No. 16-56890

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBY GLEN, LLC,
Plaintiff/Appellant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al*.
Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California,
The Honorable Percy Anderson
No. 2:16-CV-05505-PA-AS

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee the Internet Corporation for Assigned Names and Numbers has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This appeal involves a commercial transaction between two sophisticated entities, Appellant Ruby Glen LLC ("Ruby Glen") and Appellee the Internet Corporation for Assigned Names and Numbers ("ICANN"). The transaction at issue was guided by detailed and exhaustive procedures that were drafted over a number of years based on input from various sources, including entities and principals related to Ruby Glen. Throughout the process, ICANN followed the letter and spirit of the agreed-upon procedures. Ruby Glen, on the other hand, has taken several steps aimed at highjacking the process for its own financial gain, not the least being this lawsuit, which violates the parties' agreement to resolve disagreements through alternative dispute resolution mechanisms, not litigation. As the District Court correctly concluded, the parties' agreement to not resort to litigation, is justifiable, reasonable and enforceable. The District Court's dismissal of Ruby Glen's claims should be affirmed.

ICANN is a California not-for-profit, public benefit corporation that oversees the technical coordination of the Internet's domain name system ("DNS"), which converts easily-remembered domain names, such as "ca9.uscourts.gov," into numeric IP addresses recognized by computers. In 2012, ICANN began accepting applications from companies and organizations around the world for the right to operate new generic top-level domains ("gTLDs") that would compete with

existing gTLDs, such as .COM and .NET. ICANN's "New gTLD Program," which generated almost 2,000 applications for new gTLDs, was ICANN's most ambitious undertaking to date, aimed at increasing competition and creativity in, while ensuring the stability and security of, the DNS.

Ruby Glen is an entity created by its parent company, Donuts Inc. ("Donuts"), for the sole purpose of applying for new gTLDs, including the .WEB gTLD. Donuts was formed by four individuals who participated in ICANN's community-driven, years-long discussions on how to conduct an open and transparent process for entities to apply for and operate new gTLDs. Donuts, through its many, specially-created subsidiaries, such as Ruby Glen, ultimately submitted ***over 300*** new gTLD applications, more than any other applicant.

The new gTLD application process was set forth in a detailed and exhaustive 338-page Applicant Guidebook ("Guidebook") published by ICANN in six different languages. The Guidebook went through ten drafts over the span of more than two years, adjusted each time based on comments, suggestions, and proposals from multiple entities and organizations, including the Donuts founders.

Two Guidebook provisions are critical to this lawsuit. First, the Guidebook provides that if there are multiple, qualified applicants for the same gTLD, referred to as a gTLD "contention set" in the Guidebook, ICANN will schedule an ICANN auction in order to resolve the contention set, but only if the applicants cannot

agree on some other, private resolution. Second, like all other entities applying for new gTLDs, Ruby Glen agreed to detailed terms and conditions, including a covenant not to sue ICANN in court relating to ICANN's review of the new gTLD applications (the "Covenant Not to Sue"). Applicants, however, were not left without any form of redress. The Covenant Not to Sue explicitly states that disgruntled applicants may raise challenges to ICANN's implementation of the New gTLD Program through various accountability mechanisms established in ICANN's Bylaws. These accountability mechanisms include an Independent Review Process under which disputes are referred to independent panels administered by the American Arbitration Association's International Centre for Dispute Resolution.

Ruby Glen, and six other companies, applied to ICANN for the right to operate .WEB, a proposed new gTLD. Because all seven .WEB applicants passed initial evaluations and the applicants were not able to privately resolve the .WEB contention set, ICANN scheduled an auction in order to resolve the contention set, as provided for in the Guidebook.

Ruby Glen attempted to halt the auction by invoking every one of ICANN's accountability mechanisms, arguing that the only .WEB applicant that refused to agree to a private resolution, Nu Dotco LLC ("NDC"), had not reported to ICANN a post-application change in control. After investigating Ruby Glen's claims,

ICANN concluded that no such change of control had occurred and moved forward with the auction. Ruby Glen then sued ICANN to block the auction and filed an application for temporary restraining order ("TRO") just days before the auction. The District Court denied Ruby Glen's TRO application based on evidence that ICANN had conducted a full investigation of Ruby Glen's claims regarding NDC. As such, ICANN proceeded with the auction and NDC prevailed.

Thereafter, the District Court granted ICANN's motion to dismiss Ruby Glen's first amended complaint ("FAC") based on the enforceability and applicability of the Covenant Not to Sue. Ruby Glen now appeals the District Court's dismissal. Ruby Glen's appeal, however, raises "several" new arguments that Ruby Glen concedes were never raised in the District Court,[1] invokes inapplicable standards aimed at protecting individual members of the public from overreaching releases that have no relevance in a transaction like Ruby Glen's .WEB application, and attempts to assert claims that Ruby Glen has never asserted, and could never actually assert.

A key flaw in Ruby Glen's appeal is that the Covenant Not to Sue, which Ruby Glen repeatedly describes as the "exculpatory clause"[2] is not exculpatory at all. The Covenant Not to Sue simply does not do what California Civil Code

[1] Appellant's Opening Brief at 28 n.2.

[2] This phrase appears 90 times in Ruby Glen's Opening Brief.

Section 1668 ("Section 1668") prohibits – "exempt [ICANN] from responsibility for [its] own fraud, or willful injury to the person or property of another, or violation of law…." Instead, the Covenant Not to Sue is a promise by applicants to resolve disputes through ICANN's accountability mechanisms, including the Independent Review Process, rather than through lawsuits. The District Court correctly found that the Covenant Not to Sue is not an exculpatory clause under Section 1668 because it "does not leave Plaintiff without remedies." (ER16-17, Motion to Dismiss ("MTD") Minute Order.) Inasmuch as the Covenant Not to Sue is not an "exempt[ion] from responsibility," but instead a mechanism for alternative dispute resolution, the District Court properly rejected Ruby Glen's attempt to evade the agreed-upon dispute resolution procedures, particularly in light of the prominent federal policy favoring alternative dispute resolution. Indeed, this Court has previously held that Section 1668 does not nullify promises not to sue where "[o]ther sanctions remain in place." *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987).

Ruby Glen's Opening Brief wholly fails to address the District Court's ultimate conclusion that the Covenant Not to Sue is not an "exculpatory clause" under Section 1668, and instead attempts to undercut the District Court's ruling by invoking rules meant to protect individuals seeking essential health and housing services from overbroad releases. Ruby Glen's attempt to apply public policy

concepts – such as "unconscionabilty" and releases "affecting the public interest" – to a commercial transaction between sophisticated entities is unsupported by the law and the record below. Ruby Glen's principals were part of the ICANN community that worked for years on collaboratively developing the New gTLD Program and the Guidebook. The task of fairly evaluating 1,930 new gTLD applications was inherently complex. The Covenant Not to Sue was necessary to address the prospect of fragmented court litigation which could, as the District Court observed, "derail the entire system developed by ICANN to process applications for gTLDs." (ER18, MTD Minute Order.)

