

1 Paula L. Zecchini (SBN 238731)
 2 Aaron M. McKown (SBN 208781)
 3 Jeffrey M. Monhait (*pro hac vice* to be submitted)
 4 COZEN O’CONNOR
 5 999 Third Avenue, Suite 1900
 6 Seattle, WA 98104
 7 Telephone: 206.340.1000
 8 Toll Free Phone: 1.800.423.1950
 9 Facsimile: 206.621.8783
 10 E-Mail: pzecchini@cozen.com
 11 amckown@cozen.com

12 Attorneys for Plaintiff
 13 RUBY GLEN, LLC

14 UNITED STATES DISTRICT COURT
 15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 RUBY GLEN, LLC

17 Plaintiff,

18 vs.

19 INTERNET CORPORATION FOR
 20 ASSIGNED NAMES AND NUMBERS
 21 AND DOES 1-10

22 Defendant.

Case No.:

PLAINTIFF’S COMPLAINT FOR:

- 1) **BREACH OF CONTRACT**
- 2) **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
- 3) **NEGLIGENCE**
- 4) **UNFAIR COMPETITION (VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200)**
- 5) **DECLARATORY RELIEF**

DEMAND FOR JURY TRIAL

1 Plaintiff RUBY GLEN, LLC (hereinafter, “Plaintiff”) alleges as follows:

2 **INTRODUCTION**

3 1. Plaintiff was formed for the purpose of applying to the Internet
4 Corporation for Assigned Names and Numbers (“ICANN”) for the right to operate the
5 .WEB generic top-level domain (“gTLD”). In reliance on ICANN’s agreement to
6 administer the bid process in accordance with the rules and guidelines contained in its
7 gTLD Applicant Guidebook (“Applicant Guidebook”), Plaintiff paid ICANN a
8 mandatory \$185,000 application fee for the opportunity to secure the rights to the .WEB
9 gTLD.

10 2. Throughout every stage of the four years it has taken to bring the .WEB
11 gTLD to market, Plaintiff worked diligently to follow the rules and procedures
12 promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead
13 of functioning as a disinterested regulator of a fair and transparent gTLD bid process,
14 ICANN used its authority and oversight to unfairly benefit an applicant who is in
15 admitted violation of a number of provisions of the Applicant Guidebook. Even more
16 problematic, ICANN’s conduct, tainted by an inherent conflict of interest, ensured that
17 it would be the sole beneficiary of the multi-million dollar proceeds from the .WEB
18 auction—a result that ICANN’s own guidelines identify as a “last resort” outcome.

19 3. As set forth more fully herein, ICANN has deprived Plaintiff and other
20 applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in
21 accordance with established ICANN policy and guidelines. Court intervention is
22 necessary to ensure ICANN’s compliance with its own accountability and transparency
23 mechanisms in the ongoing .WEB bid process.

24 ///

25 ///

26 ///

27 ///

PARTIES

1
2 4. Plaintiff RUBY GLEN, LLC is a limited liability company, duly organized
3 and existing under the laws of the State of Delaware and operated by an affiliate located
4 in Bellevue, Washington.

5 5. Defendant INTERNET CORPORATION FOR ASSIGNED NAMES
6 AND NUMBERS (“ICANN”) is a nonprofit corporation, organized and existing under
7 the laws of the State of California, with its principal place of business in Los Angeles,
8 California.

9 6. Defendants Does 1-10 are persons who instigated, encouraged, facilitated,
10 acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible
11 in some manner or degree for the breaches and wrongful conduct averred herein.
12 Plaintiff is presently ignorant of the true names and capacities, whether individual,
13 corporate, associate, or otherwise, of DOES 1 through 10, and will amend this
14 Complaint to allege their true names and capacities when the same have been
15 ascertained.

16 **JURISDICTION AND VENUE**

17 7. This Court has subject matter jurisdiction over this action under 28 U.S.C.
18 § 1332(a).

19 8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in
20 that Defendant ICANN resides and transacts business in this judicial district. Moreover,
21 a substantial part of the events, omissions, and acts that are the subject matter of this
22 action occurred within the Central District of California.

23 **FACTS COMMON TO ALL CAUSES OF ACTION**

24 **A. ICANN’S FORMATION AND PURPOSE**

25 9. ICANN is a non-profit corporation originally established to assist in the
26 transition of the Internet domain name system from one of a single domain name
27 operator to one with multiple companies competing to provide domain name
28

1 registration services to Internet users “in a manner that w[ould] permit market
2 mechanisms to support competition and consumer choice in the technical management
3 of the [domain name system].”

4 10. ICANN’s ongoing role is to provide technical coordination of the
5 Internet’s domain name system by introducing and promoting competition in the
6 registration of domain names, while ensuring the security and stability of the domain
7 name system. In that role, and as relevant here, ICANN was delegated the task of
8 administering generic top level domains (“gTLDs”) such as .COM, .ORG, or, in this
9 case, .WEB.

10 11. Article 4 of ICANN’s Articles of Incorporation requires ICANN to
11 “operate for the benefit of the Internet community as a whole, carrying out its activities
12 in conformity with relevant principles of international law and applicable international
13 conventions and local law and, to the extent appropriate and consistent with these
14 Articles and its Bylaws, through open and transparent processes that enable competition
15 and open entry in Internet-related markets.” A true and correct copy of ICANN’s
16 Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by
17 reference.

