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8 NAMES AND NUMBERS

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

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

14 Plaintiffs,

15 v.

16 INTERNET CORPORATION FOR  
17 ASSIGNED NAMES AND NUMBERS,

18 Defendant.

**CASE NO. 20STCV42881**

Assigned to Hon. Craig D. Karlan

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

19 [[Proposed] Order Filed Concurrently  
20 Herewith]

21 Date: T.B.D.  
22 Time: T.B.D.  
23 Dept: N

24 Complaint Filed: November 9, 2020  
25 FAC Filed: March 7, 2022



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**DEMURRER**

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

**DEMURRER TO ALL CAUSES OF ACTION**

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

**DEMURRER TO FIRST CAUSE OF ACTION**

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

**DEMURRER TO SECOND CAUSE OF ACTION**

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

**DEMURRER TO THIRD CAUSE OF ACTION**

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

**DEMURRER TO FOURTH CAUSE OF ACTION**

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

**DEMURRER TO FIFTH CAUSE OF ACTION**

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

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**DEMURRER TO SIXTH CAUSE OF ACTION**

7. The sixth cause of action for public benefit corporation bylaw enforcement under California Corporations Code Section 14623 fails to state facts sufficient to constitute a cause of action against ICANN because Plaintiffs lack standing to pursue this claim. Cal. Civ. Proc. Code § 430.10.

**DEMURRER TO SEVENTH CAUSE OF ACTION**

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

Dated: April 4, 2022

JONES DAY

By:           /s/ Eric P. Enson            
Eric P. Enson

Attorneys for Defendant  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The First Amended Complaint (“Amended Complaint”) fails to cure the deficiencies  
4 identified by the Court in its Minute Order Sustaining ICANN’s Demurrer, dated January 18,  
5 2022 (“Order”). As the Court noted, “the complaint [made] clear that Plaintiffs’ claims related to  
6 Defendant’s processing of Plaintiffs’ applications for the rights to exclusively operate .hotel[],  
7 such that the language of the covenant may apply here to preclude Plaintiffs’ claims.” Nothing  
8 has changed substantively in the Amended Complaint, which continues to make clear that  
9 Plaintiffs’<sup>1</sup> claims relate to ICANN’s<sup>2</sup> processing of Plaintiffs’ .HOTEL applications and are  
10 therefore barred by the Covenant Not to Sue (“Covenant”) that Plaintiffs agreed to when they  
11 submitted their .HOTEL applications. Furthermore, the deficiencies noted by the Court with  
12 regard to each cause of action also continue – the Amended Complaint fails to sufficiently allege  
13 any cause of action against ICANN. Rather, the allegations are directly contradicted by ICANN’s  
14 Bylaws<sup>3</sup> or Plaintiffs’ own statements, they are conclusory and devoid of any factual support, or  
15 they demonstrate that Plaintiffs lack standing to pursue their claims. These flaws, taken together  
16 or individually, demonstrate that Plaintiffs’ claims are barred by the Covenant and that Plaintiffs  
17 cannot state a claim against ICANN, each of which independently requires that the Amended  
18 Complaint be dismissed with prejudice.

19 As noted in ICANN’s prior demurrer, Plaintiffs each submitted an application to ICANN  
20 in 2012 to operate the new generic top-level domain (“gTLD”) .HOTEL. In their separate  
21 applications, Plaintiffs each agreed to a covenant not to sue that requires all claims arising out of,  
22 based upon, or relating to ICANN’s evaluation of their applications be resolved not through  
23 litigation, but through ICANN’s unique alternative dispute resolution mechanisms, referred to as  
24 ICANN’s “Accountability Mechanisms.” These Accountability Mechanisms include the  
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26 <sup>1</sup> Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. Ltd., and Domain Venture Partners PCC Limited  
27 (collectively, “Plaintiffs”).

28 <sup>2</sup> Defendant the Internet Corporation for Assigned Names and Numbers (“ICANN”).

<sup>3</sup> References to the Bylaws are to those amended on November 28, 2019, unless stated otherwise.



1 Independent Review Process (“IRP”), under which challenges to ICANN’s actions and inactions  
2 are resolved by a panel of independent arbitrators administered by the American Arbitration  
3 Association’s International Center for Dispute Resolution. Indeed, an IRP filed by Plaintiffs  
4 regarding their .HOTEL applications is currently underway. The IRP is proceeding before a  
5 three-member panel of esteemed arbitrators, and the Plaintiffs are raising the same claims in the  
6 IRP, challenging the decisions ICANN made regarding the .HOTEL applications. Moreover,  
7 much of the relief that Plaintiffs seek in this litigation was already ruled upon and denied in the  
8 IRP, which is why they are improperly seeking another venue to plead their case and asking this  
9 Court to intervene in ICANN’s Accountability Mechanisms. Plaintiffs’ Amended Compliant  
10 should be dismissed, this time with prejudice.