Applicants like Ruby Glen and its parent company, Donuts, knowingly released the right to sue ICANN relating to its review of new gTLD applications. Neither Ruby Glen, nor any other applicant, however, was left without any form of redress. Applicants were afforded a robust form of review in which those challenges could be addressed through ICANN's accountability mechanisms, which many applicants – including Ruby Glen and Donuts – have frequently and successfully invoked. Moreover, because Section 1668 does not apply to all releases of liability, but only those that seek to exempt one from its own "fraud" and "willful misconduct," the District Court was correct to conclude that Ruby Glen did not, and could not, assert the type of claims covered by Section 1668. The Covenant Not to Sue is reasonable, justifiable, enforceable, and applies to all

of Ruby Glen's claims. The District Court's ruling should be affirmed on this basis.

The District Court's dismissal of Ruby Glen's FAC could also be affirmed on the alternative basis that Ruby Glen's FAC fails to state a claim against ICANN, which was fully briefed below. Ruby Glen's FAC does not plausibly allege facts that support any cognizable cause of action against ICANN.

STATEMENT OF JURISDICTION

ICANN agrees with the Jurisdictional Statement in Appellant's Opening Brief.

STATEMENT OF ISSUES PRESENTED

1. Does the Covenant Not to Sue apply to Ruby Glen's allegation that ICANN incorrectly required Ruby Glen's .WEB application to proceed to auction in order to obtain the rights to operate the .WEB gTLD?

2. Is the Covenant Not to Sue an "exculpatory provision" subject to Section 1668, despite the fact that it provides Ruby Glen, and all other aggrieved applicants, with access to meaningful redress through ICANN's accountability mechanisms, including the Independent Review Process?

3. Can the Covenant Not to Sue be facially invalidated based on a theory that the Covenant Not to Sue could theoretically encompass claims proscribed by

Section 1668 even though Ruby Glen is not asserting such claims and even though Ruby Glen freely accepted the Covenant Not to Sue?

5. Are Ruby Glen's causes of action for breach of the implied covenant of good faith and fair dealing and for violation of California's Business & Professions Code Section 17200 claims for "fraud" and "willful misconduct" covered by Section 1668?

6. Was Ruby Glen's .WEB gTLD application "affected with the public interest" such that freedom of contract is curtailed, and the terms of the Covenant Not to Sue are invalidated, by *Tunkl v. Regents of University of California,* 60 Cal. 2d 92, 98 (1963)?

7. Is the Covenant Not to Sue's requirement that Ruby Glen raise its claims through ICANN's accountability mechanisms, including the Independent Review Process, rather than court proceedings procedurally and substantively unconscionable?

8. Given the terms and enforceability of the Covenant Not to Sue, was the District Court entitled to deny leave to amend as futile?

9. Should the District Court's order of dismissal be affirmed on the alternative ground that Ruby Glen's FAC fails to state a claim upon which relief can be granted, which was fully briefed below by the parties?

STATEMENT OF THE CASE

I. ICANN and its Accountability Mechanisms.

ICANN is a California not-for-profit, public benefit corporation that oversees the technical coordination of the Internet's DNS on behalf of the Internet community. (ER613, FAC ¶ 10.) The essential function of the DNS is to convert easily remembered Internet domain names, such as "icann.org" and "uscourts.gov," into numeric IP addresses understood by computers. ICANN's ongoing responsibility is to ensure the stability, security, and interoperability of the DNS while, among other things, simultaneously promoting competition in the registration of domain names. (ER613, FAC ¶ 11.) To that end, ICANN contracts with entities for the operation of gTLDs, which represent the portion of a domain name to the right of the final dot, such as ".COM" or ".GOV." (*Id*.)

ICANN originally derived its responsibility to coordinate the DNS through a series of contracts with the National Telecommunications & Information Administration ("NTIA") of the United States Department of Commerce.[3] In October 2016, however, NTIA finalized the transfer of oversight authority away

[3] National Telecommunications and Information Administration, Quarterly Report on the Transition of the Stewardship of the Internet Assigned Numbers Authority ("IANA") Functions (Oct. 2016), *available at* https://www.ntia.doc.gov/files/ntia/publications/final_ntia_iana_8th_quarterly_report_q4_fy_2016.pdf.

from the U.S. Government and directly to the global Internet community acting through ICANN, a transfer envisioned since ICANN's creation in 1998.[4]

In order to ensure ICANN's accountability to the global Internet community, ICANN has established accountability mechanisms for review of ICANN actions and decisions. Any aggrieved party can seek to hold ICANN accountable for alleged violations of ICANN's Bylaws, Articles of Incorporation ("Articles"), or certain other internal policies and procedures through these accountability mechanisms. (ER650-656, ER656-657, Bylaws, Art. IV §§ 2, 3, Art. V § 2.)[5]

For instance, the applicable ICANN Bylaws mandate an independent Ombudsman, who is a "neutral dispute resolution practitioner." (ER656-657, Bylaws, Art. V § 2.) The "principal function of the Ombudsman [is] to provide an independent internal evaluation of complaints by members of the ICANN community" who believe they have been treated unfairly by ICANN staff, the ICANN Board, or an ICANN constituent body. (*Id*.)

The operative ICANN Bylaws also provide for a process by which "any person or entity materially affected by an action of ICANN may request review or

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[4] *Id.* at 3.

[5] Unless otherwise noted, all references to ICANN's "Bylaws" refer to the Bylaws that were in effect on 11 February 2016 and are relied upon by Ruby Glen in the FAC. (ER646-716, FAC Ex. B.) An amended set of ICANN Bylaws became effective on 1 October 2016.

reconsideration of that action by the Board." (ER650-651, Bylaws, Art. IV § 2(1).) Requests for reconsideration of Board or staff actions or inactions are submitted to, and considered by, a special committee of the ICANN Board (at the time the Guidebook was published, the Board Governance Committee). (ER651, Bylaws, Art. IV § 2(3).)

Finally, the applicable ICANN Bylaws also create an Independent Review Process under which a party materially affected by an action or inaction of the ICANN Board may submit its claims to an "independent third-party." (ER653, Bylaws, Art. IV § 3(1).) Claims filed under the Independent Review Process are submitted to the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"), which is responsible for administering Independent Review Process proceedings in accordance with the ICDR's International Dispute Resolution Procedures, as modified by the ICANN's Independent Review Process Supplementary Procedures.[6]

The Independent Review Process is mandatory in that ICANN is required by its Bylaws to participate in the process. (ER653-656, Bylaws, Art. IV § 3.) And an Independent Review Process panel's declarations "are final and have precedential value." (ER656, Bylaws, Art. IV § 3(21); *see also* Final Declaration

[6] IRP Supplementary Procedures (April 2013), *available at* https://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTAGE2019470.

