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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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

Plaintiffs,

vs.

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

Defendant.

Case No. 20STCV42881

PLAINTIFFS' OPPOSITION TO DEFENDANT'S DEMURRER

Assigned to Hon. Craig D. Karlan

[Filed concurrently with Request for Judicial Notice]

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Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. LTD., and Doman Venture Partners PCC Limited (together, "Plaintiffs") hereby oppose Defendant ICANN's Demurrer.

I. FACTUAL BACKGROUND

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

II. ARGUMENT

A. ICANN's Championed "Covenant Not To Sue" Is Unenforceable As A Matter Of Law, Is Also Factually Inapplicable To The Claims Alleged, And Is Also Unenforceable As It Was Procured By Fraud

1. The CNTS Is Unenforceable As A Matter Of Law

Civil Code section 1668 "invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence[,]" exactly like ICANN's CNTS. *Frittelli, Inc. v. 350 North Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) (upholding release) (citations omitted):

> Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence. Furthermore, the statute prohibits contractual releases of future liability for ordinary negligence when "the 'public interest' is involved or . . . a statute expressly forbids it. . . . Even when such exculpatory clauses have no impact upon the public interest, they are "'strictly construed against the person relying upon them.'"

See also Manderville v. PCG&S Group, Inc., 146 Cal. App. 4th 1486, 1499-1502 (2007) (holding release unenforceable under Section 1668 as against fraud-in-the-inducement claims); *Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148, 1153-1154 (1990); *Low v. Altus Finance SA*, 136 F. Supp.2d 1113, 1118-1119 (C.D. Cal. 2001) (applying Section 1668; "in light of the disputed scope and validity of the release, the Court finds that dismissal based on motions challenging the mere pleadings would be premature and inappropriate").

In turn, agreements in violation of Civil Code section 1668 are void as against the policy of the law. Cal. Civ. Code section 1599 (partial illegality, partial voidance); *Marathon Ent. v. Blasi*, 42 Cal.4th 974, 992-993 (2008); *In re Marriage of Facter*, 212 Cal App. 4th 967, 985-987 (2013). This Court (Judge Halm) has already held that under Section 1668 ICANN's covenant not to sue cannot bar claims for at least willfully inflicted injuries, such as those alleged to have been caused by fraud, fraud-in-the-inducement or gross negligence. *DOT CONNECT AFRICA TRUST v. ICANN*, 2017 WL 5956975, at *1, 5 (Los Angeles Co. Sup. Ct., Aug. 9, 2017) ("The

Court finds DCA raises a triable question of material fact as to whether ICANN committed fraud by indicating it would follow its Bylaws and Articles of Incorporation . . . .").

The Central District has held the same thing, noting evidence of ICANN's fraud in that case too. But, ICANN omits that case from its demurrer. *DOT CONNECT AFRICA TRUST v. ICANN*, 2016 WL 9136168, at *4-5 (C.D. Cal., Apr. 12, 2016):

> The evidence suggests that ICANN intended to deny DCA's application based on pretext. Defendants have not introduced any controverting facts. As such, the Court finds serious questions regarding the enforceability of the Release due to [§1668].

ICANN's reliance on *Ruby Glen LLC v. ICANN*, 2016 WL 6966329 (C.D. Cal., Nov. 28, 2016), *affd.*, 740 Fed.Appx. 118 (Mem.) (9th Cir. 2018), is unavailing both legally and factually.

First, the Ninth Circuit's *Ruby Glen* opinion is unpublished (as well as unanalyzed), and so as a matter of law has no precedential value in this action. Ninth Circuit Rules 36-1, 36-3(a). Predictably, *Ruby Glen* has never been cited by *any* court. Indeed, ICANN should never even have cited it to this Court. Ninth Circuit Rule 36-3(b).

Second, the District Court in *Ruby Glen* recognized expressly that that case did *not* allege willful torts such as fraud or fraud-in-the-inducement, nor any violation of a public interest, which are all alleged here, and questioned the CNTS' enforceability as to such claims. *Ruby Glen*, 2016 WL 6966329, at *5. In this respect, *Ruby Glen* actually supports Plaintiffs, not ICANN. Indeed, Judge Halm of this Court noted this *exact* point. *DOT CONNECT AFRICA TRUST*, 2017 WL 5956975, at *3.

Third, *Ruby Glen* is premised in large part on the unanalyzed presumption that the CNTS is not a release of liability but rather, in essence, only an ADR forum clause. *Ruby Glen*, 40 Fed.Appx. at 118. [See also Demurrer, 13:22-14:6.] Plaintiffs appreciate and will rely on ICANN's admission in this respect. In this respect, however, *Ruby Glen* is in conflict with *Commercial Connect v. ICANN*, 2016 WL 319879, at *3 (W.D. Ky., Jan. 26 2016), also cited by ICANN, in which the court characterized the CNTS as a *release*. *Ruby Glen* is similarly in conflict with *DOT CONNECT AFRICA TRUST*, 2016 WL 9136168, at *4-5, which also characterized the CNTS as "release." Plaintiffs note that the CNTS, on its face, arguably includes both release and forum provisions. [Demurrer, 9:14-10:3 (quoting provision).]