### 11 SUMMARY OF PLAINTIFFS’ ALLEGATIONS

12 *Plaintiffs’ gTLD Applications.* ICANN is a California non-profit public benefit  
13 corporation that oversees the technical coordination of the Internet’s domain name system.  
14 (Amended Compl. ¶ 7.) In 2012, Plaintiffs each applied to ICANN to operate the .HOTEL  
15 gTLD. (*Id.* ¶ 6.) By submitting their applications, Plaintiffs agreed to a set of terms and  
16 conditions contained in an Applicant Guidebook (“Guidebook”). (*Id.* ¶ 89, Ex. 2, Ex. 4.<sup>4</sup>) A key  
17 provision of the Guidebook, the Covenant Not to Sue (“Covenant”), expressly forbids lawsuits  
18 against ICANN for claims that “arise out of, are based upon, or are in any way related to” the  
19 gTLD application. Such claims must be pursued through ICANN’s Accountability Mechanisms:

20 Applicant hereby releases ICANN and the ICANN Affiliated  
21 Parties from any and all claims by applicant that arise out of, are  
22 based upon, or are in any way related to, any action, or failure to  
23 act, by ICANN or any ICANN Affiliated Party in connection with  
24 ICANN’s or an ICANN Affiliated Party’s review of this  
25 application, investigation or verification, any characterization or  
description of applicant or the information in this application, any  
withdrawal of this application or the decision by ICANN to  
recommend, or not to recommend, the approval of applicant’s  
gTLD application. **APPLICANT AGREES NOT TO**

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26 <sup>4</sup> Any Exhibits (“Ex.”) referenced in this Demurrer are the exhibits that the Court judicially noticed via its  
27 January 18, 2022 Minute Order. The exhibit numbers are consistent with the sequence in which they were filed with  
28 the Court and include: (1) ICANN’s Bylaws as amended November 28, 2019; (2) the Applicant Guidebook, finalized  
on June 4, 2012; (3) the Emergency Panelist’s decision in the pending IRP; (4) Plaintiffs’ IRP Request; and (5)  
ICANN’s Bylaws as amended March 16, 2012.

1                   **CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL**  
2                   **FORA, ANY FINAL DECISION MADE BY ICANN WITH**  
3                   **RESPECT TO THE APPLICATION, AND IRREVOCABLY**  
4                   **WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR**  
5                   **ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY**  
6                   **OTHER LEGAL CLAIM AGAINST ICANN AND ICANN**  
7                   **AFFILIATED PARTIES WITH RESPECT OF THE**  
8                   **APPLICATION . . . ; PROVIDED THAT, APPLICANT MAY**  
9                   **UTILIZE ANY ACCOUNTABILITY MECHANISM SET**  
10                   **FORTH IN ICANN’S BYLAWS FOR PURPOSES OF**  
11                   **CHALLENGING ANY FINAL DECISION MADE BY ICANN**  
12                   **WITH RESPECT TO THE APPLICATION.**

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

14                   **ICANN’s Accountability Mechanisms.** ICANN’s Bylaws provide for several  
15                   Accountability Mechanisms, such as Reconsideration Requests, an Ombudsman, and the IRP.  
16                   (Amended Compl. ¶ 25, 33; Ex. 1, Art. 4, §§ 4.2, 4.3, Art. 5, § 5.2 .) A Reconsideration Request  
17                   allows “any person or entity materially affected by an action or inaction of the ICANN Board or  
18                   staff” to request “the review or reconsideration of that action or inaction.” (Ex. 1, Art. 4,  
19                   § 4.2(a).) Reconsideration Requests are reviewed by a subset of the ICANN Board, the Board  
20                   Accountability Mechanisms Committee (“BAMC”), which makes recommendations to the  
21                   ICANN Board on the merits of the Reconsideration Request. (*Id.* Art. 4, § 4.2(e).) The Bylaws  
22                   also provide for an Ombudsman who shall “provide an independent internal evaluation of  
23                   complaints by members of the ICANN community. (*Id.* Art. 5, § 5.2 .) In October 2016, the  
24                   Bylaws were amended to add a new provision establishing that Reconsideration Requests would  
25                   be sent to the Ombudsman for review, with the express caveat that the Ombudsman office must  
26                   recuse itself from matters “for which the Ombudsman has, in advance of filing the  
27                   Reconsideration Request, taken a position while performing his or her role as the Ombudsman . . .  
28                   or involving the Ombudsman’s conduct in some way.” (*Id.*, Art. 4, § 4.2(l)(iii).) In the case of  
29                   such a recusal, the Bylaws set forth that the BAMC then will “review the Reconsideration  
30                   Request without involvement by the Ombudsman.” (*Id.*, Art. 4, § 4.2(l)(iii).)

