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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND DOES 1-10

Defendant.

Case No.: 2:16-cv-05505-PA-AS

PLAINTIFF RUBY GLEN, LLC'S OPPOSITION TO DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

Hearing Date: November 28, 2016
Hearing Time: 1:30 p.m.
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I. INTRODUCTION

Plaintiff Ruby Glen, LLC's ("Plaintiff") First Amended Complaint ("FAC") seeks to hold Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") accountable for its failure and/or refusal to investigate Nu Dot Co, LLC's ("NDC") disqualifying sale of its .WEB application to VeriSign, Inc. ("VeriSign")—the largest registry operator in the world and a party with whom ICANN has a longstanding and ongoing business relationship—in the weeks leading up to the .WEB auction. Plaintiff's continued resort to the legal process is necessary because despite VeriSign's shocking public announcement of facts that obligate ICANN to unwind the .WEB auction, ICANN has shown no interest in conducting its own investigation or otherwise taking action against NDC or VeriSign. Indeed, ICANN appears content to facilitate VeriSign's acquisition of .WEB, a move that seems aimed at increasing VeriSign's market dominance of the Internet domain name system.

In an effort to avoid liability for its failings, ICANN's Motion to Dismiss relies on a series of flawed premises, starting with its erroneous assertion that the Court's prior ruling on Plaintiff's July application for a temporary restraining order ("TRO") bars Plaintiff's claims. ICANN, however, fails to appreciate that the allegations in the FAC reflect the fact that much has changed since the time of Plaintiff's TRO. ICANN's attempt to summarily dispose of the FAC with repeated references to this Court's order on Plaintiff's TRO, fails upon even a cursory review of the FAC's allegations, which, at this stage, *must be accepted as true* and, at a minimum, entitle Plaintiff to discovery.

ICANN's Motion also fails to overcome the FAC's extensive factual allegations when evaluated on a claim-by-claim basis. As to Plaintiff's contract-based claims, the FAC thoroughly details ICANN's repudiation of its contractual obligations to Plaintiff, as set forth in its Articles of Incorporation, Bylaws, Applicant Guidebook, and Auction Rules, in order to benefit itself and VeriSign, damaging Plaintiff, the other .WEB applicants, and the Internet community as a whole. The FAC is replete with allegations

of the manner in which ICANN breached its express contractual obligations which, although irrelevant to the issue of whether Plaintiff alleged a distinct breach of the implied covenant by ICANN, are sufficient to overcome ICANN's illogical challenge to that claim.

The FAC similarly supports Plaintiff's tort-based claims. ICANN's efforts to overcome Plaintiff's properly-pled negligence claim find no support in prevailing law. Nor can ICANN avoid Plaintiff's claim under California's Unfair Competition Law ("UCL") by repeatedly mischaracterizing the facts alleged in the FAC, each of which fits within well-established precedent demonstrating that (a) Plaintiff "lost money or property" sufficient to confer UCL standing and (b) ICANN's alleged conduct is "unfair," "unlawful," and "fraudulent" in the context of the UCL.

Although ICANN argues that Plaintiff's declaratory relief claim must be dismissed due to the existence of a Covenant Not to Sue (the "Purported Release"), ICANN fails to advise the Court of a recent decision from this District that opines that the very release at issue in this case may be unenforceable. In so doing, the court found "serious questions regarding the enforceability of [ICANN's Purported] Release." These serious questions arise not only from a plain reading of the Purported Release, which demonstrates that it is *facially invalid* as contrary to public policy, but also from the fact that it is entirely one-sided and was subject to negotiation. ICANN cannot avoid the fact that, as alleged, Plaintiff's declaratory relief claim is more than sufficient to move this litigation beyond the pleadings stage.

Ultimately, ICANN asks this Court to deny Plaintiff its day in Court by finding that ICANN is not bound by its own contract, on the one hand, and should be shielded from tort liability on the other. Neither established case law nor ICANN's parade of unsupported arguments support such an outcome. As such, Plaintiff respectfully requests the Court deny ICANN's motion to dismiss and allow this case to proceed to discovery.

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II. ICANN IMPROPERLY ASKS THIS COURT TO APPLY AN INAPPLICABLE LEGAL STANDARD TO ITS MOTION TO DISMISS

ICANN does not dispute the fact that in evaluating the FAC for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)"), Plaintiff's allegations "must be construed in the light most favorable to the plaintiff [and t]he court must accept as true all material allegations in the complaint, as well as any reasonable inferences to be drawn from them." *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citation omitted). Yet despite acknowledging the correct applicable legal standard, ICANN repeatedly attempts to appropriate the TRO standard for its Motion by relying on the Court's earlier denial of Plaintiff's Ex Parte Application for a TRO. *See* Mot. 1:1-5, 1:21-23, 11:4-21. ICANN's effort fails.

As ICANN is aware, a party applying for a TRO must show that it will, among other things, "probably prevail on the merits." *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). In contrast, to survive a Rule 12(b)(6) motion to dismiss, a complaint need only have "facial plausibility," meaning that it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 556 (2007).