In all events, however, ICANN's admission that the CNTS is not a release does not answer the relevant legal question at bar, i.e., whether the CNTS is a release or merely a forum clause. Is it void under Section 1668? As clearly alleged, the CNTS is being applied by ICANN fraudulently by herding Plaintiffs (and others) into an unfair, sham ADR scheme that is

designed not to provide any meaningful relief. As such, it is a *de facto* exculpatory clause in violation of Section 1668. [Complaint, *passim*.] *See, Gentry v. Superior Court*, 42 Cal.4th 443, 453-455 (2007) (representative action arbitration waiver was in practice tantamount to an exculpatory agreement made unlawful by Section 1668); *OTO, LLC v. Kho*, 8 Cal.5th 111, 135-137 (2013) (employee arbitration agreement was unenforceable because it foreclosed possibility of meaningful relief). All that is material to the present motion, however, is that (i) the CNTS contains potential ambiguities and (ii) it is allegedly (and in fact) being applied as an unlawful exculpatory clause, both of which raise issues of fact not susceptible to disposition on demurrer.

Fourth, it is of course fundamental that application of the CNTS language involves a case-by-case analysis of whether the particular facts fit within the scope of the provision. *Huverserian v. Catalina, Scuba Luv, Inc*., 184 Cal. App. 4th 1462, 1466-1469 (2010); *Burnett v. Chimney Sweep*, 123 Cal. App. 4th 1057, 1066 (2004). Not only were the *Ruby Glen* allegations much different than Plaintiffs' (as detailed below), but there was no issue in *Ruby Glen*, as there is here, regarding the breach of the very ADR mechanisms that were supposed to provide the alternative forum. In the end, *Ruby Glen's* application of the CNTS to the facts of that very different case is of limited or no value here. *Factually, Ruby Glen* could not be more different from, and as such inapposite to, this case. There, and as expressly found by the District Court, the plaintiff's allegations fit squarely into the language of the CNTS provisions as the plaintiff was seeking review of ICANN's actions in approving (or not disapproving) a competitor's application and of ICANN's final decision to auction the involve gTLD. *Ruby Glen*, 2016 WL 6966329, at *1-2.

Contrary to ICANN's self-serving paraphrasing of Plaintiffs' allegations, however, and as clearly alleged over and over in their Complaint, Plaintiffs have *not* sought review here of any ICANN final gLTD delegation decision, any interim decisions, or of anything ICANN did in connection with its review of Plaintiffs' applications. [Complaint, *passim*.] Instead, Plaintiffs have sued for specific performance of ICANN's ADR bylaws that form part of Plaintiffs' contracts with ICANN. Such bylaw provisions are the mechanisms by which Plaintiffs are supposed to be able to meaningfully challenge ICANN's application review and final delegation decisions. *Ruby Glen assumed* that these ADR procedures would be effective and provide a meaningful remedy, but the allegations here, and the evidence, prove that they are actually a sham in both design and implementation. [*Id*.]

2. The CNTS Also Does Not Bar Plaintiffs' Alleged Causes Of Action As A Matter Of Law For Several Other Reasons

First, as matter of law, ICANN's CNTS -- whether it is a release or a forum clause or both -- cannot apply to Plaintiffs' claims which were unknown at the time of contracting, such as the fraud-in-the-inducement and other deceit claims. Cal. Civ. Code sections 1541, 1542; *Casey v. Proctor*, 59 Cal.2d 97, 109-115 (1963); *Mellus v. Potter*, 91 Cal. App. 700, 703-704 (1928). At best, whether the CNTS was intended to include unknown claims is a factual issue. *Leaf v. City of San Mateo*, 104 Cal. App. 3d 398, 411 (1980).

Second, and also as a matter of law, ICANN's CNTS cannot bar Plaintiffs' claims for public injunctive relief under the Unfair Competition Law. Cal. Bus. & Prof. Code sections 17200, 17203 (authorizing injunctive relief), 17500, 17535 (authorizing injunctive relief); *Cruz v. PacifiCare Health Systems, Inc.*, 30 Cal.4th 303, 315-316 (2003) (such claims are inarbitrable as a matter of law); *Warren-Guthrie v. Health Net*, 84 Cal. App. 4th 804, 817 (2000) (same).[1]

Third, as alleged in their Complaint, Plaintiffs are suing in part to enforce the public interest, i.e., to enforce rights against a public benefit corporation charged with one of the most critical roles on the internet, affecting literally every public and private internet user in the world and trillions of dollars in commerce. [Complaint, paras. 1, 7-10, 15, 25, 65, 70-73, 112-118, 121, 124.] Indeed, ICANN itself admits in its bylaws (Art. 1.2(a)) that "ICANN must operate in a manner consistent with these Bylaws for the benefit of the internet community as a whole, . . . in conformity with . . . law, through open and transparent processes." [*See also, e.g.,*, Bylaw 1.2(b)(ii) and (iv) (two of ICANN's "Core Values" that refer to its "public interest" mandate, including specifically with respect to the New gTLD Program).]