31                   The IRP is an alternative dispute resolution process through which an aggrieved party can  
32                   ask a three-member panel of independent arbitrators to evaluate whether an ICANN action or  
33                   inaction was inconsistent with ICANN’s Articles of Incorporation (“Articles”) or Bylaws.

1 (Amended Compl. ¶ 18; Ex. 1, Art. 4, § 4.3(a).) In 2013, the Bylaws were amended to provide  
2 for a Standing Panel of independent panelists to hear and resolve IRPs. (Amended Compl.  
3 ¶¶ 33.) The Bylaws require ICANN, “in consultation with the Supporting Organizations and  
4 Advisory Committees, [to] initiate a four-step process to establish the Standing Panel,” but the  
5 Bylaws do not set a deadline by which this extensive process must be complete. (Ex. 1, Art. 4,  
6 § 4.3(j)(ii).) Indeed, the Bylaws specifically contemplated that it would take time to form the  
7 Standing Panel, and they provide a method by which IRP Claimants and ICANN are able to  
8 appoint an IRP Panel and conduct a full IRP in the absence of a Standing Panel: “the Claimant  
9 and ICANN shall each select a qualified panelist from outside the Standing Panel and the two  
10 panelists selected by the parties shall select the third panelist.” (*Id.*, Art. 4, § 4.3(k)(ii).) As  
11 Plaintiffs conceded in their original Complaint, ICANN is in the midst of the process to establish  
12 a Standing Panel. (Compl. ¶¶ 32, 54, 64, 65.) In the interim, an IRP Panel that consists of three  
13 arbitrators selected through the Art. 4, § 4.3(k)(ii) procedure has the power to conduct an IRP and  
14 make a final determination as to whether an action violated ICANN’s Articles or Bylaws. (Ex. 1,  
15 Art. 4, § 4.3(o).) Once an IRP Panel makes its determination, ICANN has agreed through its  
16 Bylaws Art. 4, § 4.3(x)(iii) that it will “be bound by all IRP decisions of Disputes of Covered  
17 Actions as a final, binding arbitration.”

18 ***Plaintiffs’ Currently Pending IRP and this Lawsuit.*** Plaintiffs have challenged  
19 ICANN’s processing of their .HOTEL applications in a currently-pending IRP that was filed in  
20 2019. (Compl. ¶¶ 13, 16, 32.) In their IRP, Plaintiffs moved for interim relief seeking the exact  
21 same relief that Plaintiffs seek in this lawsuit. (Compl. ¶¶ 32, 39.) Specifically, Plaintiffs  
22 requested, in part, that an Emergency Panelist in the IRP order ICANN to “appoint an  
23 independent ombudsman” to review Plaintiffs’ Reconsideration Requests; “appoint and train a  
24 Standing Panel” to hear Plaintiffs’ IRP; and “pay all costs of the Emergency Panel and of the IRP  
25 Panelists,” including IRP initiation fees.<sup>5</sup> (Ex. 3 ¶ 61.) The Emergency Panelist, however, denied  
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27 <sup>5</sup> Filing for interim relief in an IRP is akin to filing for a preliminary injunction that would be binding on  
28 ICANN had it been granted. Although the Emergency Panelist denied Plaintiffs the interim relief they sought, the  
IRP is ongoing and will continue through discovery, motion practice, hearings before the three-member panel of  
arbitrators, and conclude with a final hearing before the panel issues a final declaration.

1 Plaintiffs’ requests for interim relief. (Ex. 3, ¶ 226(F), (G), (I).) Despite that denial, Plaintiffs’  
2 IRP is proceeding before a three-member panel of arbitrators and is in the discovery phase, with  
3 the next conference before the IRP Panel scheduled for April 28, 2022.

4 When Plaintiffs were denied the interim relief they were seeking from the Emergency  
5 Panelist in the IRP, they then filed this lawsuit seeking the same relief (through a different  
6 forum). (Compl. ¶¶ 83–126.) After this Court sustained ICANN’s demurrer to Plaintiffs’  
7 original Complaint, Plaintiffs filed the Amended Complaint on March 4, 2022.

8 The Amended Complaint, like the Complaint, alleges that each of Plaintiffs’ .HOTEL  
9 applications are contracts between ICANN and Plaintiffs that specifically incorporate ICANN’s  
10 Bylaws as contractual terms and that these contracts are automatically amended each time  
11 ICANN’s Bylaws are amended. (Amended Complaint ¶¶ 10, 33, 48.) According to Plaintiffs,  
12 any ICANN breach of its Bylaws is also therefore a breach of the alleged contracts between  
13 ICANN and Plaintiffs. (*Id.* ¶¶ 74-78.) Plaintiffs continue to allege that ICANN committed fraud  
14 on Plaintiffs because ICANN never intended to comply with certain Bylaws provisions allegedly  
15 incorporated into the Plaintiffs’ contracts with ICANN, despite the fact that these Bylaws  
16 provisions were enacted after Plaintiff submitted their .HOTEL application to ICANN. Plaintiffs  
17 have added vague breach of contract and fraud claims allegedly relating to Bylaws provisions in  
18 place in 2012 regarding a “Reconsideration process” and a general “Ombudsman review process”  
19 within ICANN. (*Id.* ¶¶ 25-26.) Presumably this is an effort to cure one of the key flaws in  
20 Plaintiffs’ original Complaint, which was that the Bylaws provisions underlying Plaintiffs’ claims  
21 regarding the Standing Panel, Ombudsman review of Reconsideration Requests, and ICANN  
22 payment of IRP fees did not exist until years after Plaintiffs submitted their applications to  
23 ICANN.