ICANN offers this Court no reason to disregard the dictates of *Twombly* and *Iqbal* in evaluating the FAC. Nor can it, as ICANN's improper attempt to bootstrap this Court's prior denial of Plaintiff's request for injunctive relief into a dismissal of the FAC suffers a deeper flaw—it ignores critical new facts alleged in the FAC that emerged in the days following Plaintiff's filing of the TRO. As ICANN is aware, within days after the .WEB auction, VeriSign—the market dominant operator in the world and a party with whom ICANN has a longstanding and ongoing business relationship—confirmed that it had effected a change in NDC's ownership or control relative to the

auction when it publicly announced that it had funded NDC's bid for .WEB, and would be acquiring the .WEB rights for itself.[1] *See* FAC ¶¶ 57-62. This fact renders ICANN's claim that the Court "already found" that ICANN "conduct[ed] a thorough investigation," disingenuous in light of the substantial misrepresentations in the investigatory "evidence" that ICANN placed before this Court in opposing the TRO. Mot. 11:3-10. Indeed, ICANN's claim is all the more misleading in light of the fact that—contrary to ICANN's assertions—Plaintiff specifically advised ICANN, weeks before the .WEB auction, of rampant speculation within the industry that VeriSign had purchased the rights to NDC's .WEB application.[2] *See* RJN, Ex. B at 1 n.1.

III. PLAINTIFF ADEQUATELY PLEADED EACH CAUSE OF ACTION ASSERTED IN THE FAC

As set forth more fully below, the extensive allegations set forth in the FAC adequately plead each of Plaintiff's five causes of action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) negligence, (4) violation of Section 17200, and (5) declaratory relief.

A. The FAC Sufficiently Alleges Breach of Contract

"Under California law, to state a claim for breach of contract a plaintiff must plead 'the contract, plaintiff's performance (or excuse for nonperformance), defendant's breach, and damage therefrom.'" *Luxul Technology, Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156, 1175 (N.D. Cal. 2015) (quoting *Gautier v. Gen. Tel. Co.*, 234 Cal. App. 2d 302 (1965)). There is no dispute that Plaintiff performed all of its

[1] VeriSign's subterfuge in circumventing ICANN's application process, in combination with its market dominance, spurred Senators Ted Cruz, Michael Lee, and Sean Duffy to "urge the DOJ to conduct a thorough competition review" of the relationship between VeriSign and ICANN. RJN, Ex. A at 2; *see also id.* at 4 ("A competition review is also timely and necessary in light of Verisign's recent efforts to increase its presence in the global domain marketplace. . . . Verisign's bid to secure the .web registry may have been undertaken to protect its position in the .com market from additional competition").

[2] Although not specifically pled as an allegation in the FAC, this fact is not subject to dispute as set forth in Plaintiff's concurrently-filed Request for Judicial Notice. Plaintiff would willingly add this factual allegation to any amended pleading deemed necessary by the Court.

obligations pursuant to the parties' agreement. FAC ¶¶ 65-67. Rather, ICANN takes issue with (a) Plaintiff's allegations that the Bylaws are part of the parties' contract and (b) Plaintiff's alleged failure to plead facts demonstrating a breach of the parties' agreement. Mot. 7:14-15, 8:14-11:2. ICANN's arguments, however, fail to provide this Court with a basis to dismiss Plaintiff's breach of contract claim.

1. ICANN's Articles of Incorporation, Bylaws, Applicant Guidebook, and Auction Rules Make Up the Parties' Contract

ICANN does not dispute that its Articles of Incorporation, Applicant Guidebook, and Auction Rules form a part of the parties' contract. *See* Mot. 7:14-15, 8:14-9:12 (arguing for the exclusion of the Bylaws only). ICANN's only argument regarding *which* documents make up the parties' contract is that the "Bylaws do not comprise a contract between ICANN and Plaintiff." Mot. 7:14-15. ICANN's effort to exclude its Bylaws from the parties' contract, however, fails because ICANN has previously admitted, in a dispute with another gTLD applicant, that the Bylaws do, in fact, form a part of its contract with gTLD applicants. RJN, Ex. C ¶ 30 ("According to ICANN, panelists derived their powers . . . from . . . the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws").[3]

A brief review of ICANN's Motion, as well as its accountability mechanisms supports this conclusion. *See* FAC, Ex. B Article IV; Mot. 3:16-22 ("an aggrieved applicant can ask independent panelists to evaluate whether an action or inaction of ICANN's Board was inconsistent with ICANN's Articles and Bylaws."). As recognized by ICANN, the Bylaws purported to offer the means by which (and manner in which) Plaintiff and other applicants could seek review of decisions made by ICANN in relation to the .WEB Auction. Indeed, the accountability mechanisms to which ICANN obligated itself specifically call for ICANN's actions to be evaluated in terms

[3] The Court can take judicial notice of this document and consider it in ruling on the Motion to Dismiss, as it falls within the category of "matters of public record, such as pleadings in another action and records and reports of administrative bodies." *Von Koenig v. Snapple Bev. Corp.*, 713 F. Supp. 2d 1066, 1073 (E.D. Cal. 2010.)

of its compliance with the Bylaws. *Id.* at Article IV § 1 ("ICANN should be accountable . . . for operating in a manner consistent with these Bylaws."). Despite this fact, ICANN appears to take the position that the Bylaws are part of the parties' contract only when reviewed through ICANN's internal mechanism. That position is not only untenable, it is unsupported by the parties' contractual agreements—agreements that must be construed against ICANN, as their drafter. *See Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (1997) ("A well-settled maxim states the general rule that ambiguities in a form contract are resolved against the drafter."). ICANN agreed that the Bylaws are a part of the parties' contractual relationship, and it makes no difference, for purposes of whether ICANN agreed to the contract, whether a court of law or an independent panel reviews ICANN's conformance with it.