Here, Plaintiffs seek specific performance and public injunctive relief. [Complaint, Prayer for Relief, paras. 2, 3.][2] ICANN's purported CNTS, if enforced, would amount to an unlawful waiver of law intended to protect the public or to enforce such rights in civil court. Cal. Civ. Code sections 1668, 3513. These statutes prohibit "contractual releases of future

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

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

liability for ordinary negligence when 'the 'public interest' is involved . . . . " *Frittelli*, 202 Cal. App. 4th at 43; *see also, e.g., Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 95 (1960) (stating rule and finding a public interest); *Hiroshima v Bank of Italy*, 78 Cal. App. 362, 377 (1926) (stating rule; invalidating banking waiver based on public interest).

B. Plaintiffs' Claims Fall Outside The Factual Scope Of The CNTS; At Most, That Scope Is Ambiguous, Raising Fact Issues Requiring Parol

Even if the CNTS could bar any claims under the law, which it cannot, it still would not apply *factually* to any of Plaintiffs' claims. Whether an exculpatory clause covers a given claim "turns primarily on contractual interpretation, . . . ; of necessity, each case will turn on its own facts." *E.g., Burnett*, 123 Cal. App. 4th at 1066; *Huverserian v. Catalina, Scuba Luv, Inc*., 184 Cal. App. 4th at 1467-1469 (claims outside scope of release; "To be effective, such a release 'must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties.'"); *Queen Villas Homeowners Ass'n v. TCB Property Mgmt*, 149 Cal App. 4th 1, 5-6 (2007) ("exculpatory clauses are construed against the released party"); *Stewart v. Seward*, 148 Cal. App. 4th 1513, 1524 (2007) (waiver; knowing, clear and unambiguous); *see also, e.g., Knutsson v. KTLA, LLC*, 228 Cal. App. 4th 1118, 1130 (2014) (party cannot be required to arbitrate a claim not agreed to be submitted to arbitration); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 297 (2010) (order to arbitrate proper only where parties agreed to arbitrate "that dispute").

ICANN's demurrer studiously glosses over the actual CNTS language. ICANN's purported (yet ambiguous) "*release"* language says that it applies to claims that:

> arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, approval of applicant's gTLD application. [Demurrer, 9:15-20.]

Even a cursory review of this language makes plain that it 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 or verification," and "characterization" of an application – the actual decision to recommend it for approval or not. This language says nothing about any other ICANN activities, including relevant things such as "bylaw compliance," "ADR process mechanisms" or "dispute resolution provisions" -- not to mention gross negligence and fraud in contracting and in public statements, as alleged.

Further, as a matter of contractual construction, that the activities encompassed by the release are specifically itemized underscores an intent to cover only such items; if the intent was broad and not limited, supposedly covering undescribed activities (as ICANN champions), there would be no need to itemize specific activities at all. *E.g.*, *Huverserian*, 184 Cal. App. 4th at 1468-1469; *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1045 n.4 (2008). If ICANN wanted to try to enforce a release and covenant not to sue that barred actions against it for violating its bylaws or committing fraud and other business torts with respect to such bylaws, it at a very minimum needed to make that perfectly clear. *Huverserian*, 184 Cal. App. 4th at 1462 ("clear, unambiguous, and explicit"). It did not, and Plaintiffs agreed to nothing like that.

As also plainly alleged, this action has *not* challenged ICANN's wrongful preliminary (or other) delegation of the .HOTEL gTLD. [E.g., Complaint, paras. 1, 10, 13, 32, 35, 42, 55-58, 62, 70-71, 76-79, 81, 84-85, 90, 96-97, 103, Prayer for Relief, paras. 1, 2.] It also has not claimed 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. [Complaint, *passim*.] Rather, and again, all of Plaintiffs' claims are based on ICANN's breach of its contractual obligations and fraud related to implementation (or lack thereof) of the bylaw ADR mechanisms. [Complaint, *passim*.]

Other emphasized language further proves that the purported CNTS is both narrow in scope and facially inapplicable here. It only purports to bar court actions challenging a "FINAL DECISION WITH RESPECT TO THE APPLICATION." "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 could only apply narrowly, and only to specifically itemized court actions and the itemized monetary damages -- not to other court actions for equitable relief, attorneys' fees and other damages. However, and again, *Plaintiffs' claims in this action have not challenged any final ICANN decision with respect to any application whatsoever, and no damages have been claimed due to any such final decision.* Instead, and again, Plaintiffs seek specific performance and a public injunction and damages for breach of contract and fraud for ICANN's failure to implement the agreed ADR processes.