¶ 130, *Vistaprint Limited v. ICANN* (ICDR Case No. 01-14-0000-6505) (Oct. 9, 2015), *available at* https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf.)

II. The New gTLD Program and the Applicant Guidebook.

Since its inception, one of ICANN's goals has been to expand the number of gTLDs in order to promote consumer choice and competition in the DNS. (ER719, Guidebook Preamble.) In 2007, ICANN's Generic Names Supporting Organization recommended a policy to introduce new gTLDs in an orderly, timely and predictable way. (*Id.*) Thereafter, in 2012, ICANN launched the "New gTLD Program" under which qualified and established entities and organizations applied for the opportunity to operate new gTLDs that would add diversity to the DNS and provide alternatives to existing gTLDs. (ER615, FAC ¶ 16; SER37, Willett Decl. ¶ 3.) As the ICANN community envisioned it, "[t]he new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS." (ER719, Guidebook Preamble.)

In connection with the New gTLD Program, ICANN published the Guidebook, setting forth the criteria that applicants must meet to be eligible to operate a gTLD, as well as the procedures for ICANN's evaluation of applications. (ER718-1055.) ICANN engaged in a multi-year process and ten different drafts to develop the Guidebook. (*See* SER37-38, Willett Decl. ¶ 4.) With each draft,

ICANN sought community comments, suggestions, and proposals regarding the policies and procedures set forth in the Guidebook. (*Id*.; ER719, Guidebook Preamble.) The Internet community, which includes "governments, individuals, civil society, business and intellectual property constituencies, and the technology community," participated in both the policy considerations behind deciding to implement the New gTLD Program as well as the drafting of the Guidebook. (ER719, Guidebook Preamble.) In June 2012, ICANN published the operative 338-page Guidebook in six different languages based on "[m]eaningful community input." (*Id*.)

III. Module 6 and the Covenant Not to Sue.

By submitting an application, all applicants, including Ruby Glen, agreed to the terms and conditions set forth in the Guidebook. (ER1049, Guidebook, Module 6; ER617, FAC ¶ 21.) One of the terms and conditions – the Covenant Not to Sue – is contained in Module 6 of the Guidebook:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this 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 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

(ER1051, Guidebook Module 6 § 6 (capitalization in original).)

While the Covenant Not to Sue prohibits lawsuits, it explicitly allows applicants to use ICANN's accountability mechanisms for any alleged violations by ICANN of its Articles, Bylaws, or the Guidebook in connection with the New gTLD Program. (*Id.*) ICANN sought and considered public comment regarding

Module 6, as it did the remainder of the Guidebook, during its years-long drafting process. (ER719, Guidebook Preamble.) For example, the provision confirming that applicants could invoke ICANN's accountability mechanisms regarding ICANN's implementation of the New gTLD Program was added in response to comments and proposals by the Internet community.[7]

IV. Ruby Glen and its .WEB Application.

Ruby Glen is a subsidiary of Donuts Inc. ("Donuts"). (ER612, FAC ¶ 5.) Donuts' founders are longstanding members of the ICANN community that participated via public comment in the drafting of the Guidebook. (SER70, Weinstein Decl. ¶ 4.) Donuts submitted 307 applications for new gTLDs through its subsidiary companies, such as Ruby Glen, which is more than any other applicant. (*Id*. ¶ 2.) Thus, in submitting its applications, Donuts agreed to be bound by the Guidebook's terms and conditions, including the Covenant Not to Sue, ***over 300 times***.

Donuts, through Ruby Glen, followed the processes set forth in the Guidebook and applied for the opportunity to operate .WEB, along with multiple other applicants. (ER619, FAC ¶¶ 28, 31.) Ultimately, seven .WEB applicants,

[7] gTLD Applicant Guidebook, April 2011 Discussion Draft, p. 6-3 (https://archive.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf); Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response, April 2011, p. 31 #9 (https://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf).

including Ruby Glen and Nu Dot Co, LLC ("NDC"), passed the initial evaluation process for .WEB. (SER38, Willett Decl. ¶ 6.) In a circumstance where there is more than one qualified applicant for the same gTLD, the Guidebook mandates that all such applications be placed in a "contention set" that must be resolved in order to select a single successful applicant. (ER732-733, Guidebook § 1.1.2.10.)

When applicants are placed in a contention set, the Guidebook encourages the applicants to agree among themselves on resolution of the contention set. (ER907, Guidebook § 4.1.3.) If it is resolved by agreement, such as through a private auction, the applicants allocate the proceeds as they choose. (ER618, FAC ¶ 27.) But in order to privately resolve a contention set, all applicants must agree to the private resolution method. (*Id*., FAC ¶ 26.) If all members of a contention set do not, the Guidebook requires ICANN to schedule an auction of last resort for those applicants wishing to proceed with their applications in order to select the successful applicant. (ER920, Guidebook § 4.3.) The Guidebook makes clear that the gTLD contention process, including resolution by either private means or through an ICANN auction, is part of ICANN's evaluation process. (*See* ER903, ER931, Guidebook §§ 4.1, 5.1.)

Should an ICANN auction occur, the auction proceeds are first used to offset the administrative costs of the auction. (ER920, Guidebook § 4.3 n.1.) The remainder of the auction proceeds are held in a segregated account until the

Internet community develops, and the ICANN Board authorizes, a plan to use the funds for charitable purposes consistent with ICANN's mission, core values, and status as a not-for-profit entity. (*Id.*; SER73, Weinstein Decl. ¶ 13.) Accordingly, ICANN does not retain remaining auction funds for its own operational use. (*Id.*)

With respect to the .WEB contention set, one of the applicants, NDC, did not agree to participate in a private resolution. As such, on April 27, 2016, ICANN scheduled the .WEB auction for July 27, 2016, as required by the Guidebook. (ER618, ER621, ER623, FAC ¶¶ 26, 37, 43.)

V. Ruby Glen's Unsuccessful Attempts to Halt the .WEB Auction.

Following NDC's refusal to join in a private resolution of the .WEB contention, Ruby Glen alleged that NDC had undergone an undisclosed change in control, and asked ICANN to halt the .WEB auction while investigating. (ER622, FAC ¶ 40; SER46, Willett Decl. Ex. A.) On investigation, ICANN's staff found a lack of support for Ruby Glen's allegations, and thus refused to postpone the auction. Ruby Glen then invoked every ICANN accountability mechanism available, and eventually litigation, in an attempt to prevent the auction from going forward. (*See* ER622-623, FAC ¶¶ 40-42; ER624-626, FAC ¶¶ 49-52, 55.)

First, Ruby Glen complained to ICANN staff that NDC appeared to have experienced a change in ownership and control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook. (ER622, FAC ¶ 40.)

