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 ASSIGNED NAMES AND NUMBERS
 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 DOTCONNECTAFRICA TRUST,
 15 Plaintiff,
 16 v.
 17 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 18 NUMBERS,
 19 Defendant.

Case No. CV 16-00862-RGK

Assigned for all purposes to the
 Honorable R. Gary Klausner

**MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF ICANN'S
 MOTION TO DISMISS FIRST
 AMENDED COMPLAINT**

[Notice of Motion and Motion to
 Dismiss First Amended Complaint;
 Request for Judicial Notice; and
 [Proposed] Order Filed Concurrently
 Herewith]

Hearing Date: April 25, 2016
 Hearing Time: 9:00 a.m.
 Hearing Location: Courtroom 850

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INTRODUCTION

1
2 ICANN is tasked with coordinating portions of the Internet’s domain name
3 system (“DNS”), which permits Internet users to find websites and to communicate
4 within the global Internet. ICANN also evaluates potential “top-level domain”
5 (“TLD”) operators, and it recommends that TLDs be added to the DNS. A TLD is
6 the portion of a domain name to the right of the last dot, such as .COM, .NET
7 and .ORG.

8 Plaintiff’s First Amended Complaint (“FAC”) arises out of its application to
9 ICANN to operate the TLD known as .AFRICA (“Application”); every cause of
10 action in the FAC directly relates to Plaintiff’s Application. But in submitting the
11 Application, Plaintiff agreed to a Covenant Not to Sue (“Covenant Not to Sue”)
12 with respect to any and all claims relating in any way to the Application. The
13 FAC’s eleventh cause of action for declaratory relief seeks a declaration that the
14 Covenant Not to Sue is unenforceable, but it provides only conclusory reasons (as
15 opposed to facts) as to why the Court should not enforce the Covenant Not to Sue.
16 As explained more fully below (and as another district court recently found), the
17 Covenant Not to Sue is “clear and comprehensive” and bars all lawsuits by gTLD
18 applicants such as Plaintiff against ICANN. *Commercial Connect v. Internet Corp.*
19 *for Assigned Names & Nos.*, No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550,
20 at *8-10 (W.D. Ky. Jan. 26, 2016).

21 Even if the Covenant Not to Sue did not bar the FAC, many of Plaintiff’s
22 claims are otherwise defective. In particular, Plaintiff alleges that ICANN breached
23 its contract with Plaintiff. However, the actual terms of that contract, which
24 ICANN is permitted to rely upon in this Motion, expressly permit ICANN to do
25 exactly what Plaintiff alleges to be the breach. Further, Plaintiff has not pled its
26 fraud claims with the requisite specificity.

27 In sum, Plaintiff has not alleged and cannot allege facts sufficient to state a
28 claim against ICANN. ICANN requests that the Court dismiss the FAC with

1 prejudice.

2 **BACKGROUND**

3 **ICANN and the New gTLD Program:**

4 ICANN is a California non-profit public benefit corporation with its principal
5 place of business in Los Angeles, California. (FAC ¶ 8, ECF No. 10.) Pursuant to
6 a series of agreements over the years with the United States Department of
7 Commerce, ICANN oversees the technical coordination of the Internet’s DNS on
8 behalf of the Internet community, ensuring the DNS’s continued security, stability,
9 and integrity. (See Request For Judicial Notice (“RJN”) Ex. 1 (“ICANN Bylaws”)
10 at 6 (Art. I, § 1); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*,
11 795 F.3d 1124, 1127-28 (9th Cir. 2015).) The essential function of the DNS is to
12 convert numeric IP addresses into easily-remembered domain names that permit
13 users to find specific websites, such as “USCOURTS.GOV” and “ICANN.ORG.”
14 The “.GOV” and “.ORG” in these addresses, just like the more well-known
15 “.COM,” are referred to as TLDs. *Name.Space, Inc.*, 795 F.3d at 1127.

16 Throughout its history, ICANN has sought to expand the number of
17 accessible TLDs in the DNS in order to promote consumer choice and competition.
18 To that end, in 2012, ICANN launched the “New gTLD Program,” which resulted
19 in nearly 2,000 applications for new gTLDs, including Plaintiff’s Application for
20 the .AFRICA gTLD. (FAC ¶¶ 18, 21.)

21 In connection with the New gTLD Program, ICANN published the
22 Guidebook, which sets forth all of the requirements and the criteria by which new
23 gTLD applications are evaluated. (*Id.* ¶ 20.) Although Plaintiff’s claims are based
24 on ICANN’s alleged failure to abide by the terms of the Guidebook, Plaintiff fails
25 to attach all the relevant portions of the Guidebook to its FAC. Nonetheless, as
26 explained in the accompanying Request for Judicial Notice, the Court may consider
27 the relevant terms of the Guidebook in ruling on this Motion because Plaintiff has
28 sued for breach of a contract, which permits the Court to consider the terms of the

1 actual contract.