As also alleged [Complaint, paras. 48, 116], ICANN's own admissions further refute a broad interpretation of the CNTS. One of ICANN's supposed "Core Principle[s]" is that the "[a]ccountability structures should not preclude any party from filing suit against ICANN in a court of competent jurisdiction," confirming that even ICANN believes 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 mandatory. [Demurrer, 9:24-10:3 ("may").]

The limited scope of these provisions is also confirmed by ICANN's own position taken after prior ADR IRP proceedings, as specifically alleged [Complaint, paras. 55-62, 85, 103, 108], that it still then was *not* required by such panel decisions to implement the Standing Panel and IRP appeal bylaws. As ICANN has refused to follow the IRP decisions regarding these procedural mechanisms (and the admonitions of its experts and lawyers to implement them, and its public statements supporting enactment and declaring implementation to be imminent), 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 the subject ADR (or thus, any) of ICANN's bylaws. [E.g. Complaint, para. 62.][3/4]

That would also render ICANN's ADR "Core Principle" meaningless and its years'-long promises to implement the bylaw ADR mechanisms illusory, a contractual construction that the law also abhors. *Saika v. Gold*, 49 Cal. App. 4th 1074, 1082 (1996) (illusory arbitration clause is unenforceable); *Cheng-Canindin v. Renaissance Hotel Assoc*., 50 Cal. App. 4th 676, 691-692 (1996) (arbitration agreement in which drafter was sole decision maker was unfair and illusory).

Finally, if the CNTS contains any ambiguity as to its scope, it must be construed against ICANN which drafted and proffered it, and would also create a further issue of fact. *See Huverserian*, 184 Cal. App. 4th at 1469 (ambiguous release cannot support summary judgment).

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[3]For this reason, ICANN's "two bites at the apple" ruse [Demurrer, 11:11-24], wholly misses the point. First, and as alleged [Complaint, paras. 37-40, 42], Plaintiffs were *coerced* into the pending IRP on pain of loss of their Applications (and their substantial rights, monies incurred and efforts), and they have objected all the way along. Further, ICANN's claim is inherently flawed because it is based on the incorrect assumptions that litigating these claims (under compulsion) within the patently deficient system Plaintiffs are challenging somehow provides Plaintiffs with the benefit of their contracts, and is also somehow fair and appropriate.

[4] For the same reason, ICANN's heavy reliance on the so-called "Emergency Panelist" ruling is wildly misplaced. All he did was force ICANN to stay any action on Plaintiffs' gTLD applications (in line with all prior IRP precedent), then punt every decision to the full IRP panel. That took nine months. Then, the IRP panel selection process lasted ten months more.

C. The CNTS Is Not Enforceable Because It Was Procured Through Fraud And Is Illusory

The purported CNTS -- again whether it is a release, a forum selection clause, or whatever -- is unenforceable because it was, as expressly alleged, extracted by ICANN's fraud. [Complaint, paras. 17-23, 52-54, 82, 89-93, 96-98.] ICANN's misrepresentations were directly material to Plaintiffs and induced them to accept the CNTS and the ADR bylaw provisions, and the agreements more generally, and to do so several times over as the parties' agreements were successively modified. [E.g., Complaint, paras. 82, 86, 89-92, 96, 97, 98.] *DOT CONNECT AFRICA TRUST*, 2017 WL 5956975, at *1 (ICANN's CNTS does not bar claims for fraud).

In general, neither releases nor ADR agreements are enforceable if they have been obtained by fraud, deception, misrepresentation, duress, or undue influence. *E.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 339, 343 (2011); *Engalla v. Permanente Medical Group, Inc.*, 15 Cal.4th 951, 973-979 (1997); *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 392, 418-419 (1996); *Duffens v. Valenti*, 161 Cal. App. 4th 434, 447-451 (2008); *Winet v. Price*, 4 Cal. App. 4th 1159, 1172-1173 (1992); *Edwards v. Comstock Insurance Co.*, 205 Cal. App. 3d 1164, 1169 (1988). *See also* Cal. Civ. Code section 1689(b)(1) (fraud and rescission); Cal. Civ. Proc. Code section 1281, 1282(b) (rescission and avoidance of arbitration agreements).