24 The Amended Complaint, like the original Complaint, is barred by the Covenant, does not  
25 sufficiently state any cause of action against ICANN, and should be dismissed with prejudice.

#### 26 **LEGAL STANDARD**

27 A demurrer should be sustained “when [t]he pleading does not state facts sufficient to  
28 constitute a cause of action.” *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505,

1 512 (2017) (citing Cal. Civ. Proc. Code, § 431.10(e)) (internal quotations omitted). “A general  
2 demurrer searches the complaint for all defects going to the existence of a cause of action and  
3 places at issue the legal merits of the action on assumed facts.” *Carman v. Alvord*, 31 Cal. 3d  
4 318, 324 (1982) (citing *Banerian v. O’Malley*, 42 Cal. App. 3d 604, 610–11, (1974)). The court  
5 “accepts as true all the material allegations of the complaint, but do[es] not assume the truth of  
6 contentions, deductions or conclusions of fact or law.” *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at  
7 512. A demurrer should be granted without leave to amend where “no amendment could cure the  
8 defect in the complaint[.]” *See Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014).

## 9 ARGUMENT

### 10 **I. THE COVENANT BARS PLAINTIFFS’ CLAIMS.**

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

16 As the Court held in its Order, where “the complaint makes clear that Plaintiffs’ claims  
17 relate to Defendant’s processing of Plaintiffs’ applications for the rights to exclusively operate  
18 .hotel, ... the language of the covenant may apply here to preclude Plaintiffs’ claims.” (Order at  
19 2.) Here, as in the *Ruby Glen* cases,<sup>6</sup> each of Plaintiffs’ claims, no matter how styled or re-  
20 packaged in the Amended Complaint, boil down to a challenge of ICANN’s review and  
21 processing of Plaintiffs’ .HOTEL applications. Simply put, if any of the Plaintiffs had been  
22 awarded the .HOTEL gTLD, they would not have joined this lawsuit, so their claims inherently  
23 “arise out of, are based upon, [and] relate[] to” their .HOTEL applications. (Ex. 2, Module 6 §

24  
25 <sup>6</sup> In *Ruby Glen, LLC v. ICANN*, the United States District Court for the Central District of California  
26 dismissed a similar lawsuit filed by a gTLD applicant against ICANN on the sole ground that the Covenant bars all  
27 “claims related to ICANN’s processing and consideration of a gTLD application.” No. CV 16-5505 PA (ASx), 2016  
28 U.S. Dist. LEXIS 163710, at \*10–11 (C.D. Cal. Nov. 28, 2016); *see also Commercial Connect v. ICANN*, No.  
3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at \*9–10 (W.D. Ky. Jan. 26, 2016) (holding that the Covenant is  
enforceable, “clear and comprehensive.”). The Ninth Circuit affirmed, finding that the applicant’s entire lawsuit was  
barred by the Covenant. *See Ruby Glen, LLC v. ICANN*, 740 F. App’x 118 (C.D. Cal. Oct. 15, 2018) (“The district  
court properly dismissed the FAC on the grounds that Ruby Glen’s claims are barred by the covenant not to sue  
contained in the Applicant Guidebook.”).

1 6.6.) In addition, Plaintiffs’ Amended Complaint continues to premise each of its causes of  
2 action on the pending IRP, alleging that “ICANN breached its Reconsideration obligations... [in  
3 that] ICANN denied Plaintiffs any opportunity at all to [sic] Reconsideration of at least one  
4 disputed claim” regarding their applications. (Amended Compl. ¶ 31.) Even the injuries  
5 Plaintiffs allege, and the relief Plaintiffs seek, continue to relate to their .HOTEL applications.  
6 (Amended Compl. ¶ 61 (“Plaintiffs have not received the benefit of their contractual bargain”);  
7 ¶ 66 (“[the] improper delegation of the .hotel gTLD would cause Plaintiffs inestimable and  
8 irreparable financial damage and lost commercial opportunities.”); Prayer for Relief 1, Amended  
9 Compl. ¶ 29 (seeking “meaningful, independent Ombudsman review, [and] constitution of the  
10 expert, community-chosen Standing Panel to adjudicate Plaintiffs’ gTLD claims,” both of which  
11 are predicated on ICANN’s evaluation of Plaintiffs’ .HOTEL applications). Regardless of  
12 whether Plaintiffs have reworded their Amended Complaint to explicitly state that it “does not  
13 claim that ICANN did anything wrong related to its ‘review’ of Plaintiffs’ applications”  
14 (Amended Compl. ¶ 13), all of Plaintiffs’ claims, both procedural and substantive, still “arise out  
15 of, are based upon, [and] relate[] to” ICANN’s review of Plaintiffs’ applications for .HOTEL and  
16 are barred by the Covenant. (Ex. 2, Module 6, § 6.6.)