Nonetheless, ICANN disingenuously argues that "this Court has considered this precise issue," and directs this Court to Judge Pregerson's decision in *Image Online Design, Inc. v. Internet Corporation for Assigned Names and Numbers*, No. CV 12-08968-DDP (JCx), 2013 U.S. Dist. LEXIS 16896 (C.D. Cal. Feb. 7, 2013). Mot. 8:20-26. The *Image Online* decision, however, merely holds that "statements . . . made after [a] contract was entered into," constitute "extraneous material" that is not a part of the parties' contract. *Image Online*, at *9-10 ("IOD does not specifically claim that the statements in the Reconsideration Recommendation or made by the Chairman, discussed above, were part of the Agreement. […] IOD provides no reason why statements beyond the Agreement, made after the contract was entered into, should be part of the contract.").

In contrast to the facts offered in *Image Online*, the FAC alleges that ICANN breached specific provisions of the Bylaws, Applicant Guidebook, and Auction Rules—contractual terms to which the parties agreed. *See* FAC, Ex. B Article I, § 2.8-2.10, Article II, § 3, Article III, § 1, Auction Rules ¶ 8. This case is not analogous to *Image Online*, because Plaintiff relies on specific contractual provisions, not outside documents, to support its breach of contact claim.

In a further effort to avoid litigating Plaintiff's breach of contract claim, ICANN argues that its status as a non-profit insulates it from Plaintiff's effort to enforce ICANN's contractual promise to abide by its Bylaws. Mot. 9:6-12 (relying on Cal. Corp. Code § 5142). ICANN's position is not only misguided, it raises the specter that ICANN fraudulently induced Plaintiff (and others) to contract with ICANN in the first place. Regardless, contrary to ICANN's position, Plaintiff is not a random member of the general public seeking to hold ICANN liable for violating its foundational documents. *See Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161-62 (1987). Rather, Plaintiff is a party with whom ICANN entered into a contractual relationship, pursuant to which Plaintiff paid ICANN $185,000 and ICANN agreed to abide by its Bylaws. Plaintiff has standing to enforce ICANN's contractual promises to Plaintiff, regardless of ICANN's status as a non-profit.

2. The FAC Alleges the Specific Contractual Provisions that ICANN Breached

The FAC extensively details how ICANN breached its obligations to Plaintiff by (a) failing to investigate (or turning a blind eye to) NDC's change in ownership and its agreement with VeriSign and (b) for refusing to postpone the .WEB auction to allow for a full and transparent investigation of NDC.[4] *See, e.g.*, FAC ¶ 68. Although ICANN offers a series of bald assertions to counter each breach, *see* Mot. 9:13-11:2, the FAC's well-pleaded allegations demonstrate the paucity of ICANN's arguments.

Plaintiff alleges that ICANN violated Article I, Section 2.8 and Article III, Section 1 of its Bylaws, which require it to "apply documented policies neutrally and objectively," and to operate "in an open and transparent manner." FAC ¶ 69(a). The Applicant Guidebook requires that applicants affirm the veracity of their statements to ICANN, and update their applications based on new or changed information. ICANN

[4] Plaintiff could amend its pleading to allege a further breach as a result of ICANN's refusal to cancel the auction results and disqualify NDC now that VeriSign has brazenly admitted to purchasing the rights to NDC's application to participate in the .WEB auction. *See* FAC, Ex. C § 6.10.

overlooks its disparately positive treatment of NDC and VeriSign in suggesting that the FAC does not allege that ICANN failed to act "neutrally and objectively." Mot. 9:13-23. As clearly alleged in the FAC, ICANN failed to thoroughly, openly, and transparently investigate NDC's agreement with VeriSign, despite the requests of multiple auction participants and having done so in similar contexts in the past. FAC ¶¶ 42-62; 69. ICANN's disparate treatment of NDC and VeriSign is sufficient to plausibly state a claim that ICANN breached its obligation to Plaintiff and the other auction participants under the Bylaws.

ICANN further breached Article I, Section 2.9 of its Bylaws because, among other things, it failed to "act with a speed that is responsive to the needs of the Internet while . . . obtaining informed input from the entities most affected." FAC ¶¶ 44-47, 54, 69(b). ICANN suggests that these allegations supporting this breach are insufficient because Plaintiff should have identified a contractual requirement that ICANN "interview[] . . . all individuals mentioned in NDC's application," or alleged "facts suggesting that ICANN was or should have been aware of the . . . agreement between NDC and VeriSign." Mot. 10:4-10. Plaintiff had no obligation to do the former and did in fact do the latter when, *weeks before the .WEB Auction took place*, Plaintiff's Reconsideration Request explicitly directed ICANN to industry suspicions that VeriSign had purchased NDC's application. RJN, Ex. B at 1 n.1 ("Applicants have learned of speculation within the industry that NDC has sold its application to . . . VeriSign, Inc.").[5]

Plaintiff also alleges that ICANN separately breached Article I, Section 2.10 of its Bylaws when it disregarded its own accountability mechanisms by failing to use its investigatory powers to ensure NDC's compliance with the Applicant Guidebook. FAC ¶ 69(c). ICANN's only argument on this issue is that it was not "require[d] . . . to utilize

[5] ICANN's position is all the more remarkable in light of the fact that the potential improprieties in ICANN's relationship with VeriSign led three U.S. Senators to urge DOJ to exercise additional oversight over it. *See* RJN, Ex. A at 3 ("In light of ICANN and Verisign's history . . . the public would be well served by continuing and active oversight.").

those procedures." Mot. 10:11-18. In other words, ICANN claims that it was not required to do anything at all to verify applicant eligibility despite the fact that each applicant paid ICANN a $185,000 application fee in consideration of ICANN's promise that it would, among other things, use the powers granted it to ensure the integrity of the auction process. FAC ¶¶ 29, 33-36. ICANN's refusal to fulfill its obligations, if permitted, would render the agreement illusory. *See Flores v. Am. Seafoods Co.*, 335 F.3d 904, 913 (9th Cir. 2003).