Engalla is controlling. There, plaintiffs claimed that an arbitration agreement was extracted by fraudulent promises about timing and other procedures contained in the agreement. 15 Cal.4th at 960. The court held that the defendant's failure to choose an arbitrator in 144 days, and related conduct, was evidence of fraud (15 Cal.4th at 979-80-82; emphasis supplied):

> A defrauded party has the right to rescind a contract, even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. … [[T]he Engallas] must show that … there was substantial delay in the selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations. *Here, there is ample evidence to support the Engallas' contention that Kaiser breached its arbitration agreement by repeatedly delaying timely appointment of an available party arbitrator and a neutral arbitrator.*
>
> *In sum, we conclude there is evidence to support the Engallas' claims that Kaiser fraudulently induced Engalla to enter the arbitration agreement in that it misrepresented the speed of its arbitration program, ...*

In this case, as alleged, ICANN has had 9 years to implement meaningful Ombudsman review, constitute the promised Standing Panel (with *en banc* appellate review), implement the promised discovery and other rules, and to pay the promised fees. [Complaint, *passim*.] In 9

years, ICANN only dragged its feet in the face of public promises that it would timely implement the bylaw procedures, and prior IRP panel decisions faulting ICANN for failing to do so. [Complaint, *passim*.] Under *Engalla*, Plaintiffs allegations of fraud-in-the-inducement -- and 9 years of delays versus 144 days in *Engalla* -- at a minimum raise issues of fact that preclude disposition on demurrer. *See also, e.g., Lynch v. Crittenden & Co.*, 18 Cal. App. 4th 802, 809-11 (1993) (allegation of fraud-in-the-inducement precluded arbitration); *Magness Petroleum Co. v. Warren Resources of Calif. Inc.*, 103 Cal. App. 4th 901, 909 (2002) (arbitrator selection mechanism must be followed); *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167, 170-71 (1963) (fraud issue must be resolved first; misrepresentation "goes to the arbitration clause itself").

III. OPPOSITION TO DEMURRERS TO SPECIFIC CAUSES OF ACTION

A. The Demurrer To Plaintiffs' Breach Of Contract Claim Is Meritless

First, ICANN claims that Plaintiffs have not identified the contract or terms breached. However, as alleged, Plaintiffs' contracts with ICANN are the Applications each submitted to obtain delegation of the .HOTEL gTLD and the provisions incorporated by reference, including ICANN's bylaw ADR provisions. [Complaint, paras. 1, 12, 84-87.] Each Plaintiff also has other contracts with ICANN, to operate other gTLDs, and thus each has strong interest in ICANN implementing its long-promised Accountability Mechanisms (as do all other registry applicants and operators, and all members of the internet community). Plaintiffs' allegations are plain that the contractual provisions breached by ICANN are the bylaw ADR provisions which are expressly incorporated into the very CNTS, and which bind all of ICANN's actions, all of which are to be in the public interest. [E.g., id., paras. 1, 12, 15, 18, 19-21, 23, 25, 27, 31, 33, 34, 44-49, 54, 76-79, 84-87; see also Demurrer, 9:24-10:3.] Moreover, as drafter, ICANN is well-aware of its contracts and their contents. ICANN also spends almost its entire brief arguing that the bylaws allegedly breached are inapplicable or were actually complied with; ICANN clearly knows the provisions at issue.

Second, ICANN's argument that the bylaws allegedly breached did not exist when Plaintiffs submitted their applications in 2012 is both wrong and ignores the express allegations.

ICANN's argument is wrong at very least because the Reconsideration requirements existed in the ADR bylaws as of December 8, 2011, before Plaintiffs submitted their Applications in 2012. [Rodenbaugh Decl., Exh. A (2011 ICANN Bylaw excerpts, Art. 4.2

(Reconsideration).][5] ICANN focuses on later amendments that they also breached, but ignores Plaintiffs' allegations that the entire Reconsideration process is a sham, by design, because the same ICANN board committee that made all underlying decisions arising from the New gTLD Program, was later appointed as the very same committee to "reconsider" its own decisions when challenged per the bylaws, despite the obvious, stated intent of the related bylaws. [Complaint, 16-18.]

ICANN's argument also ignores Plaintiffs' express allegations that each successive ADR bylaw amendment created a newly modified contract. [*Id*., paras. 82 ("renewed promises"), 86 ("modified promises"), 89-92 ("bilateral amendments"), 96, 97 ("induce Plaintiffs to contract and to continue to contract"), 98 ("agreed to contractual amendments requested by ICANN").] *E.g., R Power Biofuels LLC v. Chemex LLC*, 2017 WL 1164296, at *7, 9-11 (N.D. Cal., March 29, 2017) (overruling motion to dismiss):

> Specifically, Plaintiff argues that Defendant fraudulently induced the creation of a new or modified contract . . . . Although Plaintiff has not alleged a specific claim for promissory fraud, Plaintiff's intentional misrepresentation claim is based on allegations that promissory fraud induced Plaintiff to enter a new or modified contract.

See also, e.g., Lewis v. McClure, 127 Cal. App. 439, 444-449 (1932) (contractual modification supported fraud-in-the-inducement claim); *Lee v. Fed. St. L.A., LLC*, 2016 WL 2354835, at *9 (C.D. Cal., May 3, 2016) (fraudulent inducement into contract amendment); *Intelligraphics, Inc. v. Marvell Semiconductor, Inc*., 2008 WL 3200212, at *11 (N.D. Cal., Aug. 6, 2008) (same).