18 12. ICANN is accountable to the Internet community for operating in a manner
19 consistent with its Bylaws and Articles of Incorporation as a whole. ICANN’s Bylaws
20 require ICANN, its Board of Directors and its staff to act in an open, transparent and
21 fair manner with integrity. A true and correct copy of ICANN’s Bylaws are attached
22 hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN
23 Bylaws require ICANN, its Board of Directors, and staff to:

- 24 a. “Mak[e] decisions by applying documented policies neutrally and
25 objectively, with integrity and fairness.”
26
27
28

1 b. “[Act] with a speed that is responsive to the needs of the Internet
2 while, as part of the decision-making process, obtaining informed input
3 from those entities most affected.”

4 c. “Remain[] accountable to the Internet community through
5 mechanisms that enhance ICANN’s effectiveness.”

6 d. Ensure that it does “not apply its standards, policies, procedures, or
7 practices inequitably or single out any particular party for disparate
8 treatment unless justified by substantial and reasonable cause, such as the
9 promotion of effective competition.”

10 e. “[O]perate to the maximum extent feasible in an open and
11 transparent manner and consistent with procedures designed to ensure
12 fairness.”

13 **B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK**

14 13. ICANN is the sole organization worldwide with the power and ability to
15 administer the bid processes for, and assign rights to, gTLDs. As of 2011, there were
16 only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

17 14. In or about 2011, ICANN approved the expansion of a number of the
18 gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains
19 Internet Expansion Program (the “New gTLD Program”).

20 15. In January 2012, as part of the New gTLD Program, ICANN invited
21 eligible parties to submit applications to obtain the rights to operate various new gTLDs,
22 including, the .WEB and .WEBS gTLDs (collectively referred to herein as “.WEB” or
23 the “.WEB gTLD”). In return, ICANN agreed to (a) conduct the bid process in a
24 transparent manner and (b) abide by its own bylaws and the rules and guidelines set
25 forth in ICANN’s gTLD Applicant Guidebook (“Applicant Guidebook”). A true and
26 correct copy of the Applicant Guidebook is attached hereto as Exhibit C and
27 incorporated herein by reference.
28

1 16. The Applicant Guidebook obligates ICANN to, among other things,
2 conduct a thorough investigation into each of the applicants' backgrounds. This
3 investigation is necessary to ensure the integrity of the application process, including a
4 potential auction of last resort, and the existence of a level playing field among those
5 competing to secure the rights to a particular new gTLD. It also ensures that each
6 applicant is capable of administering any new gTLD, whether secured at the auction of
7 last resort or privately beforehand, thereby benefiting the public at large.

8 17. ICANN has broad authority to investigate all applicants who apply to
9 participate in the New gTLD Program. This investigative authority, willingly provided
10 by each applicant as part of the terms and conditions in the guidelines contained in the
11 Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

12 8. ... In addition, Applicant acknowledges that [sic] to allow
13 ICANN to conduct thorough background screening
14 investigations:

15 ...

16 c. Additional identifying information may be required to
17 resolve questions of identity of individuals within the applicant
18 organization; ...

19 ...

20 11. Applicant authorizes ICANN to:

21 a. Contact any person, group, or entity to request, obtain,
22 and discuss any documentation or other information that, in
23 ICANN's sole judgment, may be pertinent to the application;

24 b. Consult with persons of ICANN's choosing regarding
25 the information in the application or otherwise coming into
26 ICANN's possession...

27 ///

1 18. To aid ICANN in fulfilling its investigatory obligations, “applicant[s]
2 (including all parent companies, subsidiaries, affiliates, agents, contractors, employees
3 and any and all others acting on [their] behalf)” are required to provide extensive
4 background information in their respective applications. In addition to serving the
5 purposes noted above, this information also allows ICANN to determine whether an
6 entity applicant or individuals associated with an entity applicant have engaged in the
7 automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant
8 Guidebook, including convictions of certain crimes or disciplinary actions by
9 governments or regulatory bodies. Finally, this background information is important to
10 provide transparency to other applicants competing for the same gTLD.

11 19. Indeed, ICANN deemed transparency into an applicant’s background so
12 important when drafting the Applicant Guidebook that applicants submitting a new
13 gTLD application are required to undertake a continuing obligation to notify ICANN
14 of “any change in circumstances that would render any information provided in the
15 application false or misleading,” including “applicant-specific information such as
16 changes in financial position and changes in ownership or control of the applicant.”

17 20. As a further condition of participating in the .WEB Auction, ICANN
18 required Plaintiff and other applicants to agree to a broad covenant not to sue in order
19 to apply for the .WEB contention set (the “Purported Release”). The Purported Release
20 applies to all new gTLD applicants and states, in relevant part:

21 Applicant hereby releases ICANN . . . from any and all claims by applicant
22 that arise out of, are based upon, or are in any way related to, any action,
23 or failure to act, by ICANN . . . in connection with ICANN’s . . . review of
24 this application. . . . Applicant agrees not to challenge . . . and irrevocably
25 waives any right to sue or proceed in court.

26 21. The Purported Release is not subject to negotiation. If a potential applicant
27 does not agree to the release, it cannot be considered for participation in the .WEB
28

1 auction. The Purported Release is also entirely one-sided in that it allows ICANN to
2 absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the
3 Purported Release does not apply equally as between ICANN and the applicants
4 because it does not prevent ICANN from proceeding with litigation against an applicant.