According to Ruby Glen, this alleged failure, if true, constituted a "disqualifying change in the control of [NDC]." (ER601.) Disqualification of NDC would have paved the way for a private resolution, rather than an ICANN auction. (ER740-744, ER749, ER770-771, Guidebook §§ 1.2.1, 1.2.7, Module 2, 2.1.) ICANN thoroughly investigated these claims. Specifically, ICANN contacted NDC on June 27, 2016, asking it to confirm whether there were any changes to NDC's organizational structure that required reporting to ICANN. (SER40, Willett Decl. ¶ 13.) NDC's Chief Financial Officer, Jose Ignacio Rasco III, responded the same day to confirm that NDC had not experienced any changes in its organizational structure. (*Id*.) Nonetheless, in an abundance of caution, ICANN contacted NDC again, just eleven days later, to inquire further into potential changes to NDC's organization. (SER42, *Id*. ¶ 18.) ICANN staff interviewed Mr. Rasco via telephone. (*Id*.) During the call, Mr. Rasco explicitly stated (and later confirmed via email on July 11, 2016): "Neither the ownership nor the control of [NDC] has changed since we filed our application." (SER42, SER63, Willett Decl. ¶ 18, Ex. F.) Thereafter, ICANN informed Ruby Glen by letter that ICANN had "investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction." (ER623, FAC ¶ 44; SER556, Zecchini Decl., Ex. G.)

Second, Ruby Glen brought its allegations to the Ombudsman, who also investigated the claim. (ER622-623, FAC ¶¶ 41, 42; SER 41-42, Willett Decl. ¶¶ 16-17; SER61, Willett Decl. Ex. E.) Like ICANN staff, the Ombudsman did not find evidence that NDC had experienced any change in ownership. (SER43, Willett Decl ¶ 21; SER65, Willett Decl. Ex. G.)

Third, on July 17, 2016, Ruby Glen filed a Reconsideration Request on an emergency basis to enjoin the auction, claiming that ICANN staff had failed to sufficiently investigate Ruby Glen's claims regarding NDC. (ER81-101, Reconsideration Request.) ICANN's Board Governance Committee accommodated Ruby Glen's request and expeditiously reviewed the thoroughness of ICANN staff's investigation into the alleged changes in NDC's management and control. (SER581-592, Final Determination.) After finishing its review, ICANN's Board Governance Committee denied the Reconsideration Request, concluding that ICANN staff had sufficiently investigated Ruby Glen's claims. (*Id.*; ER626, FAC ¶ 54.)

Fourth, just days before the .WEB auction was set to begin, Ruby Glen filed a complaint and an *ex parte* application for a temporary restraining order ("TRO") in the District Court seeking an order blocking the auction. (SER616-652, *Ex Parte* Appl. for TRO.) ICANN opposed the TRO application, arguing, among other things, that Ruby Glen was not likely to succeed on the merits of its claims

because ICANN's Board and staff appropriately investigated Ruby Glen's claims and detected no changes to NDC's ownership or control, which was corroborated by sworn declarations from NDC's Chief Operating Officer and Chief Financial Officer. (SER24, Opp'n to TRO.) The District Court agreed based on the "strength of ICANN's evidence." (SER4, Order on *Ex Parte* Appl. for TRO.) Specifically, the District Court held:

> ICANN has provided evidence that it has conducted investigations into Plaintiff's allegations concerning potential changes in NDC's management and ownership structure at each level of Plaintiff's appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.

(*Id*.)

Finally, Ruby Glen filed a request for Independent Review Process at the same time as it sought its TRO on the same grounds. (ER626, FAC ¶ 55, SER616,

Ex Parte Appl. for TRO.) Ruby Glen, however, later withdrew its Independent Review Process request, opting to proceed with litigation despite the Covenant Not to Sue.

After denial of the TRO application, the .WEB auction proceeded as scheduled in accordance with the Guidebook and the Auction Rules. (ER626-627, FAC ¶ 56.) Ruby Glen and all other .WEB applicants were outbid by NDC, which won the auction for $135 million. (*Id*.) Days after NDC won the auction, Verisign, Inc., which is the entity that operates the .COM and .NET gTLDs, among others, publicly stated that it "provided funds for [NDC's] bid" in exchange for an agreement that if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC would then seek to "assign[] the Registry Agreement to VeriSign upon consent from ICANN." (ER627.) To date, NDC has not sought to assign the rights to operate the .WEB gTLD to Verisign.

VI. ICANN's Motion to Dismiss.

On August 8, 2016, after the Court's denial of the TRO and after the conclusion of the .WEB auction, Ruby Glen filed its FAC, the operative complaint in this action. (ER610, FAC.) The FAC alleges that ICANN improperly allowed the .WEB auction to proceed thereby permitting NDC to succeed in obtaining the rights to operate .WEB. (ER611-612, FAC ¶¶ 1-4.) Ruby Glen's FAC alleges 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 California Business and Professions Code section 17200; and (5) declaratory relief. (ER610, FAC.) Ruby Glen seeks a damages award against ICANN of "not less" than $22.5 million (ER632, FAC ¶ 72), which represents what would have been Ruby Glen's share of NDC's $135 million bid for .WEB if the bid had been submitted in a private auction.

ICANN filed a motion to dismiss the FAC on the following grounds: (1) the Covenant Not to Sue contained in the Guidebook barred each of Ruby Glen's claims; (2) Ruby Glen failed to state a claim on which relief could be granted; and (3) Ruby Glen failed to join NDC, a necessary and indispensable party. (ER220-221, MTD.)

The District Court granted ICANN's motion to dismiss, ruling that the Covenant Not to Sue barred Ruby Glen from asserting its claims in court. (ER19, MTD Minute Order.) The District Court held that because the Covenant Not to Sue "does not leave [Ruby Glen] without remedies," but instead provides redress through ICANN's accountability mechanisms, the Covenant Not to Sue is not of the type of "exempt[ion] provision" barred by Section 1668. (ER16-17, MTD Minute Order.) The District Court also found that Section 1668 was inapplicable because the "FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence." (ER16, MTD Minute Order.) In regards to Ruby

Glen's claim of procedural unconscionability, the District Court noted that Ruby Glen is a "sophisticated entity" and that "at most" the Covenant Not to Sue is "only minimally procedurally unconscionable." (ER18, MTD Minute Order.) The District Court further held that the Covenant Not to Sue was not substantively unconscionable at all. (*Id*.) Notably, the District Court reasoned that without the Covenant Not to Sue, "any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs," a burden that ICANN alone bears. (*Id*.)

