/CNTS, continued in their contracts with ICANN including in its dispute resolution processes, and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued both their financial and work efforts and outlays. Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP fees that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

97. As a direct and proximate result of ICANN’s fraudulent misrepresentations, Plaintiffs have been injured and damaged in that ICANN has totally failed to implement its promises in practice, never providing Plaintiffs with (i) the specific benefits of their bargain with ICANN, (ii) the benefits for which they paid substantial monies, (iii) the promised fair and meaningful Reconsideration and independent Ombudsman review processes, (iv) the Standing Panel and any appeal process, and (v) the promised rules of procedure, (vi) all of which, on information and belief, would have led to a fairer and far less expensive proceedings, and (vii) which would have led to a different, favorable, outcome in Plaintiffs’ substantive dispute with ICANN regarding the delegation of the .hotel gTLD.

98. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.
FOURTH CAUSE OF ACTION
(Grossly Negligent Misrepresentations)

99. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

100. ICANN had statutory and common law duties not to negligently or with gross negligence misrepresent material facts to Plaintiffs regarding the subject matter of their business relationship. ICANN breached those duties by making material misrepresentations to Plaintiffs which ICANN knew or should have known were false. These material misrepresentations directly and proximately caused Plaintiffs’ injuries and damages.

101. In making the alleged material misrepresentations, ICANN acted (and failed to act) not only below the relevant industry and legal standards of care, but with absolutely no care at all and with complete indifference to the rights others, including Plaintiffs. In example, ICANN (i) made knowing false representations over the internet to the public and to Plaintiffs for literally years, (ii) failed to follow the most basic industry standards of fair and truthful disclosure, (iii) failed to follow the most basic advice of its own experts that the promised ADR procedures were critical and should be implemented immediately to assure basic fairness, (iv) failed to follow the most basic advice of its own lawyers, including its in-house lawyers, that the promised ADR procedures were critical and should be implemented immediately to assure basic fairness, and (v) continually failed to actually implement the promised procedures.

102. As alleged in Paragraphs 21-28, 33-35, 39-44, 48-50, 57-58, above, ICANN’s material misrepresentations to Plaintiffs regarding ICANN’s Accountability Mechanisms included:

* The 12/31/10 ATRT Final Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue
are those italicized in Paragraph 21, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 22, 23.

* ICANN’s 3/16/12 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 25, 26, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 27, 28.

* ICANN’s 10/26/12 ASEP Recommendations which were published and communicated to Plaintiffs on or about the same date. The specific misrepresentations at issue are those italicized in Paragraphs 39, 40, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 41, 42.

* The 4/8/13 ICANN in-house counsel misrepresentations which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first contractual modification. The specific misrepresentations at issue are those italicized in Paragraph 43, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 43, 44.

* ICANN’s 4/11/13 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the first contractual modification, and which promised a Standing Panel, appeal rights and ICANN’s payment of IRP fees. The specific misrepresentations at issue are those italicized in Paragraph 33, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 34, 35.

* ICANN’s 6/18/18 bylaws (Arts. IV, V) which were published and communicated to Plaintiffs on or about the same date and before Plaintiffs agreed to the second contractual modification, and which promised a Standing Panel, appeal rights, new rules of procedure and ICANN’s payment of IRP-related fees. The specific misrepresentations at issue are those
italicized in Paragraphs 48, 57, which were made by the persons, to the persons, by the media, and on the dates alleged in Paragraphs 49-50, 58.

103. As alleged above in Paragraphs 24, 29-32, 38-39, 43, 46, 53, 55, all such misrepresentations were specifically designed and made to induce (and did induce) Plaintiffs to accept and agree to several specific terms contained in their original and modified contracts with ICANN, specifically the release/CNTS and each of the bylaw ADR provisions at issue. ICANN’s 12/31/10 (ATRT), 12/8/11 (bylaw) and 3/16/12 (bylaw) misrepresentations were made before Plaintiffs entered into their original contracts with ICANN in May-June 2012. ICANN’s subsequent misrepresentations, 4/8/13 (in-house counsel) and 4/11/13 (bylaw), were all made before or at the time of the first contractual modification was accepted by Plaintiffs. And ICANN’s subsequent misrepresentations, 6/18/18 (bylaws) were all made before or at the time of the second contractual modification was accepted by Plaintiffs.