The written contractual modifications here required no consideration from the Plaintiffs. Cal. Civ. Code sections 1697, 1698(a). Even so, the modifications (i) were accepted by Plaintiffs although they had no duty to accept them, and (ii) created more onerous and in some cases new and additional obligations for Plaintiffs,[6] either of which constituted legally sufficient consideration for the modifications. Such modifications occurred, and each Plaintiff's successive new contracts arose, at least on April 11, 2013, October 1, 2016 and July 22, 2017.

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[5]These referenced bylaws and interrogatory responses are attached as exhibits to the concurrently-filed declaration of Michael Rodenbaugh, Esq. ISO this Opposition. The Court is respectfully requested to take judicial notice of the bylaws and pleadings and their contents.

[6]*See, e.g.,* Rodenbaugh Decl., Exhs. B & C (*cf.* 2012 ICANN Bylaw Art. 4.2 *with* 2013 ICANN Bylaw Art. 4.2, among other things, imposing additional notice, filing and information requirements for Reconsideration requests, limiting the time to file such requests, and giving ICANN greater powers in addressing them; *cf. also*, 2012 ICANN Bylaw Art 4.3 *with* 2013 Art. 4.3 (among other things, imposing additional filing and information requirements in IRP proceedings, limiting the time to file them, giving ICANN powers to approve panel arbitrators, and stripping IRP panels of power to require ICANN compliance with decisions).

ICANN, moreover, has itself applied the newly enacted bylaw provisions to its contractual relationships with Plaintiffs. [*See, e.g.*, Demurrer, 17:13-23 (admitting that a new Ombudsman bylaw applied to a dispute that arose after the bylaw's enactment), 16:22-17:5 (arguing that the *post-2012* Standing Panel bylaw was not breached).]

Third, ICANN's is wrong that the bylaw ADR provisions were not expressly incorporated into the parties' agreements. [Demurrer, 16:1-5, 17-18.] As admitted, the CNTS *expressly* incorporates the bylaw ADR mechanisms. *E.g, Engalla,* 15 Cal.4th at 961 (ADR provisions incorporated by reference); *Republic Bank v. Marine Nat. Bank,* 45 Cal.App.4th 919, 923 (1996) (same); *Janda v. Community Hosp. of Madera,* 16 F.Supp.2d 1181, 1186-1189 (1998) (same; hospital bylaws incorporated by reference). Given the express reference to the bylaws in the CNTS, there is at very least a related issue of fact as to incorporation. *See Huverserian,* 184 Cal. App. 4th at 1468-1469. Indeed, the entire premise of ICANN's demurrer is that Plaintiffs' claims are barred by the CNTS -- but that they have recourse to the ADR bylaw procedures instead.

Fourth, ICANN's claims that it did not breach any of the ADR bylaws raise issues of fact, precluding disposition. ICANN contradicts Plaintiffs' allegations which must be taken as true. *Evans v. City of Berkeley,* 38 Cal.4th 1, 6 (2006). The allegations (and evidence) are that:

(i) ICANN breached the Ombudsman review bylaw (Art. 5) because there has *never* been any meaningful Ombudsman review mechanism and Plaintiffs got none. It was designed as a sham process with ICANN's Board Accountability Mechanisms Committee ("BAMC") empowered to make – and then purportedly, somehow independently "reconsider" -- all underlying decisions arising from the New gTLD program. Moreover, the Ombudsman subsequently has recused himself from every gTLD application dispute, leaving the BAMC to deny every single reconsideration request presented in the New gTLD program. [E.g., Complaint, paras. 1, 16-23, 85.] A system that consists of "reconsideration" in name only, and with independent review systemically denied from *every* gTLD dispute, at a minimum raises an issue of compliance versus breach (or sham). *See Engalla,* 15 Cal.4th at 979-80, 981-82.

(ii) ICANN breached the IRP Standing Panel bylaw (Art. 4.3) by having taken almost 9 years to constitute the panel, since 2013, and by still failing to do so. All the while, every losing IRP claimant (including Plaintiffs) have been denied the right to ANY appellate review at all, despite the bylaws providing for *en banc* appellate review by the Standing Panel in all cases. ICANN has failed for more than 9 years, to hire up to 7 arbitrators, despite ICANN's public misrepresentation that panel selection was underway at the time the bylaws were first

enacted in 2013. [Complaint, 50.] A representation upon which Plaintiffs and the entire internet community relied when agreeing to those bylaw amendments. Given this delay alone, ICANN is in presumptive breach of the bylaws. *Engalla*, 15 Cal.4th at 981-82. Under no construction could a 9-year delay be reasonable.

(iii) ICANN is in breach of the bylaw requiring it to follow IRP panel decisions (Art. 4.3(x), 4.3(x)(iii)). ICANN has either ignored or refused to comply with previous IRP panel decisions in 2015 and 2017, each telling ICANN that implementation of the Standing Panel was overdue. [Complaint, paras. 1, 2, 55-62, 85.]. This proves that ICANN is both in breach of the bylaw provision, and flippantly recalcitrant about it.