17 Next, Plaintiffs again allege that the Covenant is not enforceable under Section 1668 of  
18 California’s Civil Code (“Section 1668”). These allegations fail. As this Court already held, “the  
19 covenant ... does not appear to exempt Defendant from liability, as there is an independent  
20 review process for claims of the nature raised here, such that Civil Code section 1668 would seem  
21 to be inapplicable.” (Order at 3.) Despite Plaintiffs’ baseless claim that the IRP is a “sham” that  
22 provides no meaningful relief (Amended Compl. ¶ 18), ICANN’s Bylaws make clear that the IRP  
23 is, in fact, a robust arbitration process (Ex. 1, Art. 4, § 4.3) and, moreover, the Court already held  
24 that it is “unclear how such an allegation can support an invocation of Civil Code section 1668.”  
25 (Order at 3.) And, with regard to Plaintiffs’ claim that ICANN has “refused” to comply with  
26 prior IRP decisions recommending a Standing Panel be put in place (Amended Compl. ¶ 19), that  
27 is simply false. No prior IRP panel has ordered ICANN to put a Standing Panel in place or set  
28 any timeframe for ICANN to do so. Moreover, as acknowledged by Plaintiffs, the process of

1 implementing the Standing Panel is underway. (*see* Compl. ¶¶ 32, 54, 64, 65.)

2 As to Plaintiffs’ continued claims that the Covenant does not apply to fraud claims  
3 (Amended Compl. ¶ 18), ICANN refers to this Court’s Order addressing precisely that issue:

4 [T]he Court is not so convinced. The covenant prohibited actions for any claims that  
5 “arise out of, are based upon, or are in any way related to” ICANN’s review of the  
6 application... Here, there is no other way to read the pleading except to conclude that the  
7 purported fraud arose out of Plaintiffs’ application(s) with ICANN, and “a general  
8 release,” such as the one at issue here, “can be completely enforceable and act as a  
9 complaint bar to all claims.”

8 (Order at 3.)

9 Finally, in an effort to get around the Court’s Order that the Covenant could not have been  
10 procured by fraud because ICANN’s Bylaws regarding Ombudsman review of Reconsideration  
11 Requests, an IRP Standing Panel, and ICANN payment of IRP fees were all put in place *after*  
12 Plaintiffs accepted the Covenant in their applications (Order 3-4), Plaintiffs make vague  
13 references to ICANN statements made, and Bylaws provisions established, before Plaintiffs  
14 submitted their applications regarding a “Reconsideration process” and an “Ombudsman  
15 process.” (Amended Compl. ¶¶ 21, 25, 26.) These earlier statements and Bylaws, however,  
16 speak generally about the separate processes for Reconsideration Requests and for Ombudsman  
17 review, which are Accountability Mechanisms that have been in ICANN’s Bylaws for many  
18 years. Therefore, it is unclear what exactly Plaintiffs allege ICANN “misrepresented” or what  
19 “fraudulent” statements in earlier iterations of ICANN’s Bylaws induced Plaintiffs to accept the  
20 Covenant. ICANN has been and continues to be straightforward about its Accountability  
21 Mechanisms, which Plaintiffs have utilized, and Plaintiffs cannot now claim that the Covenant  
22 was procured by fraud because they dislike the Accountability Mechanisms in place, as the Court  
23 found in its Order. (Order, 3.)

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

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

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

3 “To state a cause of action for breach of contract, Plaintiff must be able to establish ‘(1)  
4 the existence of the contract, (2) plaintiffs’ performance or excuse for nonperformance, (3)  
5 defendant’s breach, and (4) the resulting damages to the plaintiff.’” (Order at 4, citation omitted.)

6 Plaintiffs’ Amended Complaint asserts that their .HOTEL applications constitute their  
7 contracts, and that the Bylaws provisions regarding ICANN’s Accountability Mechanisms are  
8 “incorporated into Plaintiffs’ contracts with ICANN.” (Amended Compl. ¶¶ 1, 10.) This claim  
9 fails, as an initial matter, because Plaintiffs have not attached a copy of their applications for the  
10 .HOTEL gTLD to either their original Complaint or their Amended Complaint, which is required  
11 for a breach of contract claim. (Order at 4 (“If a breach of contract claim is based on a written  
12 contract, the terms must be set out verbatim in the body of the complaint or a copy of the written  
13 agreement must be attached and incorporated by reference.”).) This alone is sufficient for the  
14 Court to sustain ICANN’s demurrer. Attaching the applications, however, would not cure the  
15 deficiencies with this cause of action for several reasons.