104. As alleged above in Paragraphs 24, 29-32, 38-39, 43, 46, 53, 55, all such grossly negligent misrepresentations were specifically designed and made to induce (and did induce) Plaintiffs to accept and agree to several specific terms contained in their original and modified contracts with ICANN, specifically the release/CNTS and each of the bylaw ADR provisions at issue. All such misrepresentations were never intended by ICANN to be put in place and practice, and ICANN has never done so.

105. Each such misrepresentation was false when made by ICANN and ICANN knew of that falsity or should have known of it, in that, *inter alia*, at the time of their publication ICANN had already decided not to implement real and meaningful, or any, Reconsideration and independent Ombudsman review procedures, the promised Standing Panel or appeal processes, the procedural rules, or to pay IRP administrative fees. The proof that ICANN knew or should have known that each of its misrepresentations were false when made to Plaintiffs is both direct
and circumstantial, even absent significant discovery. First, as to the Reconsideration and independent Ombudsman procedures, at the time ICANN first made the misrepresentations to Plaintiffs it had already failed to implement the procedures for several years, proof that it never intended to do so. Second, in the decade since making the misrepresentations, ICANN has continued to deny Reconsideration or has provided only sham Reconsideration, never once changing its initial decisions. Similarly, and as alleged, as to independent Ombudsman review, ICANN has never once provided such a review to any gTLD applicant; the Ombudsman has recused himself from every single matter since inception of the new gTLD program.

106. ICANN also knew or should have known that its Standing Panel and appeal implementation, procedural rules implementation and fee payment misrepresentations were false when made to Plaintiffs because ICANN’s board had already decided not to implement these procedures as promised despite (supposedly) having acknowledged their critical importance and the need for immediate implementation. Circumstantially, ICANN then continued to fail to implement these procedures for some 9 years (up until the present) despite its representations that implementation was critical and would be imminent, despite the recommendations of immediaicy and the need for fairness made by ICANN’s expert technical panels and attorneys, and despite the fact that ICANN has represented that implementation should take just some 6 months. That ICANN represented that implementation would occur in about 6 months when this action was filed in March 2020 further underscores the proof of its lies. In fact, ICANN has done nothing to implement the Standing Panel in the past two years. ICANN was supposed to implement these procedures as a specific, 2016, condition of its agreement to divorce itself from U.S. Government oversight, but has not. ICANN misled the global internet community and the U.S. Government, as it has refused to implement the promised procedures.
107. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its agents’ misrepresentations and subsequent misrepresentations to Plaintiffs’ detriment. In reliance on the misrepresentations, in example, Plaintiffs contracted with ICANN and accepted the bylaw Accountability Mechanisms and the related release/CNTS, continued in their contracts with ICANN including in its dispute resolution processes, and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued both their financial and work efforts and outlays. Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP-related fees that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

108. As a direct and proximate result of ICANN’s gross negligence, Plaintiffs have been injured and damaged in that (i) they have been denied the specific benefits of their bargain with ICANN, (ii) they have been denied the benefits for which they paid substantial monies, (iii) they have been denied the promised fair and meaningful Reconsideration and independent Ombudsman review processes, (iv) they have been denied the Standing Panel and any appeal process, (v) they have been denied the promised rules of procedure, and (vi) they have been denied payment of IRP administrative fees, (vi) all of which, on information and belief, would have led to a fairer and far less expensive proceedings, and (vii) which would have led to a different, favorable, outcome in Plaintiffs’ substantive dispute with ICANN regarding the delegation of the .hotel gTLD.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.
FIFTH CAUSE OF ACTION
(Gross Negligence)

109. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

110. ICANN had statutory and common law duties not to negligently or with gross negligence fail to implement its promised ADR procedures which it had represented to Plaintiffs would be timely implemented. ICANN breached those duties by failing to implement such procedures for over a decade, and at all. These failures directly and proximately caused Plaintiffs’ injuries and damages.