5 22. In lieu of the rights ICANN claims are waived by the Purported Release,
6 ICANN purports to provide applicants with an independent review process, as a means
7 to challenge ICANN's actions with respect to a gTLD application. The IRP is
8 effectively an arbitration, operated by the International Centre for Dispute Resolution
9 of the American Arbitration Association, comprised of an independent panel of
10 arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

11 23. In accordance with the IRP, any entity materially affected by a decision or
12 action by the Board that the entity believes is inconsistent with the Articles of
13 Incorporation or Bylaws may submit a request for independent review of that decision
14 or action. In order to be materially affected, the person must suffer injury or harm that
15 is directly and causally connected to the Board's alleged violation of the Bylaws or the
16 Articles of Incorporation, and not as a result of third parties acting in line with the
17 Board's action. The IRP results are advisory to the ICANN Board.

18 **C. THE AUCTION PROCESS FOR NEW gTLDs**

19 24. A large number of new gTLDs made available by ICANN in 2012 received
20 multiple applications. In accordance with the Applicant Guidebook, where multiple
21 new gTLD applicants apply to obtain the rights to operate the same new gTLD, those
22 applicants are grouped into a "contention set." Applicants are encouraged in the
23 Applicant Guidebook to resolve a new gTLD contention set (i.e., reach a determination
24 as to which applicant will ultimately be assigned the right to operate the new gTLD at
25 issue). If no other resolution occurs among the contention set members, ICANN
26 ultimately facilitates and collects the proceeds of an auction process.

27 ///

1 25. Pursuant to the Applicant Guidebook, a contention set may be resolved
2 privately among the members of a contention set or facilitated by ICANN as an auction
3 of last resort. An ICANN auction of last resort will only be conducted when the
4 members of a contention cannot reach agreement privately. By refusing to agree to
5 resolve a contention set privately, one member of a contention set has the ability to force
6 the other members, all of whom may be willing to resolve the contention set privately,
7 to an ICANN auction of last resort.

8 26. For purposes of this matter, it is important to understand that the manner
9 in which a contention set is resolved—whether by private agreement or ICANN
10 auction—determines which entities will receive the proceeds from the winning bid.
11 When a contention set is resolved privately, ICANN receives no financial benefit; in an
12 ICANN auction, the entirety of the auction proceeds go to ICANN.

13 **D. PLAINTIFF’S APPLICATION FOR THE .WEB gTLD**

14 27. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB
15 contention set. Plaintiff also submitted with its application the sum of \$185,000—the
16 mandatory application fee.

17 28. In consideration of Plaintiff paying the \$185,000 application fee, ICANN
18 agreed to conduct the application process for the .WEB gTLD in a manner consistent
19 with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth
20 in both the Applicant Guidebook and the Auction Rules, and in conformity with the
21 laws of fair competition. Plaintiff would not have paid the \$185,000 mandatory
22 application fee absent the mutual consideration and promises set forth above.

23 29. Plaintiff’s application passed ICANN’s “Initial Evaluation” process on
24 July 19, 2013. It is an approved member of the .WEB contention set and qualified to
25 participate in the ICANN auction process for .WEB.

26 ///

27 ///

E. NDC’S APPLICATION FOR THE .WEB gTLD

30. On June 13, 2012, NDC submitted application number 1-1296-36138 for the .WEB contention set.

31. Among other things, the application required NDC to provide “the identification of directors, officers, partners, and major shareholders of that entity.” As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

32. By submitting its application for the .WEB gTLD and electing to participate in for the .WEB contention set, NDC expressly agreed to the terms and

1 conditions set forth in the Applicant Guidebook as well as Auction Rules, including
2 specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant
3 Guidebook.

4 33. The Applicant Guidebook requires an applicant to notify ICANN of any
5 changes to its application; including the applicant background screening information
6 required under Section 1.2.1, the failure to do so can result in the denial of an
7 application. For example, Section 1.2.7 imposes an ongoing duty to update “applicant-
8 specific information such as changes in financial position and changes in ownership or
9 control of the applicant.” Similarly, pursuant to Section 6.1, “[a]pplicant agrees to
10 notify ICANN in writing of any change in circumstances that would render any
11 information provided in the application false or misleading.”

12 34. In addition to a continuing obligation to provide complete, updated, and
13 accurate information related to its application, Section 6.10 of the Applicant Guidebook,
14 strictly prohibits an applicant from “resell[ing], assign[ing], or transfer[ring] any of
15 applicant’s rights or obligations in connection with the application.” An applicant that
16 violates this prohibition is subject to disqualification from the contention set.

17 35. ICANN failed to investigate credible evidence supporting a determination
18 that NDC violated each of these guidelines—evidence that it has held for over a month.
19 Despite the urging of multiple .WEB applicants and NDC’s written admissions of
20 potentially disqualifying changes to NDC’s application, ICANN continues to turn a
21 blind eye to the direct detriment of other .WEB applicants and to ICANN’s foundational
22 duties to administer the New gTLD Program with fairness and transparency.

23 **F. NDC’S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS**
24 **APPLICATION**

25 36. On or about June 1, 2016, Plaintiff learned that NDC was the only member
26 of the .WEB contention set unwilling to resolve the contention set in advance and in
27 lieu of the ICANN auction.

1 37. At the time, Plaintiff found the decision unusual given NDC's historical
2 willingness and enthusiasm to participate in the private resolution process. Overall,
3 NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were
4 resolved privately with NDC's agreement. The auction for the .WEB gTLD is the first
5 auction in which NDC has pushed for an ICANN auction of last resort.