(iv) ICANN is in breach of its bylaw requiring adoption of ADR rules of procedure (Art. 4.3(n)) [Complaint, paras. 56, 57], leaving Plaintiffs without meaningful discovery mechanisms such as depositions or interrogatories, and proving further that the bylaw ADR scheme is a sham that denies both meaningful discovery and meaningful relief.

(v) ICANN breached its bylaw obligation to pay related fees (Bylaw Art. 4.3(r)), agreeing only in part, but only after forced at Plaintiffs' expense. [Complaint, paras. 31, 84, 85, 91, 92, 97, 104.]

Finally, ICANN argues that the Standing Panel bylaw has, essentially, an escape clause proviso that allows ICANN to put off implementing the Standing Panel forever, and to forever deny any right to appeal any IRP decision. ICANN takes this position, rather than the obvious and only logical construction, that the clause was intended to provide ICANN a very brief, reasonable time to get the Standing Panel in place or to use another process only when reasonably needed [Demurrer, 16:22-17:6]. But ICANN's interpretation is clearly refuted by (i) ICANN's own admissions and those of its lawyers and experts regarding the immediate need for, and imminent selection 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 IRP prior decisions faulting ICANN for failing to implement it. [E.g., Complaint, paras. 2, 46-51, 54, 55-62, 64-65, 66, 82, 85, 90-91, 108-109.]

These ICANN actions and representations inform both the meaning of the relevant bylaw and the parties' intent in contracting under it, *Singh v. Singh*, 114 Cal. App. 4th 1264, 1294 (2004) (corporate bylaws construed as contractual provisions); *Olincy*, 200 Cal. App. 2d at 266-267 (bylaws must be reasonable and applied reasonably), and at a minimum raise factual issues and the need for parol, precluding disposition on demurrer. Plaintiffs have alleged, reasonably, that the proviso was to allow only for a reasonable period in which to create the

panel and for occasional situations when it was unavailable. [*Cf.* Complaint, para. 50 (*ICANN admission* that the escape proviso applies "if the panel cannot be comprised, or cannot remain comprised . . . ."), 51, 56.] The proviso was never intended to give ICANN a 9-year pass, nor to allow it to *never* appoint a panel at all. Clearly, ICANN's proffered interpretation would be an unreasonable construction of the bylaw, rendering the Standing Panel and appeal provisions illusory -- a construction to be avoided. *Mancini v. Patrizi*, 87 Cal. App. 435, 439-440 (1927).

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

First, Plaintiffs have amply identified ICANN's misrepresentations, including the what, when and how, all of which are well-known to ICANN because it or its agents made all of them; they are also all written and all were published by ICANN. [Complaint, paras. 17-19, 21, 23, 25, 27, 30, 31, 34, 44, 45, 47, 48, 50, 54, 63, 82, 90-92, 96-98 (referencing, describing and quoting the misrepresented bylaws and ICANN's other misrepresentations, and in some cases providing links to them).][7] In sum, Plaintiffs have more than complied with the specificity in pleading requirements, especially as relaxed in cases like this one where the defendant made the misrepresentations itself, has full access to the related details, and the pleadings identify the subject matter plainly. *E.g., Daniels v. Select Portfolio, Inc*., 246 Cal. App. 4th 1150, 1166-1169 (2016); *Tenet Healthsystem Desert, Inc. v. Blue Cross of California*, 245 Cal. App. 4th 821, 838-841 (2016) (reversing trial courts' sustaining of demurrer); (same).

As iterated, ICANN's misrepresentations both predate and post-date Plaintiffs' 2012 Applications. [E.g., Complaint, paras. 47, 49, 50; see also Rodenbaugh Decl., Exh. A (2011 ICANN Bylaws, Art. 4.] The prior misrepresentations include ICANN's bylaws themselves which provided for a legitimate Reconsideration process prior to 2012, as well as extra-contractual statements addressing the bylaws, coming amendments and implementation timing – including the ATRT Final Recommendations issued in December 2010. [E.g., Complaint, paras. 15, 17, 25-28, 44-51.] And, the misrepresentations that post-date Plaintiffs' original Applications were made at or before each successive contractual modification. *R Power Biofuels*, 2017 WL 1164296, at *7, 9-11; *Lewis*, 127 Cal. App. at 444-449; *Lee v. Fed. St. L.A., LLC*, 2016 WL 2354835, at *9; *Intelligraphics, Inc.*, 2008 WL 3200212, at *11.

Second, ICANN's argument that it committed no fraud because it actually complied with

[7]ICANN claims the uttering persons are not identified, yet it refuses to identify such persons, or any involved persons, in discovery -- requiring to file their pending motion to compel.

its contractual obligations [Demurrer, 19:19-28] contradicts Plaintiffs' express allegations that must be taken as true. ICANN is again arguing facts not susceptible to disposition on demurrer.