Plaintiff also alleges that ICANN breached Article II, Section 3 of its Bylaws, because it applied its standards inequitably, and singled out one party (NDC) for disparate treatment. FAC ¶ 69(d). On this issue, ICANN argues that (a) "the FAC admits that ICANN provided . . . a detailed response to Plaintiff's Reconsideration Request," and (b) Plaintiff failed to allege any disparate treatment. Mot. 10:9-11:2. ICANN is mistaken on both counts.

First, the FAC simply does not admit that ICANN's response to the Reconsideration Request was "detailed." FAC ¶ 54. The Court should not countenance ICANN's blatant mischaracterization of Plaintiff's clear position on ICANN's conduct regarding the .WEB auction. Second, Plaintiff repeatedly alleges that ICANN's action disparately favored NDC (and, by extension, VeriSign). The auction participants brought substantive evidence to ICANN of a change in NDC's control, or a sale, transfer, or assignment of NDC's rights in its application, including explicit statements from NDC; ICANN responded to these members with conclusory statements that failed to explain its inaction. FAC ¶¶ 40-54. Indeed, given the close working relationship between ICANN and VeriSign, and ICANN's subsequent failure to cancel the results despite VeriSign's brazen public admissions, it strains credulity to suggest that ICANN had no knowledge of VeriSign's improper involvement in the .WEB auction. FAC ¶¶ 57-61. Regardless, Plaintiff has sufficiently alleged ICANN's breach of this provision of the Bylaws.

Lastly, Plaintiff maintains that ICANN breached Section 8 of the Auction Rules by failing to postpone the .WEB auction until the resolution of the pending ICANN accountability mechanisms. FAC ¶ 70. At the time of the .WEB auction, ICANN had just issued a decision on Plaintiff's Reconsideration Request, its Ombudsman complaint was unresolved, and the IRP process was ongoing. FAC ¶ 70.

ICANN offers a different interpretation of this provision of the Auction Rules, arguing it merely required that it not *schedule* the auction during the pendency of these procedures. Mot. 7:18-8:2. In raising this argument, ICANN awkwardly attempts to rewrite the phrase, "enter into a New gTLD Program Auction" as "enter into the auction process." RJN, Ex. D. The plain language contradicts ICANN's interpretation; at a minimum, it is subject to both parties' proffered interpretation, and thus ambiguous. *See Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (1997). That ambiguity must be resolved against ICANN, the drafter of the rules, especially at the pleadings stage. *Id.*; *see also* Cal. Civ. Code. § 1654.

3. The FAC Sufficiently Alleges Damages

ICANN does not challenge the sufficiency of the FAC's allegations of damages. *See generally*, Mot. 7:9-12:4 (including no reference to damages in its arguments regarding Plaintiff's breach of contract claim). Nor could it, as the FAC alleges that Plaintiff suffered, and will continue to suffer, losses of revenue from third parties, profits, consequential damages, market share, reputation, and goodwill. FAC ¶ 72. Plaintiff's breach of contract claim should survive Plaintiff's Motion to Dismiss.

B. ICANN Breached the Covenant of Good Faith and Fair Dealing

As longstanding California authority makes clear, the covenant of good faith and fair dealing is implied in contracts "to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenant) frustrates the other party's rights [to] the benefits of the contract." *Marsu, B. V. v. Walt Disney Co.*, 185 F.3d 932, 937-938 (9th Cir. 1999) (quoting *Los Angeles Equestrian Ctr., Inc. v.*

City of Los Angeles, 17 Cal. App. 4th 432, 447 (1993)). The FAC alleges that ICANN breached this covenant when it acted to deprive Plaintiff of the benefits of the parties' agreement, including ICANN's promise to administer the .WEB bid process in a fair and transparent manner. FAC ¶ 75.

ICANN does not dispute the fact that Plaintiff's FAC sets forth a claim for relief separate and apart from its breach of contract claim. Mot. 12:15-24. Rather, ICANN argues that Plaintiff's claim fails absent a violation of an express contractual provision. *Id*. ICANN's unsupported position would render the covenant redundant, and ICANN's own authority contradicts its misstatement of law. *See Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992) ("[B]reach of a specific provision of the contract is not a necessary prerequisite. Were it otherwise, the covenant would have no practical meaning, for any breach thereof would necessarily involve breach of some other term of the contract."). Regardless, to the extent the Court is inclined to credit ICANN's argument, Plaintiff directs the Court to its allegations detailing ICANN's numerous breaches of the parties' agreements. *See* Section III.A., *supra*; FAC ¶¶ 36, 42-62, 69.

C. The FAC Alleges a Viable Negligence Claim Against ICANN

ICANN argues that Plaintiff fails to plead a claim of negligence due to (a) the economic loss rule and (b) ICANN's claim that "the allegations *do not prove* any of the three elements of a viable negligence claim." Mot. 13:4-6 (emphasis added). Neither argument supports dismissal of the FAC at this early stage, where Plaintiff is required only to *plead*, not prove, a plausible claim of relief.[6]

1. ICANN Owed Plaintiff a Duty of Care in its Administration of the .WEB Auction Process

[6] Given ICANN's claim that it was not contractually bound to administer the .WEB auction in accordance with the provisions in the Applicant Guidebook or its own Bylaws, Plaintiff is well within its rights to assert, in the alternative, that ICANN's failure to thoroughly and transparently investigate NDC's disqualifying conduct is, at a minimum, negligence.