6 38. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to
7 whether NDC might reconsider its recent decision to forego resolution of the .WEB
8 contention prior to ICANN's auction of last resort. In response, NDC stated that its
9 position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is
10 identified on NDC's .WEB application as Secondary Contact, Manager, and COO, is
11 "no longer involved with [NDC's] applications." NDC also made statements indicating
12 a potential change in the ownership of NDC, including an admission that the board of
13 NDC had changed to add "several others" and that he had to check with the "powers
14 that be," implying that he and his associate on the email were no longer in control. The
15 email communication containing these statements is set forth in pertinent part below:
16

17 **From:** Jose Ignacio Rasco <Contact Information Redacted>
18 **Subject:** Re: .web
19 **Date:** June 7, 2016 at 11:32:17 AM EDT
20 **To:** Jon Nevett <Contact Information Redacted>
21 **Cc:** Juan Diego Calle <Contact Information Redacted>

22 Jon,

23 [Redacted]

24 Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our
25 program and Juan sits on the board with me and several others.

26 [Redacted]

27 Best,
28 Jose

39. Noting that NDC's conduct and statements (a) appeared to directly
contradict information in NDC's .WEB application and (b) suggested that NDC had

1 either resold, assigned, or transferred its rights in the application in violation of its duties
2 under the Applicant Guidebook, Plaintiff diligently contacted ICANN staff in writing
3 with the discrepancy on or about June 22, 2016 to understand who it was competing
4 against for .WEB and improve transparency over the process for ICANN and the other
5 .WEB applicants.

6 40. After engaging in a series of discussions with ICANN staff, Plaintiff
7 decided to formally raise the issue with the ICANN Ombudsman on or about June 30,
8 2016; as of the filing of this Complaint, Plaintiff's most recent correspondence with the
9 ICANN Ombudsman, dated July 10, 2016, in which it provided further information
10 related to the statements made by NDC, remains unanswered.

11 41. At every opportunity, Plaintiff raised the need for a postponement of the
12 .WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the
13 contradictory representations made by NDC in relation to its pending application; (b)
14 address NDC's continued status as an auction participant; and (c) provide all the other
15 .WEB applicants the necessary transparency into who they were competing against. It
16 also discussed the matter with ICANN staff and the Ombudsman at ICANN's most
17 recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

18 42. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund
19 Technologies GmbH, each members of the .WEB contention set, sent correspondence
20 to ICANN stating their own concerns in proceeding with the auction of last resort
21 scheduled for July 27, 2016. The correspondence stated:

22
23 We support a postponement of the auction, to give ICANN and the other
24 applicants time to investigate whether there has been a change of
25 leadership and/or control of another applicant, NU DOT CO LLC. To do
26 otherwise would be unfair, as we do not have transparency into who leads
and controls that applicant as the auction approaches.

27 ///

1 **G. ICANN’S DECISION TO PROCEED WITH THE .WEB AUCTION**

2 43. On July 13, 2016, ICANN issued a statement denying the collective
3 request of multiple members of the .WEB contention set to postpone the July 27, 2016
4 auction to allow for a full and transparent investigation into apparent discrepancies in
5 the NDC application, as highlighted by NDC’s own statements. Without providing any
6 detail, ICANN simply stated as follows:

7
8 Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter,
9 and to date we have found no basis to initiate the application change request process or postpone the
10 auction.

11 44. Contrary to its obligations of accountability and transparency, ICANN’s
12 decision did not address the manner or scope of the claimed investigation nor did it
13 address whether a specific inquiry was made into (a) Mr. Bezsonoff’s current status, if
14 any, with NDC, (b) the identity of “several other[.]” new and unvetted members of
15 NDC’s board, or (c) any change in ownership—the very issues raised by NDC’s own
16 statements.

17 45. Plaintiff was unable to learn any further information regarding the extent
18 of the investigation undertaken by ICANN, other than it was limited to inquiries only
19 to NDC and no independent corroboration was sought or obtained.

20 46. Despite the clear credibility issues raised by NDC’s own contradictory
21 statements, ICANN conducted no further investigation. Indeed, ICANN informed
22 Plaintiff that it never even contacted Mr. Bezsonoff or interviewed the other individuals
23 identified in Sections 7 and 11 of NDC’s application prior to reaching its conclusion.

24 47. To be clear, the financial benefit to ICANN of resolving the .WEB
25 contention set by way of an ICANN auction is no small matter—ICANN’s stated net
26 proceeds from the 15 ICANN auctions conducted since June 2014 total \$101,357,812.
27 The most profitable gTLDs from those auctions commanded winning bids of
28 \$41,501,000 (.SHOP), \$25,001,000 (.APP), \$6,706,000 (.TECH), \$5,588,888

1 (.REALTY), \$5,100,175 (.SALON) and \$3,359,000 (.MLS). ICANN has not yet
2 determined what it will do with the enormous proceeds from these auctions.

3 **H. PLAINTIFF'S REQUEST FOR RECONSIDERATION**

4 48. ICANN's Bylaws provide an established accountability mechanism by
5 which an entity that believes it was materially affected by an action or inaction by
6 ICANN staff that contravened established policies and procedures may submit a request
7 for reconsideration or review of the conduct at issue. The review is conducted by
8 ICANN's Board Governance Committee.

9 49. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member
10 of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in
11 response to the actions and inactions of ICANN staff in connection with the decision
12 set forth in the ICANN's July 13, 2016 correspondence.

13 50. The Reconsideration Request sought reconsideration of (a) ICANN's
14 determination that it "found no basis to initiate the application change request process"
15 in response to the contradictory statements of NDC and (b) ICANN's improper denial
16 of the request made by multiple contention set members to postpone the .WEB auction
17 of last resort, which would have provided ICANN the time necessary to conduct a full
18 and transparent investigation into material discrepancies in NDC's application and its
19 eligibility as a contention set member.