SUMMARY OF ARGUMENT

In its Opening Brief, Ruby Glen seeks to argue a starkly different case than what it presented in the District Court, now raising what it acknowledges are "several" new arguments that Ruby Glen did not make below. At the same time, however, Ruby Glen wholly fails to address some of the District Court's critical rulings that led to dismissal of Ruby Glen's claims, such as the finding that the Covenant Not to Sue is not an exemption from liability because it "does not leave Plaintiff without remedies." There is simply no avoiding the fact that Ruby Glen's .WEB application represents a voluntary transaction between sophisticated corporate entities that limited, but did not exclude, Ruby Glen's ability to raise challenges to ICANN's review of new gTLD applications. Neither the arguments Ruby Glen asserted below nor the arguments raised for the first time on appeal are

sufficient to cure the deficiencies in Ruby Glen's claims or overturn the District Court's dismissal of Ruby Glen's FAC.

Ruby Glen's primary argument is one of the several that Ruby Glen raises for the first time on appeal. Ruby Glen now argues that the Covenant Not to Sue should be narrowly construed against ICANN because ICANN was the "sole drafter" of the provision and, based on that narrow construction, Ruby Glen's claims are not covered by the Covenant Not to Sue because its claims are not premised on ICANN's review of Ruby Glen's application. This argument should not be considered on appeal because the necessary facts were not fully developed below, but in any event, Ruby Glen's new assertions are wrong on all counts. ICANN was not the "sole drafter" of the Covenant Not to Sue. The Guidebook and the Covenant Not to Sue were collaboratively crafted by ICANN and the ICANN community, including potential applicants such as Ruby Glen's parent company. In addition, Ruby Glen's claims are clearly based on ICANN's treatment of Ruby Glen's .WEB application. The premise of each of Ruby Glen's claims is that ICANN improperly moved forward with an ICANN auction to resolve the .WEB contention set, a decision that implicated all .WEB applications including that of Ruby Glen. Moreover, Ruby Glen alleges that it lost revenue, market share, reputation, and goodwill as a consequence of its application losing at

the ICANN auction. Ruby Glen is unquestionably asserting claims based on ICANN's review of its application.

Curiously, Ruby Glen's Opening Brief fails to address the District Court's dispositive ruling that the Covenant Not to Sue does not violate Section 1668 because it does not "exempt [ICANN] from responsibility" for its own acts. As the District Court held, the Covenant Not to Sue "does not leave [Ruby Glen] without remedies," but instead requires Ruby Glen to seek redress through ICANN's accountability mechanisms, including the Independent Review Process, in lieu of litigation. Rather than addressing this ruling, Ruby Glen now argues for the first time that the Independent Review Process is "illusory" because ICANN "is free to ignore" adverse Independent Review Process rulings. This new argument is both substantively unsupported and irrelevant. The federal policy favoring alternative dispute resolution compels referral of disputes to agreed-upon alternative mechanisms in lieu of court action, even if the alternatives are non-binding.

Next, Ruby Glen argues – here again, for the first time – that the Covenant Not to Sue is so broad that it should be invalidated on its face even though Ruby Glen is not asserting the type of claims covered by Section 1668, such as fraud and willful misconduct. California law, however, is clear that when a party is mounting a Section 1668 challenge to a release that it has already accepted, a court

must follow an ***as-applied*** analysis, focusing on whether the plaintiff has alleged claims of the sort that Section 1668 protects.

Moving to an as-applied challenge, as it must, Ruby Glen argues that two of its claims – for breach of the implied covenant of good faith and fair dealing and unfair competition – are protected by Section 1668 because they are predicated on "intentional conduct by ICANN." Section 1668, however, applies only to specific types of intentional ***wrongful misconduct***, such as tortious and fraudulent acts, not just intentional acts that happen to cause injury. None of Ruby Glen's claims meet that test.

Another new argument presented for the first time on appeal is Ruby Glen's attempt to utilize *Tunkl v. Regents of University of California* as support for applying Section 1668 to the Covenant Not to Sue. The *Tunkl* Court, in evaluating a medical release form forced on a helpless hospital patient, held that an "exculpatory provision" cannot be enforced where it "affects the public interest," as illuminated by evaluating six characteristics of the transaction at issue. At the outset, this new argument should not be considered because it depends on facts and six factors not developed below. More importantly, *Tunkl* is irrelevant in a commercial transaction like the one at issue here. Ruby Glen applied to operate .WEB in a private and voluntary commercial transaction between sophisticated entities, while *Tunkl* was concerned with situations involving

services offered to members of the public essential to their well-being, such as medical treatment and housing. As this Court has held before, "[t]he commercial context presented by this case raises equities far different from those of the helpless patient entering the hospital." *Arcwell Marine, Inc. v. Sw. Marine, Inc.*, 816 F.2d 468, 470-71 (9th Cir. 1987). Moreover, none of the six factors identified by the *Tunkl* Court as relevant to application of Section 1668 pertain to Ruby Glen's .WEB application or the New gTLD Program.

Ruby Glen also argues that the Covenant Not to Sue is unconscionable. The District Court, however, was correct in rejecting this argument. Ruby Glen and its parent company, which accepted the Covenant Not to Sue over 300 times, can claim no "oppression or surprise" from the Covenant Not to Sue. Moreover, as the District Court rightly recognized, the New gTLD Program presented a well-justified need for non-judicial mechanisms to resolve disputes in a consistent manner sensitive to technical requirements. Particularly given those circumstances, the District Court correctly concluded that there was no unconscionability.

Ruby Glen's final argument is that the District Court was required to grant it leave to amend. But because the Covenant Not to Sue mandates that all disputes be referred to ICANN's accountability mechanisms, any effort by Ruby Glen to further amend its already-amended FAC would be futile. Leave was appropriately denied.

Lastly, Ruby Glen makes no effort to address ICANN's motion to dismiss for failure to state a claim, which was fully briefed in the District Court. This Court can affirm dismissal of Ruby Glen's FAC for a failure to plausibly allege facts that state a cause of action against ICANN.

STANDARD OF REVIEW

Dismissals under Federal Rule of Civil Procedure 12(b)(6) are reviewed *de novo*. *Outdoor Media Grp., Inc. v. City of Beaumont,* 506 F.3d 895, 899 (9th Cir. 2007). This Court may consider "allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Id.* at 899-900 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir.2007)). This Court may also consider "documents crucial to the plaintiff's claims." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

ARGUMENT

I. The Covenant Not To Sue Encompasses, and Therefore Bars, Ruby Glen's Claims.

Ruby Glen's lead argument is one of "several" that Ruby Glen did not assert in the District Court. Ruby Glen claims – for the first time on appeal – that the Covenant Not to Sue does not apply to its FAC, laying out a two-part argument. First, Ruby Glen argues that the Covenant Not to Sue must be narrowly construed against ICANN because ICANN was the "sole drafter" of the provision. Second,

Ruby Glen argues that, when the Covenant Not to Sue is narrowly construed, it applies only to claims brought by an applicant regarding the treatment of its own application and Ruby Glen is not asserting claims regarding ICANN's treatment of its own application. Not only should Ruby Glen's new argument not be considered on appeal but, even if it is considered, the argument fails because ICANN was not the "sole drafter" of the Covenant Not to Sue and Ruby Glen's claims are indeed based on ICANN's treatment of Ruby Glen's application.