In an effort to avoid Plaintiff's negligence claim, ICANN argues that "a contractual relationship does not give rise to a duty of care." Mot. 13:20-21. However, ICANN ignores a "fundamental principle" of California law that "accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." *North American Chemical Co. v. Superior Court of Los Angeles Co.*, 59 Cal.App.4th 764, 774 (1997).

In the leading case of *Eads v. Marks*, 39 Cal.2d 807 (1952), the California Supreme Court directly refuted ICANN's position, recognizing that "[e]ven where there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed . . . ." *Id.* at 810. As the court explained, "[t]he contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules. *Id*. at 811; *see also Tameny v. Atlantic Richfield Co*. 27 Cal.3d 167, 175 (1980).

ICANN, the entity wholly responsible for administering the .WEB auction, owed Plaintiff and the .WEB applicants a duty to act with proper care and diligence in administering the .WEB auction process in accordance with its Bylaws, Articles of Incorporation, Applicant Guidebook, and Auction Rules. FAC ¶ 80. ICANN breached that duty when it, *inter alia*, failed to use reasonable care in conducting its alleged investigation of NDC's disqualifying conduct in relation to the .Web auction. FAC ¶¶ 27, 40-54, 81. That flawed conduct became irrefutable when, shortly after the auction, VeriSign confirmed that it had used NDC as a secret proxy to obtain .WEB for itself. FAC ¶¶ 57-59.

2. The FAC Sufficiently Alleges Damages from ICANN's Negligence

Contrary to ICANN's assertions, *see* Mot. 13:7-14:4, the FAC adequately alleges harm arising from ICANN's negligence. Plaintiff agreed to participate in the .WEB auction based on its understanding that ICANN would act fairly, objectively, and with transparency, and that ICANN would ensure that each participant complied with the auction guidelines. FAC ¶¶ 29, 80. ICANN's negligent conduct (a) forced Plaintiff and the other applicants to compete with a non-applicant, VeriSign, (b) rendered meaningless the $185,000 application fee that each eligible applicant paid to participate in the auction, and (c) caused Plaintiff substantial financial losses along with loss of goodwill. FAC ¶¶ 56-62, 81-82. These facts sufficiently allege that ICANN's actions damaged Plaintiff.

ICANN attempts to deflect its responsibility for Plaintiff's damages because NDC, rather than Plaintiff, won the auction. Mot. 13:24-14:4. ICANN's argument essentially amounts to a challenge to causation. It is unsurprising that ICANN cites no authority for this position, given that it is "contrary to first-year tort law, i.e., that an injury can have only one cause." *Cole v. Town of Los Gatos*, 205 Cal. App. 4th 749, 769-770 (2012). Here, NDC's change in management or control, and/or its agreement to sell, assign or transfer the rights in its application to VeriSign, constitute disqualifying conduct—NDC should not have been permitted to participate in the .WEB auction. FAC ¶¶ 33-36, 81; see also, FAC, Ex. C § 6.10. ICANN's pre-textual investigation, and its refusal to postpone the auction, enabled NDC to participate in the auction. FAC ¶¶ 81. The FAC sufficiently alleges that ICANN caused Plaintiff's damages.

To the extent ICANN argues that the economic loss rule bars Plaintiff's negligence claim, it is mistaken. *See* Motion at 13:7-13. "The economic-loss rule bars tort claims for losses arising out of a contract, where a failed product [such as the iPhone proferred by ICANN] has caused only economic loss, but has not injured anyone or damaged other property." *Grouse River Outfitters Ltd v. NetSuite, Inc.*, No. 16-CV-02954-LB, 2016 WL 5930273, at *11 (N.D. Cal. Oct. 12, 2016). Plaintiff's claim for negligence does not stem from the purchase of a defective product. As such, the

economic loss rule does not apply to the instant case. *See Corelogic, Inc. v. Zurich Am. Ins. Co.*, No. 15-CV-03081-RS, 2016 WL 4698902, at *5 (N.D. Cal. Sept. 8, 2016).

Although Plaintiff disputes its application, to the extent the Court is inclined to apply the economic loss rule to bar Plaintiff's claim for negligence, Plaintiff seeks leave to amend its claim to more directly allege that ICANN fraudulently induced it to participate in the .WEB auction based on ICANN's representations in the Applicant Guidebook, Bylaws, and Auction Rules. *See Grouse River*, 2016 WL 5930273, at *11 ("Excepted from [the economic loss] rule are (among other things) claims that a contract was fraudulently induced."); *Frye v. Wine Library, Inc*., No. 06-5399 SC, 2006 WL 3500605, at *2-3 (N.D. Cal. Dec. 4, 2006) ("As Plaintiff's negligent misrepresentation claim can be characterized as relating to Defendant's inducement of Plaintiff to contract, there is also no question of it being barred by the economic loss rule.").

D. The FAC Alleges a Violation of Section 17200 Against ICANN

1. Plaintiff Has Standing Under the UCL

Contrary to ICANN's assertion, the FAC alleges a loss of money or property sufficient to confer standing under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.* Mot. 14:14-15:20. Section 17200 prohibits "unfair competition," defined as "any unlawful, unfair, or fraudulent business act or practice." Section 17204 limits UCL standing to a party that that "has suffered injury in fact and lost money or property as a result of the unfair competition."