2 Module 6 of the Guidebook sets forth the terms and conditions for the New
3 gTLD Program that all applicants, including Plaintiff, accepted and acknowledged
4 by submitting a gTLD application. Among those terms and conditions is the
5 Covenant Not to Sue, which bars all claims against ICANN or its Affiliated Parties
6 (as defined in Guidebook Module 6) arising out of ICANN’s or those Affiliated
7 Parties’ evaluation of any new gTLD application:

8 6. Applicant hereby releases ICANN and the ICANN Affiliated
9 Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers,
10 employees, consultants, evaluators, and agents] from any and all
11 claims by applicant that arise out of, are based upon, or are in any way
12 related to, any action, or failure to act, by ICANN or any ICANN
13 Affiliated Party in connection with ICANN’s or an ICANN Affiliated
14 Party’s review of this application, investigation or verification, any
15 characterization or description of applicant or the information in this
16 application, any withdrawal of this application or the decision by
17 ICANN to recommend, or not to recommend, the approval of
18 applicant’s gTLD application. ***APPLICANT AGREES NOT TO
19 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA,
20 ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO
21 THE APPLICATION, AND IRREVOCABLY WAIVES ANY
22 RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER
23 JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL
24 CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES
25 WITH RESPECT TO THE APPLICATION. . . .***

26 (FAC ¶ 134; RJN Ex. B (Guidebook Module 6) at 36 (¶ 6) (bold emphasis added).)

27 Module 6 also makes clear that ICANN has the absolute discretion to “determine
28 not to proceed with any and all applications for new gTLDs.” (RJN Ex. B

1 (Guidebook Module 6) at 34-35 (¶ 3.)

2 An applicant that is dissatisfied with the manner in which ICANN evaluated
3 its application is not left without recourse. ICANN’s Bylaws provide for several
4 accountability mechanisms to ensure that ICANN operates in accordance with its
5 Articles of Incorporation, Bylaws, policies and procedures. (See RJN Ex. A
6 (ICANN’s Bylaws) at 8-21 (Arts. IV, V).) For example, an aggrieved applicant can
7 file a “request for reconsideration,” which is a mechanism that asks the ICANN
8 Board to re-evaluate certain Board or staff actions and inactions that the applicant
9 believes have harmed it. (*Id.* at 9-14 (Art. IV, § 2).) In addition, an aggrieved
10 applicant can file a “request for independent review,” which asks independent
11 panelists to evaluate whether an action of ICANN’s Board was consistent with
12 ICANN’s Articles of Incorporation and Bylaws. (*Id.* at 14-18 (Art. IV, § 3).) As
13 discussed below, Plaintiff took advantage of both these accountability mechanisms
14 and prevailed in the independent review procedure that it initiated.

15 **Plaintiff’s Application for .AFRICA:**

16 In 2012, Plaintiff submitted an application to operate the .AFRICA gTLD,
17 thereby accepting and acknowledging the Guidebook, including the Covenant Not
18 to Sue and all of the above-identified terms, conditions, procedures, and policies.
19 Because Plaintiff applied for a gTLD that represents the name of a geographic
20 region, the terms of the Guidebook require that Plaintiff obtain and provide
21 documentation of support from at least 60% of the governments in that region.
22 (RJN Ex. C (Guidebook Module 2) at 42-44 (§ 2.2.1.4.2).) The Guidebook
23 provides that a Geographic Names Panel operated by a third-party vendor must
24 verify the relevance and authenticity of an applicant’s documentation. (*Id.* at 45-47
25 (§ 2.2.1.4.4).)

26 The Guidebook also provides that ICANN’s Governmental Advisory
27
28

1 Committee (“GAC”)¹ may issue specific advice to ICANN concerning any
2 application for a new gTLD. (RNJ Ex. D (Guidebook Module 3) at 50-52 (§ 3.1).)
3 Pursuant to the Guidebook, when the GAC issues “consensus advice” against a
4 particular application, this creates a “strong presumption for the ICANN Board that
5 the application should not be approved.” (*Id.* at 51 (§ 3.1).)

6 On April 11, 2013, while the Geographic Names Panel was reviewing
7 Plaintiff’s Application, the GAC, in accordance with the Guidebook, issued
8 consensus advice that Plaintiff’s Application should not proceed. (Compl. Ex. A
9 (Final Decl. in *DCA v. ICANN*) ¶ 112, ECF No. 1.) On June 4, 2013, after
10 providing Plaintiff with an opportunity to respond, ICANN’s Board accepted the
11 GAC’s advice, and ICANN stopped processing Plaintiff’s Application. (*Id.* ¶ 5.)