20 51. The Reconsideration Request highlighted the following issues:

- 21 a. ICANN's failure to forego a full and transparent investigation into
22 the material representations made by NDC is a clear violation of the
23 principles and procedures set forth in the ICANN Articles of
24 Incorporation, Bylaws and the Applicant Guidebook.
- 25 b. ICANN is the party with the power and resources necessary to delay
26 the ICANN auction of last resort while the accuracy of NDC's
27 current application is evaluated utilizing the broad investigatory
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

controls contained in the Applicant Guidebook, to which all applicants, including NDC, agreed.

- c. Postponement of the .WEB auction of last resort provides the most efficient manner for resolving the current dispute for all parties by (i) sparing ICANN and the many aggrieved applicants the time and expense of legal action while (ii) avoiding the very real likelihood of a court-mandated unwinding of the ICANN auction of last resort should it proceed.
- d. ICANN’S July 13, 2016 decision raises serious concerns as to whether the scope of ICANN’s investigation was impacted by the inherent conflict of interest arising from a perceived financial benefit to ICANN if the Auction goes forward as scheduled.
- e. ICANN’s New gTLD Program Auctions guidelines state that a contention set would only proceed to auction where all active applications in the contention set have “**no pending ICANN Accountability Mechanisms,**” i.e., no pending Ombudsman complaints, Reconsideration Requests or IRPs.

52. On July 21, 2016, ICANN denied the Request for Reconsideration. In doing so, ICANN merely relied on statements from NDC that directly contradicted those contained in NDC’s earlier correspondence. Once again, despite the clear credibility issues raised by NDC’s own contradictory statements, ICANN failed and refused to contact Mr. Bezsonoff or interview the other individuals identified in Sections 7 and 11 of NDC’s application prior to reaching its conclusion.

53. On July 22, 2016, Plaintiff initiated ICANN’s Independent Review Process by filing ICANN’s Notice of Independent Review. The IRP remains pending.

///
///

FIRST CAUSE OF ACTION

(Breach of Contract against Defendant ICANN)

1
2
3 54. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above
4 as though fully set forth herein.

5 55. In June 2012, ICANN invited eligible parties to submit applications to
6 obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program.
7 In doing so, ICANN promised the potential applicants that it would (a) conduct the bid
8 process in a transparent manner, (b) ensure competition, and (c) abide by its own
9 Bylaws and the rules set forth in the Applicant Guidebook.

10 56. On or about June 13, 2012, Plaintiff submitted an application to ICANN
11 to obtain the rights to the .WEB gTLD. In consideration of ICANN’s promise to abide
12 by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in
13 the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff
14 paid ICANN a sum of \$185,0000—the mandatory application fee.

15 57. In consideration of Plaintiff paying the sum of \$185,000, ICANN promised
16 to conduct the application process for the .WEB gTLD in a manner consistent with its
17 own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both
18 the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair
19 competition.

20 58. Plaintiff would not have paid the \$185,000 mandatory application fee or
21 spent time and other resources absent the mutual consideration and promises set forth
22 above. Plaintiff performed all conditions, covenants, and promises on its part to be
23 performed in accordance with the agreed upon terms of participating in the New gTLD
24 Program, except those obligations, if any, that it has been prevented or excused from
25 performing as a result of the misconduct set forth in this Complaint.

26 59. ICANN has materially breached its obligations to Plaintiff, as set forth in
27 ICANN’s Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a)
28

1 failing to thoroughly investigate the issues raised by NDC’s own statements and (b)
2 refusing to postpone the .WEB auction of last resort to allow for a full and transparent
3 investigation into the apparent discrepancies in NDC’s .WEB application.

4 60. Specifically, ICANN’s acts and omission violated, among other things:

5 a. Article 1, section 2.8 and Article III, Section 1 of ICANN’s Bylaws,
6 which require ICANN to “[m]ak[e] decisions by applying
7 documented policies neutrally and objectively, with integrity and
8 fairness” and “operate to the maximum extent feasible in an open
9 and transparent manner and consistent with procedures designed to
10 ensure fairness.” ICANN obligates each applicant who seeks to
11 participate in the New gTLD auction process to affirm that the
12 statements and representations contained in the application are true
13 and accurate; applicants also undertake a continuing obligation to
14 update their application when changes in circumstance affect an
15 application’s accuracy. By failing to engage in a thorough, open,
16 and transparent investigation of the contradictory statements made
17 by NDC in relation to its application, as well as an apparent change
18 of control with potential antitrust implications, ICANN plainly—
19 and inexplicably—failed to reach its decisions by “applying
20 documented policies neutrally and objectively, with integrity and
21 fairness.”

22 b. Article 1, section 2.9 of ICANN’s Bylaws, which requires ICANN
23 to “[act] with a speed that is responsive to the needs of the Internet
24 while, as part of the decision-making process, obtaining informed
25 input from those entities most affected.” In undertaking only a
26 cursory examination of the contradictory statements made by NDC
27 and the apparent change in NDC’s rights to its application, ICANN
28

1 failed to balance ICANN's interest in a swift resolution of the
2 concerns raised by the members of the .WEB contention set with its
3 obligation to obtain sufficient assurances and information from the
4 individuals and entities at the center of the statements made by
5 NDC; at the very least, ICANN should have conducted interviews
6 with Mr. Bezsonoff and all other individuals identified in Section 11
7 of NDC's application prior to reaching its conclusion.