A. Ruby Glen's "Narrow Construction" Argument Should Not Be Considered on Appeal and Is Unsupported.

Ruby Glen's argument that the Covenant Not to Sue must be narrowly construed against ICANN should not be considered on appeal. As Ruby Glen's Opening Brief acknowledges, the argument is one of "several" that Ruby Glen has raised for the first time on appeal. Under *Romain v. Shear,* 799 F.2d 1416, 1419 (9th Cir. 1986), arguments first raised on appeal will generally not be considered. The exception invoked by Ruby Glen is that "the issue is purely one of law and the necessary facts are fully developed." *Id.* This exception, however, does not apply because the necessary facts have not been fully developed.

Ruby Glen's claim that ICANN was the sole drafter of the Covenant Not to Sue depends completely on the circumstances surrounding the drafting of the Guidebook and the Covenant Not to Sue. But the facts surrounding the drafting of

the Guidebook and the Covenant Not to Sue were not fully developed in the District Court because Ruby Glen did not raise this argument in the District Court. Indeed, neither Ruby Glen's FAC nor the materials submitted by Ruby Glen in connection with its TRO application offer any facts or information describing how the Guidebook or the Covenant Not to Sue were drafted, debated, or finalized.

Perhaps more importantly, the limited facts that were developed below demonstrate that ICANN did not unilaterally draft the Guidebook or the Covenant Not to Sue. The Guidebook's provisions were developed over a number of years based on suggestions, comments and proposals made by the ICANN community, including entities planning to apply for new gTLDs. The involvement of the entire ICANN community in developing the Guidebook is noted in the Guidebook's preamble: "Meaningful community input has led to revisions of the draft applicant guidebook." (ER719, Guidebook Preamble.) To be certain, community development of the Guidebook was acknowledged in sworn Congressional testimony by Paul Stahura, a participant in the Guidebook development who later went on to co-found Ruby Glen's parent company, Donuts. In that testimony, he stated that "several years of arduous work by ICANN and the Internet community through an open and transparent process and public participation that has resulted

in ICANN's 'Draft Applicant Guidebook'…for new gTLDs."[8] Moreover, the ICANN community had a significant impact on the drafting of the Covenant Not to Sue. As an example, in April 2011, the Covenant Not to Sue was revised in response to community requests to add the proviso "THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION."[9]

Accordingly, Ruby Glen's narrow construction argument should not be considered on appeal because the facts surrounding the drafting of the Guidebook and the Covenant Not to Sue were not fully developed below. And had Ruby Glen raised this argument in the District Court, the record would further establish that ICANN was not the "sole drafter" of the Guidebook or Covenant Not to Sue.

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[8] *Expansion of Top Level Domains and its Effects on Competition: Hearing Before the Subcomm. on Courts and Competition Policy,* 111th Cong., 1st Sess., p. 78 (Sept. 23, 2009) (statement of Paul Stahura), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg52411/pdf/CHRG-111hhrg52411.pdf.

[9] gTLD Applicant Guidebook, April 2011 Discussion Draft, p. 6-3 https://archive.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf; https://archive.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-redline-15apr11-en.pdf, p. 47.

B. Ruby Glen's Causes of Action Are Based on ICANN's Treatment of Ruby Glen's .WEB Application.

Ruby Glen's corollary argument similarly fails. Ruby Glen argues, again for the first time on appeal, that it is not asserting any claims related to ICANN's evaluation of Ruby Glen's own .WEB application. Instead, Ruby Glen attempts to portray its claims as relating solely to how ICANN handled NDC's application. Ruby Glen's FAC, however, tells a different story.

All of Ruby Glen's claims are premised on the allegation that Ruby Glen submitted its .WEB application "[i]n reliance on ICANN's agreement to administer the bid process in accordance with the rules and guidelines contained in [the Guidebook]." (ER611, FAC ¶ 1.) Ruby Glen then alleges that ICANN breached the terms of the Guidebook, thereby "depriv[ing Ruby Glen] and the other applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in accordance with established ICANN policy and guidelines" by concluding that the .WEB contention set must be resolved through an ICANN auction of last resort. (ER612, ER629, FAC ¶¶ 4, 68.) From this, Ruby Glen alleges that this breach and the resulting auction caused Ruby Glen to lose "the opportunity to secure the rights to the .WEB gTLD" (ER611, FAC ¶ 1), and, as a result, Ruby Glen suffered damages arising from "losses of revenue from third parties, profits, consequential

costs and expenses, market share, reputation, and goodwill … ." (ER632, FAC ¶ 72.)

Plainly stated, Ruby Glen's causes of action and its alleged injury flow directly from ICANN's review of all of the .WEB applications including Ruby Glen's, and ICANN's decision that all .WEB applicants that wished to proceed with their applications, including Ruby Glen, must do so through an ICANN auction.[10] In other words, all of the FAC's claims arise from ICANN's decision to proceed with an auction pursuant to the Guidebook, which impacted all of the .WEB applications, including Ruby Glen's. It is undeniable that Ruby Glen's causes of action "arise out of" ICANN's "review" of Ruby Glen's .WEB application.

Moreover, the FAC complains about the manner in which ICANN conducted the .WEB auction,[11] which, as the Guidebook makes clear, is part of

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[10] Ruby Glen was not forced to participate in the .WEB auction. Once the auction was scheduled, Ruby Glen could have withdrawn its application and received a partial refund of its application fee. (ER907, Guidebook § 4.1.3; ER761-762, Guidebook § 1.5.1.)

[11] ER629, ER632, FAC ¶¶ 68, 70; *see also* SER617, *Ex Parte* Appl. for TRO ("ICANN has refused to agree to [Ruby Glen's] and other bidders' simple request to postpone the .WEB auction of last resort to allow for a full and transparent investigation into apparent discrepancies in NDC's .WEB application. The bidders should have transparency into who they are bidding against at auction."); SER023 ("This case concerns ICANN's bid process for granting the rights to the .WEB [TLD]."); SER024 ("ICANN's steadfast refusal to postpone the auction pending a thorough and transparent investigation into the disqualifying admissions made by

ICANN's application-review process. As the Guidebook describes, because only one application for a particular gTLD can prevail, ICANN's evaluation of applications continues through "string contention"[12] processes, including auctions, created to resolve competing gTLD applications. Section 4.1 of the Guidebook states that contention occurs when "[t]wo or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation." (ER903.) Section 5.1 of the Guidebook also states that contracting only occurs after an applicant has "successfully completed the ***evaluation process***—including, if necessary, the dispute resolution ***and string contention*** processes … ." (ER931 (emphasis added).)