16 First, Plaintiffs do not sufficiently allege facts indicating that ICANN’s Bylaws were  
17 expressly incorporated into Plaintiffs’ applications for .HOTEL. While the Guidebook does state  
18 that ICANN’s Accountability Mechanisms must be invoked for disputes about ICANN’s  
19 evaluation of applications, there is no Guidebook provision stating that the Bylaws are expressly  
20 incorporated therein and are part of an agreement between ICANN and applicants. (*See generally*  
21 *Ex. 2.*) The District Court for the Central District of California considered this precise issue and  
22 held that ICANN is only contractually bound by the obligations to which it agreed in the  
23 application documents, not other extraneous materials, such as Bylaws provisions. *See Image*  
24 *Online Design, Inc. v. ICANN*, No. CV 12-08968 DDP (JCx), 2013 U.S. Dist. LEXIS 16896, at  
25 \*9, 11 (C.D. Cal. Feb. 7, 2013). Even so, some of the Bylaws provisions that Plaintiffs claim  
26 were breached—*i.e.*, those regarding a Standing Panel, Ombudsman review of Reconsideration  
27 Requests, and payment of IRP fees—were not even in the Bylaws at the time Plaintiffs submitted  
28 their .HOTEL applications in 2012, but were added in the 2013 and 2016 amendments to the



1 Bylaws. (Amended Compl. ¶ 77; *see generally*, Ex. 5.) Thus, these provisions could not be part  
2 of any agreement that ICANN and Plaintiffs entered into in 2012. And Plaintiffs still have not  
3 provided any legal authority to support their argument that amendment to the Bylaws creates new  
4 or modified contracts with Plaintiffs, which the Court highlighted as a deficiency in Plaintiffs’  
5 original Complaint. (Order at 4.) As to the other Bylaws provisions Plaintiffs allege were  
6 breached—*i.e.*, those regarding a “Reconsideration process” and a general “Ombudsman review  
7 process”—Plaintiffs’ claims are so vague and ambiguous it is impossible to determine what the  
8 alleged requirements were and how they were breached. (Amended Compl. ¶¶ 25-26.)

9 Second, even if the Bylaws were incorporated by reference into the Plaintiffs’ application  
10 “contracts” with ICANN, which they were not, ICANN has not breached its Bylaws. While  
11 Plaintiffs claim that ICANN violated the Bylaws because ICANN: (1) “has not constituted the  
12 Standing Panel”; (2) has not provided “for any meaningful Ombudsman review or input into  
13 Request for Reconsideration decisions”; and (3) has not “paid IRP fees” (Amended Compl. ¶¶ 75-  
14 78), each of these claims lack merit.

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

22 In the event that a Standing Panel is not in place when an IRP Panel  
23 must be convened for a given proceeding or is in place but does not  
24 have capacity due to other IRP commitments or the requisite  
25 diversity of skill and experience needed for a particular IRP  
26 proceeding, the Claimant and ICANN shall each select a qualified  
27 panelist from outside the Standing Panel and the two panelists  
28 selected by the parties shall select the third panelist.

26 (*Id.*, Art. 4, § 4.3(k)(ii).) It is therefore impossible for ICANN to have breached the Bylaws by  
27 failing to convene a Standing Panel on Plaintiffs’ preferred timetable. *See Kim v. Westmorre*  
28 *Partners, Inc.*, 201 Cal. App. 4th 267, 282 (2011) (“When a plaintiff attaches a written agreement

1 to his complaint, and incorporates it by reference into his cause of action, the terms of that written  
2 agreement take precedence over any contradictory allegations in the body of the complaint.”). In  
3 any event, Plaintiffs’ own allegations concede, and the IRP Emergency Panelist found, that  
4 ICANN is in the process of convening a Standing Panel and is complying with the required  
5 process. (Compl. ¶¶ 32, 54, 64, 65; Ex. 3 ¶ 210.)