12 Plaintiff filed a reconsideration request challenging the Board’s acceptance
13 of the GAC’s consensus advice against Plaintiff’s Application, and later filed a
14 request for independent review. (*Id.* ¶¶ 6-8) Following a lengthy independent
15 review proceeding, the three-member independent review panel declared Plaintiff
16 to be the prevailing party and recommended that ICANN “continue to refrain from
17 delegating the .AFRICA gTLD and permit [Plaintiff’s] application to proceed
18 through the remainder of the new gTLD application process.” (*Id.* ¶¶ 113-15, 133.)

19 ICANN’s Board promptly reviewed and accepted the recommendation of the
20 independent review panel. As a result, ICANN returned Plaintiff’s Application to
21 processing, specifically, to the Geographic Names review, which had been
22 interrupted when Plaintiff’s Application was removed from processing.²

23
24 ¹ The role of the GAC, which is composed of members of national
25 governments and distinct economies as recognized in international fora, is to
26 “consider and provide advice on the activities of ICANN as they relate to concerns
27 of governments, particularly matters where there may be an interaction between
28 ICANN’s policies and various laws and international agreements or where they may
affect public policy issues.” (RNJ Ex. A (Bylaws) at 22-23 (Art. XI, § 2.1(a)).)

² Plaintiff has argued that the Panel’s declaration somehow relieved Plaintiff
of the obligation to meet the Guidebook’s requirement that Plaintiff obtain the
support of 60% of the countries of Africa. Nothing in the declaration says (or even

1 Subsequently, in the summer of 2015, the Geographic Names Panel determined that
2 Plaintiff's application did not have the requisite 60% support from African
3 governments. As provided by the Guidebook, Plaintiff was allowed a lengthy
4 period in which to supplement its documentation of support. Plaintiff provided its
5 supplemental documentation on January 27, 2016.³

6 On February 17, 2016, ICANN announced that the Geographic Names Panel
7 had concluded that Plaintiff's Application did not have the requisite support.
8 Accordingly, pursuant to the terms of the Guidebook, Plaintiff's Application was
9 removed from processing. On March 3, 2016, ICANN's Board voted to proceed
10 with the delegation of .AFRICA to ZACR, which had successfully completed all
11 stages of processing and entered into a registry agreement with ICANN; however,
12 pursuant to this Court's temporary restraining order, ICANN has stayed the
13 delegation of the .AFRICA gTLD.

14 **Plaintiff's Claims Against ICANN:**

15 As to ICANN, Plaintiff asserts claims for breach of contract, intentional and
16 negligent misrepresentation, fraud and conspiracy to commit fraud, unfair
17 competition, and negligence, as well as four claims for declaratory relief. (FAC
18 ¶¶ 62-142.) Plaintiff alleges that ICANN breached its contract with Plaintiff – the
19 Guidebook – by failing to review Plaintiff's Application for .AFRICA in
20 accordance with ICANN's Articles of Incorporation, Bylaws, and the Guidebook
21 and allegedly assisting a competing applicant for .AFRICA. (*Id.* ¶¶ 68-69.)
22 Plaintiff's intentional and negligent misrepresentation claims are based on its

23 _____
(continued...)

24 hints at) that result. Instead, the Panel's declaration is clear that the Panel wanted
25 ICANN's Board to rescind its resolution accepting the GAC's advice and to allow
26 Plaintiff's application to proceed as if that resolution had never been passed.
ICANN did exactly that.

27 ³ Plaintiff does not include in its FAC the facts set forth in this paragraph and
28 the next, which are provided to the Court for background only and are not relevant
to the resolution of ICANN's Motion to Dismiss.

1 allegation that ICANN failed to review Plaintiff’s Application in accordance with
2 ICANN’s Articles of Incorporation, Bylaws, and the Guidebook, and that ICANN
3 failed to participate in good faith in independent review proceedings. (*Id.* ¶¶ 74-77,
4 80-81.) Plaintiff alleges a claim for “fraud and conspiracy to commit fraud,”
5 alleging that ICANN conspired with third parties (the African Union Commission
6 and ZACR) to deny Plaintiff’s Application. (*Id.* ¶¶ 84-93.) Plaintiff also alleges
7 claims for unfair competition and negligence arising out of the same operative facts.
8 (*Id.* ¶¶ 96-107.)

9 Finally, Plaintiff alleges four claims for declaratory relief asking the Court:
10 (1) to “confirm” the IRP Panel’s Declaration, (*id.* ¶¶ 118); (2) to require ICANN to
11 “follow the [IRP Panel’s] Declaration and allow [Plaintiff’s] [A]pplication to
12 proceed through the delegation phase of the application process, (*id.* ¶ 124); (3) to
13 declare “that the registry agreement between ZACR and ICANN [is] null and void
14 and that ZACR’s application does not meet ICANN standards[,]” (*id.* ¶ 132); and
15 (4) to declare that the Covenant Not to Sue is unenforceable, (*id.* ¶ 142).