In an attempt to refute Plaintiff's standing allegations, ICANN first mischaracterizes the losses alleged in the FAC as "attorney's fees incurred in bringing a UCL claim." Mot. 14:18-20. Plaintiff, however, did not base its standing allegations on such fees. Rather, Plaintiff clearly identified its losses as "expenses incurred . . . in exhausting every available formal and informal avenue within ICANN *prior to the filing of the above-captioned action*, including legal fees related to the preparation and submission of the reconsideration request . . . ." FAC ¶ 85. Such fees are regularly

used to establish standing under the UCL. *See Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1280-82 (2015), *review denied* (June 10, 2015) (holding that the expenditure of resources to investigate defendant's alleged wrongdoing established standing under the UCL because plaintiff incurred the expenses prior to and independent of the litigation); *So. Cal. Housing Rights Ctr. v. Los Feliz Towes Homeowners Assoc*., 426 F.Supp.2d 1061, 1069 (C.D. Cal. 2005) ("[T]he Housing Rights Center has standing because it presents evidence of actual injury based on loss of financial resources in investigating this claim and diversion of staff time from other cases to investigate the allegations here.").

ICANN'S argument with regard to the application fee is similarly unavailing. Plaintiff paid ICANN $185,000 to participate in the .WEB auction, in consideration of ICANN's promise to treat the participants fairly, and maintain the integrity of the auction process. FAC ¶¶ 29, 65-67. ICANN's undeniable failure to fulfill this promise, which was made abundantly clear after VeriSign publicly bragged about circumventing ICANN's application process, caused Plaintiff to suffer a monetary loss. Such a loss is more than sufficient to satisfy the UCL's injury-in-fact requirements. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011) ("Notably, lost money or property—economic injury—is itself a classic form of injury-in-fact."). Plaintiff has pleaded facts giving rise to a plausible inference that it has suffered economic loss because of ICANN's conduct, which is all that is required to survive a motion to dismiss.

2. The FAC Alleges that ICANN Engaged in Unlawful, Unfair, and Fraudulent Business Practices

The FAC sets forth violations under each UCL prong. FAC ¶¶ 92. Furthermore, with all reasonable inferences to Plaintiff, it is premature to determine, prior to discovery, whether these practices are "deceptive or unfair." *See Puentes v. Wells Fargo Home Mortg., Inc.*, 160 Cal. App. 4th 638, 645 n.5 (2008) ("the issue of whether a practice is deceptive or unfair is generally a question for the trier of fact . . .").

ICANN violated the UCL's "unlawful" prong because it included an unenforceable contract term in the Purported Release, in violation of California Civil Code § 1668. FAC ¶ 86. The UCL's "unlawful" prong "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999). "[V]irtually any law or regulation—federal or state, statutory or common law—can serve as [a] predicate for a . . . [Section] 17200 "unlawful" violation." *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 681 (2006). As explained in depth at Section III.E., *infra*, ICANN's requirement that Plaintiff waive and release any redress against ICANN, without limitation, violates California Civil Code Section 1668. Therefore, the FAC sufficiently alleges a violation of this prong of the UCL.

ICANN's argument on the UCL's "unfair" prong fails in light of ICANN's failure to uncover, or its deliberate ignorance of, NDC's agreement with VeriSign. ICANN committed "unfair" business practices under the UCL when it conducted a cursory, pre-textual investigation of NDC's violations of the Applicant Guidebook, when it refused to postpone the .WEB auction to conduct this necessary investigation, and when it permitted NDC to participate in the .WEB auction. FAC ¶ 87. Contrary to ICANN's assertion, there is no need for the "Court to invent a standard for a 'fair' investigation." Mot. 16:19-25. Under *any* standard, ICANN's actions are deficient and unfair. Multiple members of the contention set brought credible evidence of NDC's disqualifying conduct to ICANN, yet ICANN failed to thoroughly and transparently investigate NDC. VeriSign subsequently confirmed these allegations shortly after the .WEB auction, contradicting the self-serving statements from NDC that ICANN had offered as proof of its "investigation." There is no need for the Court to create a "standard" for a fair investigation, as ICANN blatantly fell short of any reasonable measurement.

ICANN's actions, as set forth in the FAC, independently violate the UCL's fraud prong. "Fraudulent, as used in the statute, does not refer to the common law tort of

fraud but only requires a showing that members of the public are likely to be deceived." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994) (quotation omitted). The FAC sets forth many actions of ICANN that constitute "fraudulent" conduct in that they were likely to deceive, and in fact deceived, members of the public. FAC ¶ 88. For example, ICANN affirmatively and intentionally represented to Plaintiff and others that it would: (1) make all decisions in administering the .WEB auction process "by applying documented policies neutrally and objectively, with integrity and fairness;" (2) "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtain[ ] informed input from those entities most affected;" (3) [r]emain[ ] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness;" (4) not "apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment;" and (5) require applicants to update their applications with "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."

ICANN failed to adhere to each of the promises identified above. ICANN's representations were likely to deceive, and in fact did deceive, Plaintiff and the other .WEB applicants into believing that ICANN would honor the promises contained therein. In reliance on those representations, Plaintiff and the other applicants each paid $185,000 to participate in this auction process, and subsequently expended substantial time and money in utilizing ICANN's "accountability mechanisms" to try to hold ICANN to its illusory promises. As such, the FAC sufficiently alleges that ICANN violated the UCL's "fraudulent" prong.

E. ICANN's Purported Release is Unenforceable

ICANN seeks to dismiss Plaintiff' request for a declaration from the Court that ICANN's Purported Release is unenforceable, unconscionable, or void as against public

policy. FAC ¶¶ 96-99. Drawing all reasonable inferences in Plaintiff's favor, ICANN's Motion must be denied.