111. In failing to implement the promised ADR procedures, ICANN acted (and failed to act) not only below the relevant industry and legal standards of care, but with absolutely no care at all and with complete indifference to the rights others, including Plaintiffs. In example, ICANN (i) made knowing false representations over the internet to the public and to Plaintiffs for literally years, (ii) failed to follow the most basic industry standards of fair and truthful implementation of promised matter, (iii) failed to follow the most basic advice of its own experts to timely implement the promised ADR procedures which its experts advised were critical and should be implemented immediately to assure basic fairness, (iv) failed to follow the most basic advice of its own lawyers, including its in-house lawyers, to timely implement the promised ADR procedures which its lawyers advised were critical and should be implemented immediately to assure basic fairness, and (v) continually failed to actually implement the promised procedures.

112. As alleged above, passim, the ADR procedures that ICANN failed to implement included the promised (i) Reconsideration process, (ii) the independent Ombudsman review process, (iii) the IRP Standing Panel and appeal procedures, (iv) the IRP procedural rules, and
(v) the payment of IRP-related fees, all contained within its 12/8/11, 3/16/12, 12/20/12, 4/11/13 and 6/18/18 bylaws.

113. As alleged above in Paragraphs 24, 29-32, 38-39, 43, 46, 53, 55, all such grossly negligent failures followed ICANN’s related misrepresentations which were specifically designed and made to induce (and did induce) Plaintiffs to accept and agree to several specific terms contained in their original and modified contracts with ICANN, specifically the release/CNTS and each of the bylaw ADR provisions at issue. All such misrepresentations were never intended by ICANN to be put in place and practice, and ICANN has never done so.

114. ICANN’s grossly negligent failures are proven by the facts that ICANN’s board had and has decided not to implement the procedures as promised despite (supposedly) having acknowledged their critical importance and the need for immediate implementation. Circumstantially, ICANN then continued to fail to implement these procedures for some 9 years (up until the present) despite its representations that implementation was critical and would be imminent, despite the recommendations of immediacy and the need for fairness made by ICANN’s expert technical panels and attorneys, and despite the fact that ICANN has represented that implementation should take just some 6 months. In fact, ICANN has done nothing to implement the Standing Panel in the past two years. ICANN was supposed to implement these procedures as a specific, 2016, condition of its agreement to divorce itself from U.S. Government oversight, but has not. ICANN misled the global internet community and the U.S. Government, as it has refused to implement the promised procedures.

115. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its agents’ misrepresentations and subsequent misrepresentations to Plaintiffs’ that the procedures would be timely implemented, to Plaintiffs’ detriment. In reliance on the misrepresentations, in example, Plaintiffs contracted with ICANN and accepted the bylaw Accountability Mechanisms
and the related release/CNTS, continued in their contracts with ICANN including in its dispute resolution processes, and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued both their financial and work efforts and outlays. Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP-related fees that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

116. As a direct and proximate result of ICANN’s gross negligence, Plaintiffs have been injured and damaged in that (i) they have been denied the specific benefits of their bargain with ICANN, (ii) they have been denied the benefits for which they paid substantial monies, (iii) they have been denied the promised fair and meaningful Reconsideration and independent Ombudsman review processes, (iv) they have been denied the Standing Panel and any appeal process, (v) they have been denied the promised rules of procedure, and (vi) they have been denied payment of IRP-related fees, (vi) all of which, on information and belief, would have led to a fairer and far less expensive proceedings, and (vii) which would have led to a different, favorable, outcome in Plaintiffs’ substantive dispute with ICANN regarding the delegation of the .hotel gTLD.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

**SIXTH CAUSE OF ACTION**
(Public Benefit Corporation Bylaw Enforcement -- Cal. Corp. Section 14623)

120. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

121. ICANN is an entity subject to the California Public Benefit Corporation law. Under that law, this Court has the power to require ICANN to comply with its bylaws.
Cal. Corp. Code section 14623 provides that, *inter alia*: “A benefit enforcement proceeding may be commenced or maintained [by] persons as have been specified in the articles or bylaws of the benefit corporation.”

122. ICANN’s bylaws also state that “. . . ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant . . .” Bylaws, Section 4.3(a). Such third-party review may be brought to “[e]nsure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.” Bylaws, Section 4.3(a). A Claimant is defined by ICANN as “any legal or natural person, group, or entity . . . that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.”