16 LEGAL STANDARD

17 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be
18 dismissed when the allegations fail to set forth a set of facts, which if true, would
19 entitle the plaintiff to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (a claim
20 must be facially plausible in order to survive a motion to dismiss); *Bell Atl. Corp. v.*
21 *Twombly*, 550 U.S. 544, 555 (2007). The pleadings must raise the right to relief
22 beyond the speculative level; a plaintiff must provide “more than labels and
23 conclusions, and a formulaic recitation of the elements of a cause of action will not
24 do.” *Twombly*, 550 U.S. at 555. On a motion to dismiss, the court is not required
25 to accept as true legal conclusions couched as factual allegations.⁴ *Iqbal*, 556 U.S.

26 _____
27 ⁴ The parties and the Court find themselves in the somewhat unusual position
28 that, by the time of the hearing on this Motion, the Court will have already received
evidence and argument in conjunction with Plaintiff’s Motion for Preliminary
Injunction. For purposes of this Motion to Dismiss, however, ICANN understands

1 at 678.

2 To satisfy the heightened requirements of Rule 9(b), which applies to
3 Plaintiff's fraud and intentional misrepresentation claims, Plaintiff must allege
4 "more than the neutral facts necessary to identify the transaction," including the
5 who, what, when, where, and how of the alleged fraud. *Vess v. Ciba-Geigy Corp.*
6 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

7 **ARGUMENT**

8 **I. PLAINTIFF'S CLAIMS ARE BARRED BY THE COVENANT**
9 **NOT TO SUE CONTAINED IN THE GUIDEBOOK.**

10 The Court should dismiss the entire FAC because, in the very contract
11 Plaintiff seeks to enforce against ICANN (namely, the Application for .AFRICA
12 submitted pursuant to the terms of the Guidebook), Plaintiff expressly waived its
13 right to file suit against ICANN and released ICANN with respect to all the claims
14 asserted in the FAC. *See Commercial Connect*, 2016 U.S. Dist. LEXIS 8550, at *9-
15 10 (Covenant Not to Sue is "clear and comprehensive" and bars claims "aris[ing]
16 out of ICANN's review of [a new gTLD application] . . .").

17 Specifically, by submitting its Application, Plaintiff accepted and
18 acknowledged the terms and conditions set forth in Module 6 of the Guidebook,
19 including the very prominent Covenant Not to Sue. The language could not be
20 more clear:

21 6. Applicant hereby releases ICANN and the ICANN Affiliated
22 Parties [i.e., ICANN's affiliates, subsidiaries, directors, officers,
23 employees, consultants, evaluators, and agents] from any and all
24 claims by applicant that arise out of, are based upon, or are in any way

25 _____
26 (continued...)

27 that its arguments must be limited to the pleadings and those matters as to which
28 the Court can take judicial notice. *Walker v. Woodford*, 454 F. Supp. 2d 1007,
1024 (S.D. Cal. 2006), *aff'd in part*, 393 F. App'x 513 (9th Cir. 2010).

1 related to, any action, or failure to act, by ICANN or any ICANN
2 Affiliated Party in connection with ICANN’s or an ICANN Affiliated
3 Party’s review of this application, investigation or verification, any
4 characterization or description of applicant or the information in this
5 application, any withdrawal of this application or the decision by
6 ICANN to recommend, or not to recommend, the approval of
7 applicant’s gTLD application. ***APPLICANT AGREES NOT TO
8 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA,
9 ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO
10 THE APPLICATION, AND IRREVOCABLY WAIVES ANY
11 RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER
12 JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL
13 CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES
14 WITH RESPECT TO THE APPLICATION. . . .***

15 (RJN Ex. B (Guidebook Module 6) at 36 (¶ 6) (bold emphasis added).)

16 Plaintiff’s claims clearly arise out of ICANN’s “review of [Plaintiff’s]
17 application” and “the decision by ICANN to recommend, or not to recommend, the
18 approval of applicant’s gTLD application.” (*Id.*) Indeed, Plaintiff does not contend
19 otherwise. Plaintiff’s first claim against ICANN, for breach of contract, is based on
20 Plaintiff’s allegation that ICANN failed to “review Plaintiff’s [] application in
21 accordance with ICANN’s Bylaws, Articles of Incorporation, and the new gTLD
22 rules and procedures” (FAC ¶ 68.) Similarly, Plaintiff’s second and third
23 claims, for intentional and negligent misrepresentation, are based on Plaintiff’s
24 allegation that “ICANN represented to Plaintiff that Plaintiff’s application
25 for .Africa would be reviewed in accordance with ICANN’s Bylaws, Articles of
26 Incorporation, and the new gTLD [rules and procedures].” (*Id.* ¶¶ 74, 80.)