8 c. Article 1, section 2.10 of ICANN's Bylaws, which requires ICANN
9 to "[r]emain[] accountable to the Internet community through
10 mechanisms that enhance ICANN's effectiveness." By failing to
11 make use of the processes established in Sections 6.8 and 6.11 to the
12 Applicant Guidebook in investigating an admitted failure by NDC
13 to abide by its continuing obligation to update its application,
14 ICANN staff disregarded the very accountability mechanisms put in
15 place to serve and protect the .WEB contention set, the Internet
16 community, and the public at large. This error was compounded by
17 the cursory dismissal of the concerns raised by multiple members of
18 the .WEB contention set relating to the accuracy of the
19 representations made in NDC's application. By failing to apprise
20 the members of the contention set as to the manner and scope of the
21 investigation conducted by ICANN staff, ICANN failed to ensure
22 that it would hold itself accountable to any gTLD applicant, let alone
23 the Internet community and the public.

24 d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN
25 shall not apply its standards, policies, procedures, or practices
26 inequitably or single out any particular party for disparate treatment
27 unless justified by substantial and reasonable cause, such as the
28

1 promotion of effective competition.” There can be no questioning
2 the fact that the Staff Action resulted in disparate treatment in favor
3 of NDC. On one hand, there are clear statements from NDC that
4 representations made in its application are inaccurate and there is
5 ample evidence that NDC has either resold, assigned, or transferred
6 all or some of its rights to its .WEB application. On the other hand,
7 when pressed by multiple members of the contention set to fully
8 investigate the matter, ICANN provided only a conclusory
9 statement that raises more questions than it resolves. To the extent
10 it had reason to engage in such disparate treatment of the members
11 of the .WEB contention set, ICANN failed to provide such a reason
12 in reaching the determinations at issue in this Request.

13 61. ICANN also promised that a contention set would only proceed to auction
14 where all active applications in the contention set have “**no pending ICANN**
15 **Accountability Mechanisms.**” ICANN breached this promise by refusing to postpone
16 the .WEB auction of last resort while Plaintiff’s Reconsideration Request remains
17 pending and its Ombudsman complaint remains unresolved. ICANN further breached
18 this promise by moving forward with the .WEB auction of last resort while Plaintiff’s
19 IRP, initiated on July 22, 2016, remains pending.

20 62. On information and belief, Plaintiff alleges that the breaches set forth
21 above resulted from a pre-textual “investigation” into the admissions made by NDC and
22 ICANN’s issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
23 alleges that ICANN intentionally failed to abide by its contractual obligations to
24 conduct a full and open investigation into NDC’s admission because it was in ICANN’s
25 interest that the .WEB contention set be resolved by way of an ICANN auction. As
26 such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful
27 acts described above.

1 63. As a direct and proximate result of ICANN's breaches, Plaintiff has
2 suffered, and will continue to suffer, without limitation, losses of revenue from third
3 parties, profits, consequential costs and expenses, market share, reputation, and
4 goodwill, in an amount to be determined at trial but not less than ten million dollars
5 (\$10,000,000) plus interest.

6 **SECOND CAUSE OF ACTION**

7 **(Breach of the Covenant of Good Faith and Fair Dealing against Defendant**
8 **ICANN)**

9 64. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above
10 as though fully set forth herein.

11 65. An implied covenant of good faith and fair dealing exists between Plaintiff
12 and ICANN as a result of the contractual relationship entered into as part of the .WEB
13 gTLD application process.

14 66. ICANN breached the covenant of good faith and fair dealing when it acted
15 in a way that deprived Plaintiff of the benefits of the agreement as set forth in the
16 Applicant Guidebook, namely that the administration of the bid process for the .WEB
17 gTLD would be founded on the principles of fairness and transparency.

18 67. ICANN breached the covenant of good faith and fair dealing when it:

- 19 a. Failed to conduct due diligence and an adequate investigation into
20 apparent violations of the Applicant Guidebook raised by NDC's
21 admissions;
- 22 b. Failed to conduct interviews with Mr. Bezsonoff and all other
23 individuals identified in Sections 7 and 11 of NDC's application as
24 part of an investigation into apparent violations of the Applicant
25 Guidebook raised by NDC's admissions;
- 26 c. Failed to provide a necessary level of transparency into the identity
27 and leadership of a competing applicant; and
28

1 d. Refused to postpone the ICANN auction of last resort to allow for a
2 full and transparent investigation into the apparent violations of the
3 Applicant Guidebook raised by NDC’s admissions.

4 68. On information and belief, Plaintiff alleges that the breaches set forth
5 above resulted from a pre-textual “investigation” into the admissions made by NDC and
6 ICANN’s issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
7 alleges that ICANN intentionally failed to abide by its contractual obligations to
8 conduct a full and open investigation into NDC’s admission because it was in ICANN’s
9 interest that the .WEB contention set be resolved by way of an ICANN auction. As
10 such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful
11 acts described above.

12 69. As a direct and proximate result of ICANN’s breaches as set forth above,
13 Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue
14 from third parties, profits, consequential costs and expenses, market share, reputation,
15 and good will.

16 **THIRD CAUSE OF ACTION**

17 **(Negligence against Defendant ICANN)**

18 70. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above
19 as though fully set forth herein.