In short, the auction process is part of an application's evaluation. Accordingly, challenges to how an auction is conducted, such as those raised by Ruby Glen, are within the scope of the Covenant Not to Sue because they are claims that "arise out of, are based upon, or are in any way related to" ICANN's "review of th[e] application, investigation or verification … or the decision by

(continued…)

a .WEB applicant has placed all other .WEB applicants in a situation where they will be forced to bid against a party that has violated ICANN guidelines by obfuscating changes in its ownership or leadership and, as a result, may be subject to disqualification.")

[12] gTLDs are sometimes referred to as "strings" by the Internet community.

ICANN to recommend, or not to recommend the approval of applicant's gTLD application."[13]

Finally, if Ruby Glen's claims are wholly unconnected to ICANN's review of Ruby Glen's own application, Ruby Glen has no standing to bring its claims against ICANN or seek the damages it is seeking. Ruby Glen's standing to assert its claims is based on its status as an applicant for .WEB, as alleged in the FAC: "ICANN deprived [Ruby Glen] and the other applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in accordance with established ICANN policy and guidelines." (ER612, FAC ¶ 4.) Ruby Glen's TRO application confirmed the same: "ICANN owed [Ruby Glen] and every other member of the contention set a duty to act with proper care and diligence in administering the .WEB auction process in accordance with its Bylaws, Articles of Incorporation, and the rules and procedures as stated in the Applicant Guidebook." (SER638, *Ex Parte* Appl. for TRO.) Ruby Glen's ability to pursue claims against ICANN regarding the .WEB auction is based entirely on Ruby Glen's .WEB application and how it was affected by ICANN's alleged conduct.

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[13] ER1051, Guidebook Module 6 § 6. The Covenant Not to Sue also bars claims in court "with respect to the application," claims in court for "profits that applicant may expect to realize from the operation of a registry for the TLD," and challenges in court to "any decision made by ICANN with respect to the application."

II. The Covenant Not to Sue Is Not an "Exculpatory Provision" Because it Affords Ruby Glen Meaningful Redress for its Claims and Therefore Does Not Violate Section 1668.

By its terms, Section 1668 invalidates only contracts that "***exempt*** anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent…." (Emphasis added.) The District Court ruled that the Covenant Not to Sue is not an ***exemption*** from responsibility because:

> the covenant not to sue does not leave [Ruby Glen] without remedies. [Ruby Glen] may still utilize the accountability mechanisms contained in ICANN's Bylaws. … According to the FAC, these accountability mechanisms include "an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and [Ruby Glen], section 1668 does not invalidate the covenant not to sue."

(ER16-17, MTD Minute Order. (citations omitted).) Put another way, the District Court concluded that because the Covenant Not to Sue affirmatively gives Ruby Glen meaningful redress for its claims through ICANN's accountability

mechanisms, including the Independent Review Process, the Covenant Not to Sue is not an exemption from responsibility that could possibly violate Section 1668. The District Court's ruling on this issue is consistent with this Court's previous instruction that Section 1668 does not prohibit promises not to sue where "[o]ther sanctions remain in place." *Continental Airlines*, 819 F.2d at 1527.

Ruby Glen's Opening Brief does not address, much less rebut, the District Court's finding on this point except in a hurried claim that ICANN's Independent Review Process is "neither binding nor mandatory" and is therefore "illusory." (Opening Br. at 51.) But this is wrong. The Independent Review Process is mandatory, in that ICANN must participate, and the Independent Review Process calls for determinations that "are final and have precedential value," which the ICANN Board must act upon. (ER656, Bylaws, Art. IV § 3(21).)

And even if this were not true, that would not render the Independent Review Process illusory or decrease its value as a dispute resolution procedure available to Ruby Glen. This Court's decision in *Wolsey, Ltd. v. Foodmaker, Inc.,* 144 F.3d 1205 (9th Cir. 1998), confirms that agreements to use alternative dispute resolution procedures like those in the Covenant Not to Sue – even in a case where they are not binding – are meaningful and enforceable. *Wolsey* arose from a lawsuit brought by a party that had agreed that claims "shall be submitted for non-binding arbitration." *Id.* at 1207. The lower court refused a stay under the Federal

Arbitration Act. This Court reversed, observing that "arbitration need not be binding in order to fall within the scope of the Federal Arbitration Act." *Id.* at 1209. The promise to use the procedure was enforceable because the parties agreed to submit "claims to 'a third party.'" *Id.*; *see also AMF Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) ("No magic words such as 'arbitrate' or 'binding arbitration' or 'final dispute resolution' are needed to obtain the benefits of the Act."). Thus, the promise to submit disputes in a non-binding resolution process was enforceable.

In light of this Court's holding in *Wolsey*, and given the nature of the Independent Review Process and ICANN's Bylaws, Ruby Glen is wrong to portray the Independent Review Process as illusory. As Ruby Glen's FAC acknowledges, "[t]he IRP is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." (ER617, FAC ¶ 23.) The Independent Review Process gives Ruby Glen the ability, not available in court proceedings, to have independent third parties evaluate its challenges to ICANN's actions under ICANN's Articles and Bylaws,[14] in addition to claims under the Guidebook. In

[14] Since it is not a statutory member of ICANN, Ruby Glen lacks standing to bring court proceedings to enforce ICANN's Articles and Bylaws. *E.g.,* Cal. Corp. Code § 5141. The Independent Review Process, in contrast, gives Ruby Glen the

fact, another Donuts subsidiary has utilized the Independent Review Process in the past to overturn an ICANN Board decision and obtain the rights to operate another new gTLD, .CHARITY.[15] Far from an exemption, the Covenant Not to Sue provides Ruby Glen with valuable redress.

III. Ruby Glen Does Not Allege Claims Covered by Section 1668.

Section 1668 does not invalidate all exculpatory provisions. Rather, Section 1668 only forbids releases pertaining to particular types of claims; namely, those for fraud or willful misconduct. In its Order, the District Court analyzed the claims in Ruby Glen's FAC and correctly determined that none of them fell within the scope of Section 1668:

> The FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence. Nor does [Ruby Glen] allege that ICANN has willfully or negligently violated a law or harmed the public interest through its administration of the gTLD auction process for .web.

(ER16, MTD Minute Order.)

(continued…)

ability to pursue claims that ICANN has not complied with its foundational documents.

[15] Final Declaration, *Corn Lake, LLC v. ICANN,* ICDR No. 01-15-0002-9938 (Oct. 17, 2016), *available at* https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf.

Ruby Glen now argues – again, for the first time on appeal – that the District Court should have invalidated the Covenant Not to Sue on its face, rather than evaluating the causes of action actually alleged by Ruby Glen; and that, in any event, Ruby Glen has alleged causes of action that are covered by Section 1668. Ruby Glen is wrong on both counts.