27 Plaintiff’s fourth claim, for fraud and conspiracy to commit fraud, is based on
28

1 the allegation that ICANN conspired to “improperly deny[] Plaintiff’s application”
2 and accepted a competing application for .AFRICA. (*Id.* ¶¶ 84-85.) Plaintiff’s fifth
3 claim, for unfair competition, is based on the same allegations underlying its first
4 four claims. (*Id.* ¶ 97.) Plaintiff’s sixth claim, for negligence, is based on
5 ICANN’s alleged “duty to act with proper care in processing Plaintiff’s application,”
6 including an alleged duty to investigate the GAC’s advice concerning Plaintiff’s
7 Application and an alleged duty not to consider or move forward with the
8 competing application for .AFRICA. (*Id.* ¶¶ 101-07.) Finally, all of Plaintiff’s
9 claims for declaratory relief relate to Plaintiff’s Application and ICANN’s
10 processing thereof. Plaintiff asks the Court: (1) to “confirm” the IRP Panel’s
11 Declaration (which dealt with the processing of Plaintiff’s Application), (*id.* ¶¶ 118);
12 (2) to require ICANN to “follow the [IRP Panel’s] Declaration and allow
13 [Plaintiff’s] [A]pplication to proceed through the delegation phase of the
14 application process, (*id.* ¶ 124); (3) to declare “that the registry agreement between
15 ZACR[, Plaintiff’s competitor,] and ICANN [is] null and void and that ZACR’s
16 application does not meet ICANN standards,” (*id.* ¶ 132); and (4) to declare that the
17 Covenant Not to Sue is unenforceable, (*id.* ¶ 142).

18 Each of these claims, by their express terms, arises out of and relates to the
19 evaluation of Plaintiff’s Application. As a result, each is barred by the Covenant
20 Not to Sue contained in Module 6 of the Guidebook.

21 **II. THE COVENANT NOT TO SUE IS FULLY ENFORCEABLE.**

22 Plaintiff’s eleventh cause of action seeks a declaration from the Court that the
23 Covenant Not to Sue is unenforceable. (FAC ¶¶ 133-42.) The Court may
24 determine based on Plaintiff’s pleadings and on judicially noticeable materials that
25 the Covenant Not to Sue is fully enforceable as to Plaintiff, a sophisticated business
26 entity that knowingly and voluntarily determined to submit its gTLD application
27 despite all the inherent risks.
28

1 **A. Plaintiff is a Sophisticated Business Entity That Knowingly and**
2 **Voluntarily Agreed to the Covenant Not to Sue.**

3 As a general matter, a written release extinguishes any claim covered by its
4 terms. *Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996); *see also*
5 *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 755 (1993) (enforcing a
6 prospective release whose language was “clear and unequivocal” and “contain[ed]
7 no ambiguities in expressing the intent of the parties”). Accordingly, a party
8 seeking to avoid the plain language of a written release for reason of
9 unconscionability bears the burden of demonstrating that the release is both
10 procedurally and substantively unconscionable. *McCaffrey Grp., Inc. v. Superior*
11 *Court*, 224 Cal. App. 4th 1330, 1348 (2014). A release is procedurally
12 unconscionable “if at the time the contract was formed there was ‘oppression’ or
13 ‘surprise.’ Oppression exists if an inequality of bargaining power between the
14 parties results in the absence of real negotiation and meaningful choice. Surprise
15 involves the extent to which the supposedly agreed-upon terms are hidden in a
16 prolix printed form drafted by the party seeking to enforce them.” *Stern v. Cingular*
17 *Wireless Corp.*, 453 F. Supp. 2d 1138, 1145 (C.D. Cal. 2006) (internal quotation
18 marks and citations omitted). A release is substantively unconscionable only if its
19 “terms are so one-sided as to shock the conscience.” *Ingle v. Circuit City Stores,*
20 *Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003) (citations omitted).

21 Plaintiff cannot meet its burden to prove that the Covenant Not to Sue is
22 unconscionable. Although Plaintiff alleges in a conclusory fashion that the
23 Covenant Not to Sue is unconscionable (FAC ¶ 137), the facts (as contained in the
24 FAC and the materials as to which the Court can take judicial notice) demonstrate
25 that Plaintiff is a sophisticated business entity that made the knowing and voluntary
26 commercial decision to invest more than \$185,000 for the opportunity to operate a
27 gTLD. Indeed, applicants for gTLDs are required to demonstrate that they are
28 stable business entities that have the significant technical and financial wherewithal

1 required to operate a gTLD registry. (RJN Ex. B (Guidebook Module 2) at 47-48
2 (§ 2.2.2.1; 2.2.2.2).)