20 71. ICANN owed Plaintiff a duty to act with proper care and diligence in
21 administering the .WEB auction process in accordance with its own Bylaws, Articles
22 of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

23 72. ICANN breached the duty owed Plaintiff by, among other things:

24 a. Failing to conduct due diligence and an adequate investigation into
25 apparent violations of the Applicant Guidebook raised by NDC’s
26 admissions;

- b. Failing to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC’s application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC’s admissions;
- c. Refusing to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC’s admissions; and
- d. Failing to provide a rationale for the decision set forth in the July 13, 2016 correspondence.

73. As a direct and proximate result of ICANN’s breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

FOURTH CAUSE OF ACTION

(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against Defendant ICANN)

74. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above as though fully set forth herein.

75. The California Unfair Competition Law (“UCL”) protects both consumers and competitors by prohibiting “unfair competition,” which is defined, in the disjunctive, by Business and Professions Code section 17200 as including “any unlawful, unfair or fraudulent business act or practice” as well as “unfair, deceptive, untrue or misleading advertising.”

76. Plaintiff has standing to pursue this claim under Business and Professions Code section 17204 because Plaintiff has suffered injury in fact and has lost money or property as a result of ICANN’s actions as set forth above. The losses include, but are not limited to, expenses incurred by Plaintiff in exhausting every available formal and

1 informal avenue of recourse with ICANN prior to the filing of the above-captioned
2 action, including legal fees related to the preparation and submission of the
3 Reconsideration Request. Losses also include the \$185,000 application fee paid to
4 ICANN to participate as an application in the .WEB contention set.

5 77. The following acts and omissions of ICANN, among others, were unlawful
6 under the UCL:

- 7 a. ICANN’s imposition of the unenforceable contract terms contained
8 in the Purported Release, in violation of California Civil Code
9 section 1668, which declares violative of public policy those
10 contracts that “have for their object, directly or indirectly, to exempt
11 anyone from the responsibility for his own fraud, or willful injury to
12 the person or property of another, or violation of law, whether
13 willful or negligent....”
- 14 b. ICANN’s imposition of the unenforceable contract terms contained
15 in the Purported Release, in violation of California Civil Code §
16 1770(a)(19), which defines as unlawful, the “[i]nser[tion] of an
17 unconscionable provision in [a] contract.”

18 78. The following acts and omissions of ICANN, among others, were unfair
19 under the UCL:

- 20 a. Plaintiff hereby incorporates by this reference the allegations of
21 Paragraph 77 and its subparts as stated herein; each act therein
22 alleged is also an unfair act or practice under the UCL;
- 23 b. ICANN’s decision to conduct a cursory investigation into the
24 apparent violations of the Applicant Guidebook raised by NDC’s
25 admissions without regard for rights of the other .WEB contention
26 set members;

27 ///

- 1 c. ICANN’s decision to forego a postponement of the ICANN auction
- 2 of last resort scheduled for July 27, 2016 without conducting an
- 3 open and transparent investigation into the apparent violations of the
- 4 Applicant Guidebook raised by NDC’s admissions; and
- 5 d. ICANN’s decision to allow NDC to continue to participate as a
- 6 .WEB contention set member despite NDC’s own admission of
- 7 inaccuracies contained in its application, in violation of the
- 8 guidelines contained in the Applicant Guidebook.

9 79. The following acts and omissions of ICANN, among others, were
10 fraudulent under the UCL in that they were likely to deceive, and in fact did deceive,
11 members of the public:

- 12 a. Plaintiff hereby incorporates by this reference the allegations of
- 13 Paragraphs 77 and its subparts as if restated herein; each is also a
- 14 fraudulent act or practice under the UCL;
- 15 b. ICANN’s false representation that it would make all decisions in
- 16 administering the .WEB auction process “by applying documented
- 17 policies neutrally and objectively, with integrity and fairness”;
- 18 c. ICANN’s false representation that in administering the .WEB
- 19 auction process, it would “[act] with a speed that is responsive to the
- 20 needs of the Internet while, as part of the decision-making process,
- 21 obtaining informed input from those entities most affected”;
- 22 d. ICANN’s false representation that in administering the .WEB
- 23 auction process, it would “[r]emain[] accountable to the Internet
- 24 community through mechanisms that enhance ICANN’s
- 25 effectiveness”;
- 26 e. ICANN’s false representation that in administering the .WEB
- 27 auction process, it would “apply its standards, policies, procedures,
- 28

1 or practices inequitably or single out any particular party for
2 disparate treatment”;

3 f. ICANN’s false representation that all applicants would be subject to
4 the same agreement, rules, and procedures;

5 g. ICANN’s false representation that it would require applicants to
6 update their applications with “any change in circumstances that
7 would render any information provided in the application false or
8 misleading,” including “applicant-specific information such as
9 changes in financial position and changes in ownership or control of
10 the applicant”; and

11 h. ICANN’s false representation that a contention set would only
12 proceed to auction where all active applications in the contention set
13 have “**no pending ICANN Accountability Mechanisms.**”

14 80. On information and belief, the conduct identified in Paragraphs 77-79 and
15 their subparts resulted from the intentional conduct of ICANN.

16 81. With specific reference to the conduct identified in Paragraphs 78-79 and
17 their subparts conduct alleged above, Plaintiff alleges that ICANN’s “investigation”
18 into the admissions made by NDC and ICANN’s subsequent issuance of its July 13,
19 2016 decision were pre-textual in nature, the goal of which was to ensure ICANN
20 secured a windfall from the .WEB contention set being resolved by way of an ICANN
21 auction of last resort. Specifically, Plaintiff alleges that ICANN intentionally failed to
22 abide by its contractual obligations to conduct a full and open investigation into NDC’s
23 admission because it was in ICANN’s interest that the .WEB contention set be resolved
24 by way of an ICANN auction. As such, Plaintiff alleges that it was in ICANN’s interest
25 to willfully and intentionally commit the wrongful acts described above.