1. The Purported Release Violates California Civil Code § 1668

As alleged in the FAC, the Purported Release improperly seeks to release ICANN, in violation of California Civil Code section 1668, from liability for every claim that arises from ICANN's actions, including those based in fraud and intentional violations of the law. *See* FAC ¶ 95, Ex. C § 6.6. As such, a recent decision from this District addressing the validity of the Purported Release explicitly stated that, "[o]n its face, [ICANN's] Release is 'against the policy of the law' because it exempts ICANN from *any and all claims* arising out of the application process, even those arising from fraudulent or willful conduct." *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, Case 2:16-cv-00862-RGK-JC, at *4 (C.D. Cal. Apr. 12, 2016) ("*DCA*"). (emphasis in original). ICANN provides no reason basis for reaching a different conclusion here. Indeed, ICANN fails to even inform the Court of this precedent.

In an effort to avoid Plaintiff's declaratory relief claim, ICANN relies on *Commercial Connect, LLC v. Internet Corporation for Assigned Names and Numbers*, Civil Action No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky. Jan. 26, 2016), an unpublished decision from a court outside of this circuit. ICANN's reliance is misplaced. In *Commercial Connect*, the plaintiff did not challenge the language of the release, and did not even have counsel. *Id.* at *9 ("Plaintiff has neither challenged the language of the release, nor made any allegations that [it] was fraudulently induced into executing [it]. In fact, Plaintiff currently lacks counsel to address the implications of the release on Plaintiff's claims."). ICANN's claim that the present case involves "nearly identical circumstances," violates the duty of candor that ICANN owes to this Court, especially given its failure to advise the Court of the *DCA* decision. Mot. at 18:12-14.

In contrast, *DCA* presents a more recent decision, from this District, finding "substantial questions as to the Release, weighing towards its unenforceability." *DCA*, Case 2:16-cv-00862-RGK-JC, at *4. The court reached that conclusion in determining whether to enter a preliminary injunction—a decision made pursuant to a far more demanding standard than the one presented here. In light of the *DCA* decision, and the inapplicability of ICANN's other authorities, ICANN fails to offer this Court any basis for granting its Motion to Dismiss on this claim, much less save its fatally flawed Purported Release.[7]

2. The Purported Release is Unconscionable

"In California, a contract or clause is unenforceable if it is both procedurally and substantively unconscionable." *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)). Courts consider these elements on a sliding scale, such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the contract is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. The FAC sufficiently alleges both elements.

The Purported Release is procedurally unconscionable because it is not subject to negotiation. "A contract is procedurally unconscionable if it is a contract of adhesion, *i.e.*, a standardized contract . . . that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting*, 319 F.3d at 1148. A party seeking to apply for the rights to administer a gTLD is forced to agree to the Purported

[7] ICANN's remaining authorities are inapposite. One involves yet another matter in which the party opposing the enforcement of a release failed to challenge it. *See Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal. App. 4th 1118, 1127 (2012) ("In opposing summary judgment, Eco Safe identified no evidence that the clause was the product of unequal bargaining power, that it contravened public policy, or that it affected the public interest."). The other case that ICANN cites involves a release in a skydiving contract—an entirely voluntary, inherently high-risk activity. *See Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333 (1985). These decisions have no bearing on the present matter, especially on a Motion to Dismiss.

Release to participate in the gTLD auction process. FAC ¶¶ 95-96. Furthermore, a party has no way to obtain the rights to a gTLD except through ICANN's application process,[8] as ICANN, as a monopoly, has the sole authority to assign the rights to administer new gTLDs.

This provision is also substantively unconscionable because of its one-sidedness. *See Solo v. Am. Ass'n of Univ. Women*, Case No. 15cv1356-WQH-JMA, 2016 WL 2868693, at *5-6 (S.D. Cal. May 17, 2016) (finding a unilateral arbitration agreement unconscionable, and noting that, absent a "reasonable justification for a one-sided arrangement . . . we assume that it is [unconscionable]"). The Purported Release is entirely unilateral because: (a) it absolves ICANN of all wrongdoing without affording applicants any remedy, and (b) it does not apply equally as between ICANN and applicants, because it does not prevent ICANN from pursuing litigation against an applicant. FAC ¶¶ 95-96.

ICANN is unable to justify the imposition of this unilateral release on Plaintiff and all gTLD applicants. The purported business justification it raises fails because it is not a part of the FAC, and thus should not be considered at this stage. Mot. 22:6-9 Furthermore, the basis that ICANN offers, "prevent[ing] a dispersed flood of litigation" is no justification for the unilateral nature of the Purported Release, because it does not explain the one-sided nature of that clause. ICANN would seek a ruling that permits it to sue gTLD applicants in a court of law, but insulates itself from litigating any action in court, regardless of the unlawful nature or egregiousness of its conduct. Applicants for a gTLD have no choice but to accept the Purported Release. It is unconscionable, and should be struck.

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[8] With the notable exception of VeriSign in this case, as ICANN blindly or intentionally allowed VeriSign to circumvent the application process to bid on the .WEB gTLD.