123. Plaintiffs in this case have standing as IRP “Claimants” because they have suffered harm directly caused by ICANN’s violations of its own bylaws. Accordingly, ICANN’s own bylaws contemplate and explicitly describe persons and/or parties that are afforded standing to bring such a claim against ICANN, including Plaintiffs. A guiding principle of ICANN’s Accountability Mechanism enhancements was that those Accountability Mechanisms were not intended to be exclusive of other remedies at law or equity, in any court or forum. And indeed, ICANN has not challenged Plaintiffs’ standing as “Claimants” in the IRP.

124. Plaintiffs have been injured and damaged by ICANN’s failure to adhere to its bylaws, as alleged, which also form part of ICANN’s contracts with each Plaintiff. As a direct and proximate result of ICANN’s failure to adhere to its bylaws as alleged, Plaintiffs have each been injured and damaged contractually, practically, financially and at least in part irreparably, as alleged above.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.
SEVENTH CAUSE OF ACTION
(Unfair Competition “UCL”/“FAL”-- Cal. B&P Code Sections 17200, 17500 et seq.)

117. Plaintiffs incorporate by reference each and every paragraph above as if restated here.

118. ICANN’s (i) *seriatim* breaches of its contracts with Plaintiffs, (ii) its intentional and grossly negligent misrepresentations (see Cal. Civ. Code sections 1428, 1668, 1709, 1710, et seq., 3333, 3512, 3514, 3520, 3543), (iii) its fraud and gross negligence in the performance of its contracts with Plaintiffs (see Cal. Civ. Code sections 1428, 1668, 1709, 1710, et seq., 3333, 3512, 3514, 3520, 3543), and (iv) its violation of Cal. Corp. Codes sections 5210, et seq., as alleged, are both unfair and unlawful pursuant to the referenced statutes and the common law of contract, negligence, fraud and deceit. ICANN’s unfair and unlawful acts and omissions also affect not only Plaintiffs but the entire, worldwide internet community and the public generally.

119. As a direct and proximate result of ICANN’s unfair and unlawful acts as alleged, Plaintiffs have each been injured and damaged contractually, practically, financially and at least in part irreparably, as alleged above. More specifically, (i) Plaintiffs parted with very substantial monies based upon and as a direct result of ICANN’s contractual breaches and its grossly negligent and intentionally unlawful acts and omissions made before Plaintiffs originally contracted with ICANN, before Plaintiffs agreed to ICANN’s offered modifications to Plaintiffs’ contracts, and after both, and (ii) had ICANN properly performed its contractual obligations and not committed the referenced negligent and fraudulent acts and omissions, Plaintiffs’ claims to the .hotel gTLD, and ICANN related delegation of that gTLD, would have been subjected to fair and meaningful review that would have resulted in Plaintiffs being delegated the gTLD because of the requirement of adherence to precedent.

Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.
PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court enter judgment in their favor on each and every cause of action set forth above and award them relief including, but not limited to, the following:

1. Specific performance of ICANN’s contractual Accountability Mechanisms as set forth in its bylaws, including meaningful Reconsideration, meaningful independent Ombudsman review, constitution of the expert, community-chosen Standing Panel to adjudicate Plaintiffs’ gTLD claims and to provide *en banc* appeal, implementation of the promised procedural rules, and payment of all related administrative fees and costs.

2. A mandatory public injunction requiring ICANN to implement the Accountability Mechanisms in its bylaws, and a prohibitory public injunction forbidding ICANN from flouting any such bylaws in the future.

3. An award of Plaintiffs’ reasonable attorneys’ fees pursuant to both, or either, the California Public benefit corporation law and/or the private attorney general statute (Cal. Civ. Proc. Code section 1021.5), as this is an action to enforce important rights affecting the public interest.

4. Compensatory, general and/or special damages to be proven at trial, including for attorneys’ and consultants’ fees otherwise not awarded.

5. Punitive damages to be proven at trial.

6. All recoverable costs.

7. Any other relief as the Court may deem appropriate.

JURY DEMAND

Plaintiffs respectfully request trial by jury as to all issues so triable.
Dated: March 4, 2022

Respectfully submitted,

RODENBAUGH LAW

By: /s/ Mike Rodenbaugh
    Michael L. Rodenbaugh

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

FIRST AMENDED COMPLAINT &
DEMAND FOR JURY TRIAL

Case No. 20STCV42881