Third, Plaintiffs have alleged that ICANN's misrepresentations were made knowingly. [E.g., Complaint, paras. 91, 97.] *Manderville,* 146 Cal. App. 4th at 1498 (knowledge of falsity or recklessness). The plain allegations and evidence show that ICANN has failed to implement the bylaw ADR mechanisms for some 9 years. That period alone shows, presumptively, that its promises were knowingly false. *E.g., Engalla,* 15 Cal.4th at 979-80, 981-82 (144-day delay was evidence of fraud). ICANN has repeatedly promised that the mechanisms' implementation was imminent, but took no action. ICANN has also ignored the statements by its own attorneys and experts that implementation was essential and should be expeditious, suggesting knowing falsity. ICANN has also refused to even acknowledge, let alone follow, prior IRP panel rulings faulting its delay. This proves that ICANN knew it was acting contrary to its public statements and IRP panel directives, and had no intention of implementing the bylaws until Plaintiffs' challenged them.

Finally, Plaintiffs may sue in both contract and tort for several reasons. [Cf. Demurrer, 20:9-14.] As a matter of law, Plaintiffs may sue for fraud based on the misrepresentation of contractual terms because ICANN acted in an intentionally tortious manner with the intent to defraud. *Engalla*, 15 Cal.4th at 979-980; *Robinson Helicopter Co. v. Dana Corp.*, 34 Cal.4th 979, 989-990 (2004). Moreover, Plaintiffs' misrepresentation claims are based on both contractual and extra-contractual misrepresentations. Also, because ICANN (i) had material knowledge that Plaintiffs did not know, and (ii) uttered half-truths, it had extra-contractual duties in tort to disclose the remainder of the material facts. Cal. Civ. Code sections 1709, 1710; *San Diego Hospice v. County of San Diego*, 31 Cal. App. 4th 1048, 1055-1056 (1995).

C. Plaintiffs Gross Negligence Cause Of Action Is Properly Pled

Plaintiffs have certainly pled all the elements of a gross negligence cause of action. [Complaint, paras. 106-110.] Moreover, as ICANN's years'-long failures support a claim for intentional fraud as a matter of law under *Engalla*, they also support an alternative claim for gross negligence. Fraud is almost by definition "extreme"; it can be criminal. Cal. Penal Code section 532(a). As alleged, ICANN has lied publicly about the imminent implementation of the promised ADR mechanisms for almost 9 years. [Complaint, paras. 9,12, 18-21, 25, 27, 31, 44-51, 54, 55-62, 82, 85, 90-91.] It has flouted its bylaws in contravention of the admonitions and promises of its own lawyers and experts, prior IRP panels, and the law -- all "extreme" conduct.

D. Plaintiffs Have Standing Under Public Benefit Corporation Law

California law permits Public Benefit Corporation bylaw enforcement by "persons as have been specified in the articles or bylaws of the benefit corporation." Cal. Corp. Code section 14623. In turn, and as alleged [Complaint, paras. 114-116; see also id., paras. 1, 7-10, 15, 25, 65, 70-73, 112-118 (alleging facts of public interest), 121, 124], ICANN's bylaws specify that the Plaintiffs are members of a class of persons that are entitled to review of the bylaw Accountability Mechanisms because Plaintiffs have been "materially affected by an action or inaction of the ICANN Board or Staff," including action taken under or in contravention of ICANN's bylaws. Bylaws, Arts. 4.2(a), 4.2(u), 4.3(b)(i). Thus, ICANN's bylaws specify that Plaintiffs are in a class of persons entitled to enforce the bylaws. Cal. Corp. Code section 14623.

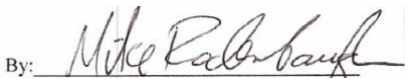
E. Plaintiffs' Unfair Competition Law Causes Are Adequately Pled

Plaintiffs' surviving underlying causes of action serve as legally-sufficient Section 17200 predicates. *Cal-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co*., 20 Cal. 4th 163, 179-181 (1999). Further, Plaintiffs have standing under the UCL as they relied on ICANN's misrepresentations and have "lost money or property" as a result. [Complaint, paras. 120-125.] *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 317, 327-328 (2011) (plaintiffs who have "lost money or property" have standing under UCL). As alleged [Complaint, 74-82, Prayer for Relief, paras. 4, 5], Plaintiffs would not have contracted with ICANN, nor continued to contract with it successively, but for its misrepresentations; Plaintiffs would not have paid $185,000 in application fees and more, or forgone enforcement of their rights. [Complaint, paras. 12 ("$185,000.00," and more); 74 (financial injury), 78 ("greater expense"), 79 ("pay more"), 82, 125.]

IV. CONCLUSION

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

Respectfully submitted, November 23, 2021

By: 

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