F. NDC is Not a Necessary Party to Plaintiff's Claims Against ICANN

ICANN's Motion also seeks to dismiss Plaintiff's FAC based on its claim that third party NDC is a necessary party to this action pursuant to Rule 19(a)(1)(A) of the Federal Rule of Civil Procedure. ICANN, however, fails to meet its burden of establishing that NDC is a "necessary" party to this action. Nor does ICANN even attempt to establish, as it must to prevail on its motion to dismiss, that NDC is an "indispensable" party under Federal Rule of Civil Procedure 19(b) ("Rule 19"). These failures are fatal to ICANN's Rule 12(b)(7) motion to dismiss. *Ilan-Gat Eng'rs, Ltd., A.G./S.A. v. Antigua Int'l Bank*, 659 F.2d 234, 242 (D.C. Cir. 1981) (burden is on party moving to dismiss for failure to join an indispensable party).

Before a court may dismiss an action pursuant to Fed. R. Civ. P. 12(b)(7), the court must determine (1) whether the absent party is "necessary" under Fed. R. Civ. P. 19(a), (2) whether it is feasible to join that party, and (3) whether the case can proceed without the absent party, if it is necessary and joinder is not feasible. *Barkhordar v. Century Park Place Condo. Ass'n*, 2:16-cv-03071-CAS(Ex), 2016 U.S. Dist. LEXIS 107165, at *4 (C.D. Cal. Aug. 11, 2016) (citing *E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 779-80 (9th Cir. 2005)).

A party may be "necessary" if: (1) "in [the party's] absence, the court cannot accord complete relief among existing parties," Fed. R. Civ. P. 19(a)(1)(A); (2) "[the party] has an interest in the action and resolving the action in his absence may impede his ability to protect that interest," *see* Fed. R. Civ. P. 19(a)(1)(B)(i); and (3) "[the party] has an interest in the action and resolving the action in his absence may leave an existing party subject to inconsistent obligations because of that interest" Fed. R. Civ. P. 19(a)(1)(B)(ii); *Salt River Project Agric. Improvement & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). "There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a). The determination is heavily influenced by the facts and circumstances of each case." *Barkhordar*, 2016 U.S. Dist.

LEXIS 107165, at *5 (quoting *N. Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986)).

As an initial matter, ICANN claims that NDC "holds a legally-protectable interest in the subject matter of the litigation" under Rule 19(a)(1)(B) because it won the .WEB auction, paid $135 million, and is waiting to enter a registry agreement with ICANN.[9] (Mot. 23.) Setting aside the fact that ICANN failed to present any evidence to support its motion, "a legally cognizable interest must be more than a financial stake in the outcome of the litigation." *Barkhordar*, 2016 U.S. Dist. LEXIS 107165, at *5 (quoting *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). ICANN's suggestion that NDC has a financial stake in this litigation does not make NDC a necessary party. This is especially true given that Plaintiff does not seek to hold ICANN liable for NDC's conduct. Rather, the FAC seeks damages and other remedies from ICANN as a result of ICANN's conduct. NDC has no interest in those claims, which may be the reason that NDC has yet to file a motion to intervene. Any interest that NDC might have in operating the .WEB gTLD (despite its agreement to resell, assign or transfer any such rights to VeriSign), is not at issue in the claims as stated in the FAC. Accordingly, contrary to ICANN's assertion, the Court can afford complete relief to Plaintiff irrespective of whether NDC is joined in this lawsuit.

ICANN's contention that resolution of this action without NDC may expose them to multiple or inconsistent obligations also fails to provide a basis for dismissing Plaintiff's FAC under Rule 19. ICANN's theory is that, if the Court, at some point, enjoins ICANN from entering a registry agreement with NDC during the pendency of this action, "NDC's interest in operating .WEB would be eliminated" and NDC would then sue ICANN "to execute the Registry Agreement." Mot. 24:14-15. But ICANN's fears that (a) NDC *might* file suit against it and (b) a judgment in that case *could* lead

[9] ICANN's opposition chooses to ignore VeriSign's announcement that NDC would be assigning any such rights to VeriSign as a result of their pre-auction agreement.

to inconsistent obligations, are insufficient to render NDC's presence as a party in this matter essential. This series of speculative events fails to demonstrate a "substantial risk" that ICANN will incur inconsistent obligations.[10]

G. Leave to Amend Should Be Granted

If the Court finds any of Plaintiff's allegations insufficient, Plaintiff can amend its claims with particular facts. As the Court noted in its Standing Order, "the Federal Rules provide that leave to amend should be 'freely given when justice so requires.' Fed. R. Civ. P. 15(a). The Ninth Circuit requires that this policy favoring amendment be applied with 'extreme liberality.'" ECF No. 22. Furthermore, "[i]t is black-letter law that a district court must give plaintiffs at least one chance to amend if their complaint was held insufficient." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Plaintiff respectfully requests leave to amend if the Court deems such an amendment necessary.

IV. CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny ICANN's Motion to Dismiss the First Amended Complaint or, at a minimum, grant Plaintiff leave to amend.

Dated: November 7, 2016

By: *s/ Paula L. Zecchini*

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[10] It also bears noting that there is no imminent request for injunctive relief against ICANN. Yet even if there were, the requested relief would not "eliminate" NDC's interest in operating .WEB, but rather delay it pending the outcome of this litigation. *See* FAC, Prayer for Relief (requesting "[a]n injunction pending a final resolution on the merits of this matter").

CERTIFICATE OF SERVICE

Pursuant to L.R. 5-3, I hereby certify that on November 7, 2016, I electronically filed the foregoing documents: Plaintiff Ruby Glen, LLC's Opposition to Defendant Internet Corporation for Assigned Names and Numbers' Motion to Dismiss First Amended Complaint; Memorandum of Points and Authorities, with the Clerk of the Court by using the CM/ECF system and that foregoing document is being served on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF:

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