6 Similarly, Plaintiffs’ claim that ICANN breached its contracts with Plaintiffs by not  
7 providing Ombudsman review of Plaintiffs’ two Reconsideration Requests also still fails. With  
8 regard to Plaintiffs’ August 2016 Reconsideration Request, the operative Bylaws at that time did  
9 not provide for, much less require, Ombudsman review of Reconsideration Requests. (Ex. 3 ¶  
10 122, n.157.) That requirement was not added to the Bylaws until the 2016 Bylaws amendments.  
11 (*Id.*) With regard to Plaintiffs’ April 2018 Reconsideration Request, the Ombudsman office  
12 recused itself, pursuant to the Bylaws, because the Ombudsman had previously taken a position  
13 on the matter. (Ex. 1, Art. 4, § 4.2(l)(iii).) As such, again in accordance with the Bylaws, the  
14 BAMC proceeded to “review the Reconsideration Request without involvement by the  
15 Ombudsman.” (*Id.*; Ex. 3 ¶ 131.) Nothing in Plaintiffs’ Amended Complaint changes the fact  
16 that ICANN acted in accordance with its Bylaws.

17 Plaintiffs admit that ICANN reimbursed Plaintiffs \$18,000 for the Emergency Panelists’  
18 fees, but challenge ICANN’s decision not to reimburse Plaintiffs for the \$3,750 fee to initiate the  
19 IRP. ICANN’s Bylaws, however, only require ICANN to “bear all the administrative costs of  
20 *maintaining* the IRP mechanism, including compensation of Standing Panel members.” (*Id.*, Art.  
21 4, § 4.3(r) (emphasis added).) The Bylaws thus are clear that ICANN is to bear the administrative  
22 costs of maintaining the IRP mechanism, not initiating a particular IRP, as the IRP Emergency  
23 Panelist found. (Ex. 3 ¶ 225.)

24 Finally, Plaintiffs have not alleged sufficient facts explaining how ICANN allegedly  
25 breached any Bylaws provision regarding the implementation of a “Reconsideration process” or  
26 an “Ombudsman review process.” Nor could they. These processes and procedures have been in  
27 place, and followed by ICANN, for many years.

1           **B. Plaintiffs Fail To State A Claim For Fraud, Deceit, Or Grossly Negligent**  
2           **Misrepresentation (Counts Two Through Four).**

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

5           “The elements of fraud, including a cause of action for fraudulent inducement, are (a) a  
6           misrepresentation...; (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d)  
7           justifiable reliance); and (e) resulting damage.” (Order at 4 (citing *Hinesley v. Oakshade Town*  
8           *Ctr.*, 135 Cal. App. 4th 289, 294 (2005)).) “The facts constituting the alleged fraud must be  
9           alleged factually and specifically as to every element of fraud.” (Order at 5.) Plaintiffs’ own  
10           allegations demonstrate that their fraud claims are deficient.

11           First, Plaintiffs’ fraud in the inducement claim fails as it relates to any misrepresentation  
12           identified by Plaintiffs that occurred *after* Plaintiffs submitted their .HOTEL applications in 2012.  
13           For example, Plaintiffs offer the April 2013 Bylaws modifications as a misrepresentation by  
14           ICANN. (Amended Compl. ¶ 33.) However, these alleged misrepresentations could not have  
15           intended to induce, or actually induced, Plaintiffs to enter into any contract with ICANN in 2012.  
16           *SI 59 LLC v. Variel Warner Ventures, LLC*, 29 Cal. App. 5th 146, 152 (2018), review denied  
17           (Feb. 13, 2019) (fraudulent inducement “occurs before a contract is signed.”).

18           Plaintiffs’ Amended Complaint now seems to allege that an ICANN statement was made  
19           in 2012 about ICANN’s Accountability Mechanisms (Amended Compl. ¶¶ 25-28), but the claims  
20           are so vague as to be unintelligible and Plaintiffs still offer no facts indicating that the  
21           representations were false, that ICANN knew any of the representations were false, or that  
22           ICANN should have known they were false. As this Court noted in its Order, where there are “no  
23           facts indicating that ICANN knew any representations were false or should have known they  
24           were false[,] conclusory statements to this effect are insufficient.” (Order at 5.) Plaintiffs have  
25           done nothing but offer conclusory statements that ICANN “knowingly[] never intended to  
26           comply with the Reconsideration or Ombudsman contractual (and bylaw) provisions” (Amended  
27           Compl. ¶ 30), which are insufficient to state a claim for fraud or deceit.

28           Second, even if the Bylaws provisions that Plaintiffs seek to enforce had been in existence  
before Plaintiffs submitted their applications (which they were not), nothing that Plaintiffs cite in

1 their Amended Complaint could be fraudulent or deceitful because ICANN has followed these  
2 Bylaws provisions. As demonstrated above, ICANN has complied with each of these Bylaws  
3 provisions regarding the Accountability Mechanisms.

4 Finally, the Amended Complaint makes clear that Plaintiffs' claims for fraud in the  
5 inducement and deceit are still predicated entirely on the alleged breach of contract claim, and  
6 thereby merely re-named as fraud claims. Reframing breach of contract claims "in the traditional  
7 words of fraud, without any supporting facts" is "simply not enough" to state a claim for fraud.  
8 *See Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 782 (1994).