3 Plaintiff's situation is not in any way comparable to the employment and
4 consumer contexts in which courts have sometimes found releases to be
5 unconscionable. No entity is required to apply for a gTLD, and certainly no entity
6 has a "right" to do so. The plainly labeled "Terms and Conditions" of the
7 Application (Module 6 of the Guidebook) include the Covenant Not to Sue as well
8 as the explicit condition that ICANN reserves the right to "determine not to proceed
9 with any and all applications for new gTLDs." (RJN Ex. C (Guidebook Module 6)
10 at 34-35 (¶ 3).)

11 Plaintiff was also aware of the other risks inherent in applying for .AFRICA.
12 Specifically, Plaintiff alleges that it was aware of the Guidebook requirement that it
13 have documented support or non-objection from at least 60% of African
14 governments, a requirement Plaintiff primarily attempted to meet using the letter it
15 had received from the AUC in 2009. (FAC ¶¶ 23-24.) But when Plaintiff
16 submitted its application to ICANN in 2012, Plaintiff knew (or at least should have
17 known) that it had lost the support of the AUC and that a competing applicant had
18 that support (ZACR, which had prevailed in a public RFP process). (*Id.* ¶¶ 24, 30.)

19 If Plaintiff did not like the terms of any portion of the Guidebook, including
20 the Covenant Not to Sue and the governmental support requirement, Plaintiff did
21 not have to apply for a gTLD. Instead, Plaintiff knowingly chose to submit its
22 Application for .AFRICA, agreeing to all of the Application's Terms and
23 Conditions. Plaintiff has no basis now to repudiate its entirely voluntary decision to
24 submit its Application or to argue that portions of the Guidebook (the contract that
25 forms the basis for most of its claims) should not apply to Plaintiff (and only
26 Plaintiff).

27 Indeed, "courts have not been solicitous of businessmen in the name of
28 unconscionability . . . probably because courts view businessmen as possessed of a

1 greater degree of commercial understanding and substantially more economic
2 muscle than the ordinary consumer.” *A&M Produce Co. v. FMC Corp.*, 135 Cal.
3 App. 3d 473, 489 (1982) (internal quotation marks and citations omitted).
4 Accordingly, courts repeatedly uphold releases in cases involving sophisticated
5 business parties, even where one party arguably had greater bargaining power and
6 where the release was completely non-negotiable. *O’Donoghue v. Superior Court*,
7 219 Cal. App. 4th 245, 258-59 (2013) (enforcing general release signed by lenders
8 and holding that “the ‘adhesive aspect’ of a contract ‘is not dispositive’ on the issue
9 of unconscionability,” especially where “the elements of surprise or
10 misrepresentation are not present”) (citations omitted); *Captain Bounce, Inc. v.*
11 *Business Fin. Servs.*, No. 11-CV-858 JLS (WMC), 2012 U.S. Dist. LEXIS 36750,
12 at *19 (S.D. Cal. Mar. 19, 2012) (“[T]he Court agrees with Defendants that the
13 business-to-business context of the Agreements is relevant . . . Plaintiffs are
14 sophisticated borrowers distinguishable from the consumer or employee plaintiff
15 who is a party to the typical unconscionable contract.”). This is particularly true
16 where, as here, the defendant (in this case a non-profit corporation) “rationally
17 required a release . . . as a condition of” entering into the contract.” *Sanchez v.*
18 *Bally’s Total Fitness Corp.*, 68 Cal. App. 4th 62, 67 (1998) (upholding a total
19 release of claims in an adhesion contract involving a consumer, noting also that the
20 consumer plaintiff did not argue that the language of the release was “unclear and
21 ambiguous”).

22 Plaintiff also alleges that the Covenant Not to Sue is unenforceable because it
23 was “procured by fraud” (FAC ¶ 138), but the only “fraud” Plaintiff identifies is
24 that “ICANN denies in practice that the IRP is binding” (*id.* ¶ 139). But Plaintiff
25 does not allege when ICANN ever represented that IRPs are binding, and certainly
26 the quotation from the Guidebook contained in paragraph 138 of the FAC does not
27 include such a representation. In any event, inasmuch as ICANN followed the IRP
28 declaration in this particular situation in its entirety, even if there was a

1 misrepresentation, there could be no injury to Plaintiff that would justify annulling
2 the Covenant Not to Sue.

3 **B. The Covenant Not to Sue Is Enforceable as a Matter of Law.**

4 Plaintiff also makes the conclusory allegation that the Covenant Not to Sue is
5 unenforceable pursuant to Section 1688 of the California Civil Procedure Code.
6 (FAC ¶ 136.) However, as to claims not involving fraud or intentional violations of
7 law, the California Supreme Court has held that Section 1688 is limited to
8 agreements that “involve the public interest,” which Plaintiff’s Application is not.
9 *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 755-56 (2007); *Tunkl v.*
10 *Regents of Univ. of Cal.*, 60 Cal. 2d 92 (1963).