26 82. Pursuant to Business and Professions Code section 17203 and the equitable
27 powers of the Court, Plaintiff seeks an order (a) enjoining ICANN from proceeding
28

1 with the ICANN auction of last resort currently scheduled for July 27, 2016 until the
2 claims presented by way of the above-captioned action are resolved and (b) enjoining
3 ICANN from engaging in the unlawful, unfair and fraudulent business acts and practices
4 described above. Plaintiff also seeks an order requiring ICANN to comply with its own
5 Bylaws, Articles of Incorporation, and the rules and procedures set forth in the
6 Applicant Guidebook, in the continued administration of the .WEB contention set
7 process and to take such corrective actions and adopt such remedial measures as are
8 necessary to prevent the further occurrence of the acts or practices alleged herein.

9 83. Plaintiff also seeks an order requiring restitution of any and all monies
10 obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and
11 fraudulent described above. Plaintiff's request includes, but is not limited to, the
12 restitution of any and all fees paid by or monies received from Plaintiff in relation to
13 the .WEB contention set process.

14 84. Preventing the unlawful business practices engaged in by ICANN will
15 ensure a significant benefit to the other .WEB contention set members as well as the
16 public at large. Moreover, the financial burden of pursuing private enforcement
17 substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice,
18 Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant
19 to Civil Code section 1021.5 in an amount subject to proof.

20 **FIFTH CAUSE OF ACTION**

21 **(Declaratory Relief—Against Defendant ICANN)**

22 85. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 53 above
23 as though fully set forth herein.

24 86. An actual and justiciable controversy has arisen, and now exists, between
25 Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the
26 Purported Release contained in the Applicant Guidebook.

1 87. As a condition of participating in the .WEB contention set process, ICANN
2 required Plaintiff and other applicants to sign the Applicant Guidebook, which
3 contained a covenant not to sue in order to apply for the .WEB contention set. The
4 Purported Release applies to all New gTLD applicants and states, in relevant part:

5 Applicant hereby releases ICANN . . . from any and all claims by applicant
6 that arise out of, are based upon, or are in any way related to, any action,
7 or failure to act, by ICANN . . . in connection with ICANN's . . . review of
8 this application. . . . Applicant agrees not to challenge . . . and irrevocably
9 waives any right to sue or proceed in court.

10 32. The Purported Release is not subject to negotiation: If a potential applicant
11 does not agree to the release, it cannot be considered for participation in the .WEB
12 contention set process. The Purported Release is also entirely unilateral in that it allows
13 ICANN to absolve itself of wrongdoing while affording no remedy to applicants.
14 Moreover, the Purported Release does not apply equally as between ICANN and the
15 applicants because it does not prevent ICANN from proceeding with litigation against
16 an applicant.

17 33. Plaintiff seeks a declaration of its rights regarding the enforceability of the
18 Purported Release in light of California Civil Code Section 1668, which prohibits the
19 type of broad exculpatory clauses contained in the Purported Release: "All contracts
20 which have for their object, directly or indirectly, to exempt anyone from responsibility
21 for his own fraud, or willful injury to the person or property or another, or violation of
22 law, whether willful or negligent, are against the policy of the law."

23 34. Plaintiff maintains that, on its face, the Release is "against the policy of the
24 law" because it exempts ICANN from any and all claims arising out of the application
25 process, even those arising from fraudulent or willful conduct.

26 35. As such, an actual controversy has arisen and now exists between Plaintiff
27 and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial
28

1 determination and declaration that the Purported Release is unenforceable,
2 unconscionable, and/or void as a matter of public policy. Such a declaration is
3 necessary and appropriate at this time so that Plaintiff may ascertain its rights with
4 respect to the enforceability of the Purported Release.

5
6 **WHEREFORE**, Plaintiff RUBY GLEN, LLC prays for relief as follows:

- 7 1. For compensatory damages according to proof at the time trial;
- 8 2. For general damages according to proof;
- 9 3. For restitutionary damages according to proof;
- 10 4. An injunction requiring ICANN to refrain from conducting the auction of
11 last resort for the .WEB gTLD pending a final decision on the merits of
12 this matter;
- 13 5. An injunction requiring ICANN to refrain from assigning the rights to the
14 .WEB gTLD pending a final decision in the merits of this matter;
- 15 6. Attorneys' fees and costs to the extent permitted by law; and
- 16 7. For such other relief as the Court deems just and proper against all
17 Defendants.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMAND FOR JURY TRIAL

Plaintiff hereby requests a jury trial on the following causes of action asserted in the Complaint:

1. First Cause of Action for Breach of Contract;
2. Second Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing;
3. Third Cause of Action for Negligence; and
4. Fourth Cause of Action for Unfair Competition in Violation of Business and Professions Code section 17200

Dated: July 22, 2016

By: /s/ Paula Zecchini
 Paula L. Zecchini (SBN 238731)
 Aaron M. McKown (SBN 208781)
pzecchini@cozen.com
amckown@cozen.com
 COZEN O'CONNOR
 999 Third Avenue, Suite 1900
 Seattle, WA 98104
 Telephone: 206.340.1000
 Toll Free Phone: 1.800.423.1950
 Facsimile: 206.621.8783
Attorneys for Ruby Glen, LLC