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

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

17 Plaintiffs' claim for grossly negligent misrepresentation is predicated on the same conduct  
18 as the claims for fraud and deceit (*see* Amended Compl. ¶¶ 100-108), and therefore fails for the  
19 same reasons. And, again, Plaintiffs make only conclusory allegations when reciting the elements  
20 of a claim for negligent misrepresentation, which is insufficient to state a claim. *See Cadlo*, 125  
21 Cal. App. 4th at 519 (holding that negligent misrepresentation must be pled with specificity).

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

23 Gross negligence "is pleaded by alleging the traditional elements of negligence: duty,  
24 breach, causation, and damages" and by alleging that the defendant engaged in conduct "want of  
25 even scant care or an extreme departure from the ordinary standard of conduct." (Order at 5.)  
26 (citation omitted). "There is no distinct cause of action for gross negligence apart from  
27 negligence, [and] Plaintiffs cannot simply allege negligence in conclusory terms; they must allege  
28 the elements of a negligence claim." (*Id.* at 5-6) (citation omitted).

1 Plaintiffs claim that ICANN “had statutory and common law duties not to negligently or  
2 with gross negligence fail to implement its promised ADR procedures which it had represented to  
3 Plaintiffs would be timely implemented.” (Amended Compl. ¶ 110.) Plaintiffs’ allegations,  
4 however, are plainly insufficient to state a cause of action for gross negligence. Although  
5 Plaintiffs’ Amended Complaint is rephrased to include negligence buzzwords such “duties,”  
6 “breached,” “proximate result” and “damaged” (Amended Compl. ¶¶ 110, 116), Plaintiffs have  
7 not actually changed their allegations in any meaningful or substantive way. Although they  
8 allege that ICANN had some vague “statutory” and “common law” duties not to fail to implement  
9 its “promised ADR procedures” (Amended Compl. ¶ 116), they provide no authority whatsoever  
10 to indicate from where those duties may stem. The claim continues to be a breach of contract  
11 claim labeled as a negligence claim, which this Court has already determined is insufficient to  
12 state a claim for gross negligence. (Order at 6.)

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

15 Plaintiffs’ sixth cause of action, for public benefit bylaw corporation enforcement, should  
16 be dismissed with prejudice because this Court already sustained ICANN’s demurrer to this cause  
17 of action (Order at 6), and Plaintiffs have not changed a single word with regard to this cause of  
18 action from their original Complaint to their Amended Complaint. Plaintiffs continue to lack  
19 standing to bring a public benefit bylaws enforcement proceeding under Cal. Corp. Code § 14623.

20 **E. Plaintiffs Fail To State A Claim Under California’s Business and Professions**  
21 **Code (Count Seven).**

22 Plaintiffs allege unfair competition claims under California Business and Professions  
23 Code Sections 17200 and 17500. (Amended Compl. ¶¶ 118–119.) This cause of action is  
24 predicated on the same conduct as the breach of contract, fraud, and gross negligence claims, and  
25 it fails for the same reasons.

26 Additionally, Plaintiffs’ unfair competition claim fails because Plaintiffs lack standing to  
27 pursue them. A plaintiff has standing to bring a claim for unfair competition only where it “has  
28 suffered economic injury or damage” that “was the result of, i.e., *caused* by, the unfair business

1 practice.” (Order at 7 (citing *Schaeffer v. Califia Farms, LLC*, 44 Cal. App. 5th 1125, 1137  
2 (2020)).) Plaintiffs have not demonstrated that they suffered any economic injury, or that any  
3 alleged economic injury was actually caused by ICANN’s conduct. Although Plaintiffs now  
4 claim in their Amended Complaint that they “parted with very substantial monies based upon and  
5 a direct result of ICANN’s” allegedly wrongful conduct (Amended Compl. ¶ 119), this claim fails  
6 because ICANN has not breached any contract with the Plaintiffs, nor has ICANN made any  
7 misrepresentations toward Plaintiffs, as discussed in detail above. What this Court determined  
8 about Plaintiffs’ original Complaint remains true with its Amended Complaint: “it appears from  
9 the pleading that Plaintiffs sustained damages because their applications were rejected, not as a  
10 result of the review process; if the review process had been sufficient, Plaintiffs’ applications may  
11 still have been rejected, such that it is not clear how the purported sham review process itself  
12 resulted in harm to Plaintiffs.” (Order at 7.) Plaintiffs’ claim should be dismissed.

13 **CONCLUSION**

14 For the foregoing reasons, ICANN respectfully requests that this Court sustain ICANN’s  
15 demurrer and dismiss Plaintiffs’ First Amended Complaint with prejudice.

16  
17 Dated: April 4, 2022

JONES DAY

18  
19 By: /s/ Eric P. Enson  
Eric P. Enson

20 Attorneys for Defendant INTERNET CORP.  
21 FOR ASSIGNED NAMES AND NUMBERS

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