11 In *Tunkl*, the California Supreme Court laid out factors typifying transactions
12 that “affect the public interest”: (1) the business involved is of the type suitable for
13 public regulation; (2) the services it provides are of great importance and a practical
14 necessity to the public; (3) the services are broadly offered to the public; (4) as a
15 result of the essential nature of the service, the party obtaining the release had a
16 decisive bargaining advantage; (5) the exculpation of liability is in a contract of
17 adhesion; and (6) the transaction places the releasing party’s person or property in
18 the control of the released party, subject to the risk of negligence. *Tunkl*, 60 Cal. 2d
19 at 98-101.

20 The Covenant Not to Sue does not implicate these factors.⁵ First, no
21 government entity or regulatory scheme governs ICANN’s decisions to approve
22 TLDs or registries. (FAC ¶ 13.) ICANN’s review of gTLD applications is not
23 even close to the same as the basic necessary services contemplated in *Tunkl* “such
24

25 ⁵ Further, to the extent the Covenant Not to Sue is in any way unenforceable,
26 its unenforceability would be limited to Plaintiff’s claims sounding in fraud. *See*
27 *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1477 (2009) (where part of a
28 contract is unenforceable, “the strong legislative and judicial preference is to sever
the offending term and enforce the balance of the agreement”). And as discussed
further below, Plaintiff’s fraud claims do not allege facts sufficient to state a claim.

1 as medical, legal, housing, transportation or similar services which must necessarily
2 be used by the general public.” *Appalachian Ins. Co. v. McDonnell Douglas Corp.*,
3 214 Cal. App. 3d 1, 29 (1989) (internal quotation marks and citations omitted);
4 *Tunkl*, 60 Cal. 2d at 98-99.

5 Second, Plaintiff does not require a gTLD, and is not entitled to one; the
6 Guidebook makes clear that being the registry operator of a gTLD is a privilege, not
7 a right. Finally, unlike the patient in *Tunkl* who placed his body in the exclusive
8 control of the hospital, Plaintiff in no way placed its “person or property in
9 [ICANN’s] control.” *Id.* at 101-02. To the contrary, Plaintiff retained complete
10 control over its Application, made the decision to submit its Application, and could
11 (and still can) withdraw its Application from consideration at any time. In short,
12 the agreement between ICANN and Plaintiff does not implicate the public interest
13 in the way required to void the release under *Tunkl*.⁶

14 **III. ICANN’S ACTIONS WITH RESPECT TO PLAINTIFF’S**
15 **APPLICATION WERE SPECIFICALLY AUTHORIZED BY**
16 **THE GUIDEBOOK.**

17 Separate and apart from the Covenant Not to Sue, Plaintiff’s claim for breach
18 of contract is insufficiently pled because it is based on Plaintiff’s allegations that
19 ICANN acted inconsistently with the terms of the Guidebook and/or failed to
20 approve Plaintiff’s Application. (FAC ¶¶ 68-69.) Even assuming that such
21 allegations are true (which they are not), they do not support Plaintiff’s claims
22 because the terms of Plaintiff’s Application explicitly allow ICANN the discretion
23 to “determine not to proceed with any and all applications for new gTLDs.” (RJN

24 ⁶ Even if it could be argued that Plaintiff’s Application somehow “affected
25 the public interest,” the Covenant Not to Sue would still be valid because Plaintiff
26 does not “identify a specific law or regulation potentially violated [by ICANN] so
27 as to trigger application of section 1668.” *CAZA Drilling, Inc. v. TEG Oil & Gas*
28 *U.S.A., Inc.*, 142 Cal. App. 4th 453, 476 (Cal. App. 2006). The only violation of
law Plaintiff alleges is “unfair competition,” and Plaintiff does not seek injunctive
relief with respect to that cause of action. There is no basis for the Court to
“intervene and remake the parties’ agreement” regarding who would “bear the risk
of economic loss” in the event that Plaintiff’s Application was unsuccessful. *Id.* at
475.

1 Ex. B (Guidebook Module 6) at 34-35, 39-40 (¶¶ 3,14); *Klein v. Chevron U.S.A.,*
2 *Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (When reviewing breach of contract
3 claims, courts “must determine whether the alleged agreement is ‘reasonably
4 susceptible’ to the meaning ascribed to it in the complaint.”.)

5 In *Image Online Design*, the plaintiff claimed that ICANN breached its
6 agreement with the plaintiff because ICANN did not officially approve or reject the
7 plaintiff’s application in conjunction with applications for new gTLDs that were
8 submitted in the year 2000. *Image Online Design Inc. v. Internet Corporation for*
9 *Assigned Names & Nos.*, No. CV 12-08968-DDP (JCx), 2013 U.S. Dist. LEXIS
10 16896 at *7-13 (C.D. Cal. Feb. 7, 2013). Judge Pregerson, however, found that
11 “the explicit terms of the Agreement (an application for a TLD from the year 2000)
12 contradict the notion that ICANN had an obligation to do anything beyond
13 considering [the plaintiff’s] application.” *Id.* at *10. Here, the analysis is the same:
14 ICANN complied with its obligations to consider Plaintiff’s Application in
15 accordance with the procedures set forth in the Guidebook; the fact that ICANN did
16 not delegate the gTLD to Plaintiff does not amount to a breach on ICANN’s part.

17 **IV. PLAINTIFF DOES NOT PLEAD ITS FRAUD CLAIMS WITH**
18 **SPECIFICITY.**

19 Plaintiff’s claims against ICANN that sound in fraud (i.e., its claims for
20 intentional misrepresentation, for fraud and conspiracy to commit fraud, and under
21 the fraudulent prong of California Business and Professions Code section 17200)
22 are insufficiently pled. (FAC ¶¶ 73-78, 83-99.) Where a claim is “grounded in
23 fraud or [] sounds in fraud, [] the pleading of that claim as a whole must satisfy the
24 particularity requirement of Rule 9(b).” *Vess*, 317 F.3d at 1103-04 (internal
25 citations and quotation marks omitted). To satisfy this standard, a plaintiff must
26 identify “the time, place, and content of [the] alleged misrepresentation[s],” as well
27 as the “circumstances indicating falseness” or “manner in which the representations
28 at issue were false and misleading.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541,

1 1547–48 (9th Cir.1994), *superseded on other grounds* (internal citation and
2 modifications omitted).

3 Plaintiff does not identify a single alleged misrepresentation by ICANN in
4 support of Plaintiff’s purported claim for fraud and conspiracy to commit fraud.
5 (FAC ¶¶ 83-95; *Wilkins v. Nat’l Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066,
6 1081 (1999) (“[A] knowingly false misrepresentation by the defendant” is one
7 element of a claim for fraud.). Instead, Plaintiff merely alleges that ICANN
8 “represented . . . that Plaintiff’s application [] would be reviewed in accordance
9 with ICANN’s Bylaws.” (FAC ¶ 74.) However, Plaintiff does not identify with
10 particularity which statements in the Guidebook (an over 300-page document) were
11 allegedly false or misleading, much less any other ICANN representations that were
12 false or misleading.⁷

13 Plaintiff also alleges that ICANN made false representations regarding the
14 independent review process; however, Plaintiff fails to allege with any particularity
15 what those false representations were or when they were made. (FAC ¶ 74.)
16 Further, Plaintiff was named the prevailing party by the independent review panel
17 and, as a result of that determination, ICANN’s Board returned Plaintiff’s
18 Application to processing, which is exactly what the review panel recommended
19 that ICANN do. *Lazar*, 12 Cal. 4th at 638.

20 Plaintiff’s unfair competition claim, which sounds in fraud insofar as it is
21 plead under the “fraudulent” prong of California Business and Professions Code
22 section 17200, is based on the same allegations that underlie its other claims and
23 thus should be dismissed for the same reasons. (FAC ¶ 97.)

24 Finally, even if Plaintiff were to allege that ICANN’s treatment of Plaintiff’s

25 _____
26 ⁷ Plaintiff quotes (incompletely) a provision in the Guidebook regarding
27 GAC Early Warnings, but Plaintiff does not allege that those Early Warnings
28 involved a misrepresentation that had an impact on the processing of Plaintiff’s
Application. (FAC ¶ 75.) *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)
(one element of a claim for intentional misrepresentation is “resulting damage”).

1 Application was not in conformance with the Guidebook or ICANN’s Bylaws, the
2 terms and conditions of Plaintiff’s Application explicitly provide that ICANN “has
3 the right to determine not to proceed with any and all applications for new gTLDs”
4 and that “[t]he decision to review, consider and approve an application . . . is
5 entirely at ICANN’s discretion.” (RJN Ex. B (Guidebook) Module 6 ¶ 3.) For this
6 reason, leave to amend would be futile.

7 **CONCLUSION**

8 For the foregoing reasons, ICANN respectfully requests that the Court grant
9 ICANN’s Rule 12(b)(6) motion and dismiss Plaintiff’s FAC with prejudice.

10 Dated: March 25, 2016

JONES DAY

11
12 By: /s/ Jeffrey A. LeVee
13 Jeffrey A. LeVee

14 Attorneys for Defendant
15 INTERNET CORPORATION FOR
16 ASSIGNED NAMES AND NUMBERS
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