A. Having Agreed to the Covenant Not to Sue, Ruby Glen Cannot Now Claim that it Is Facially Invalid Under Section 1668.

Even if the Court decides to consider Ruby Glen's new argument that the Covenant Not to Sue is invalid on its face because it ***could be read*** to apply to claims for fraud and willful misconduct, the Court should reject the argument. Ruby Glen relies on a single case to support this recently-developed position, *Baker Pacific Corp. v. Suttles,* 220 Cal. App. 3d 1148 (1990). However, *Baker Pacific* actually refutes, rather than supports, Ruby Glen's argument that the Covenant Not to Sue can be invalidated on its face regardless of the substance of Ruby Glen's claims.

In *Baker Pacific*, an asbestos remediation contractor required its employees to sign broad releases of the building owner as a condition of employment. *Id*. at 1150-51. Two prospective employees refused to sign the release, contending that it violated California public policy. *Id*. at 1151. The contractor therefore declined to put the two employees on the job and litigation over the release ensued. *Id*.

While the two justices in the *Baker Pacific* majority ruled that the broadly-worded release could cover claims subject to Section 1668 and declared the release void, they only did so because the prospective employees had refused to execute the release and therefore lost an employment opportunity. In addressing the cases cited by the dissent (*Werner v. Knoll,* 89 Cal. App. 2d 474 (1948); *Hulsey v. Elsinore Parachute Center,* 168 Cal. App. 3d 333 (1985); and *Madison v. Superior Court,* 203 Cal. App. 3d 589 (1988)), the majority distinguished those cases because they "each involve a situation where the exculpatory language is subjected to judicial review in litigation arising ***after*** the complaining party has signed and accepted the release," whereas the declaratory relief action in *Baker Pacific* was "***prior*** to the parties' acceptance of the release language." *Baker Pacific*, 220 Cal. App. 3d at 1155-56 (emphasis in original). The majority elaborated:

> We have no quarrel with the holdings in these cases cited by the dissent. *Werner, Hulsey,* and *Madison* simply stand for the proposition that where a plaintiff/releaser has knowingly and willingly contracted to exculpate the defendant releasee from liability, accepts the benefits of the agreement, and then sues the releasee on causes of action not statutorily proscribed by Civil Code section 1668 (i.e., negligence, warranty, strict liability), the releasor will not be permitted to avoid his agreement on public policy grounds by urging

> that statutorily proscribed actions, *irrelevant to the actions pursued by the releasor,* can be inferred as included within the broad exculpatory language of the agreement.

Id. at 1156 (emphasis in original).

Thus, as all three *Baker Pacific* justices agreed, after freely accepting the terms of the Covenant Not to Sue, Ruby Glen cannot now argue that it is void on its face because the Covenant Not to Sue could theoretically release fraud claims that were not alleged in the FAC. Rather, Ruby Glen must present cognizable causes of action against ICANN that are within the proscriptions of Section 1668. This, Ruby Glen has not done, and cannot do, as the District Court correctly found.

B. Ruby Glen's Causes of Action Are Not Within the Scope of Claims Protected by Section 1668.

Moving from a facial challenge to an as-applied challenge of the Covenant Not to Sue, Ruby Glen asserts that Section 1668 specifically protects two of its claims from release: its Second Cause of Action for breach of the implied covenant of good faith and fair dealing ("Implied Covenant of Good Faith"); and its Fourth Cause of Action for violation of the Unfair Competition Law ("UCL"), California Business and Professions Code Section 17200. But as the District Court correctly found, none of Ruby Glen's causes of action, including the Second and

Fourth Causes of Action, sound in "fraud, willful injury, or gross negligence," as required to invoke Section 1668. (ER16, MTD Minute Order.)

The California Supreme Court has instructed that courts should invalidate releases under Section 1668 only when "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'" *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 163 (2005) (quoting Section 1668), *abrogated on other grounds, AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011). Courts have consistently interpreted the phrase "willful injury to the person or property of another" to mean more than merely intentional conduct, but instead "***intentional wrongs***." *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) ("Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for ***future intentional wrongs***.") (emphasis added). As the California Supreme Court has explained: "While the word 'willful' implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done." *Calvillo-Silva v. Home Grocery,* 19 Cal. 4th 714, 729 (1998) (citations omitted), *disapproved of on other grounds*, *Aguilar v. Atl. Richfield Co.,* 25 Cal. 4th 826 (2001).

The California Court of Appeals' decision in *Food Safety Net Services v. Eco Safe Systems USA, Inc.,* 209 Cal. App. 4th 1118 (2012), is informative. There,

a food-disinfectant equipment manufacturer alleged that a food-safety equipment tester failed to test equipment using agreed-upon standards in bad faith, and instead intentionally employed "slovenly procedures which seemed to be slanted towards a preconceived conclusion." *Id.* at 1125. The court held that a limitation-of-liability clause in the parties' contract was enforceable and barred not only the breach of contract claim but also the "bad faith" breach of the Implied Covenant of Good Faith claim. *Id.* at 1125-27.

Based on these standards and the uniform interpretation of Section 1668, the District Court correctly found that Ruby Glen's FAC does not allege the types of conduct or claims covered by Section 1668. In particular, Ruby Glen's Second and Fourth Causes of Action do not sound in fraud or willful misconduct.

As to Ruby Glen's breach of the Implied Covenant of Good Faith claim, which Ruby Glen wrongly recasts in its Opening Brief as a claim for "tortious" breach of the Implied Covenant of Good Faith, it is no tort at all or within the protections of Section 1668. Ruby Glen's Implied Covenant of Good Faith claim alleges that Ruby Glen was denied "the benefits of the agreements as set forth in the Applicant Guidebook" because ICANN "[f]ailed to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook" by NDC. (ER633, FAC ¶¶ 75, 76.) But Ruby Glen has not alleged that ICANN did so through fraud or willful misconduct. Just like the "bad faith" claims in *Food*

Safety, Ruby Glen's Implied Covenant of Good Faith claim simply is not covered by Section 1668 because it is nothing more than a breach-of-contract claim. *Food Safety*, 209 Cal. App. 4th at 1127 ("breaches of the covenant of good faith implied within contracts are not tortious outside the context of insurance policies"). Moreover, as the California Supreme Court noted in *Erlich v. Menezes*, 21 Cal. 4th 543 (1999), a contractual breach cannot be "tortious" unless "one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." *Id.* at 553-54 (1999) (quoting *Freeman & Mills, Inc. v. Belcher Oil Co.,* (11 Cal. 4th 85,105 (1995) (Mosk, J., concurring and dissenting)). Ruby Glen does not allege – nor could it – that ICANN intentionally breached the Guidebook to cause Ruby Glen "severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages." *Erlich*, 21 Cal. 4th at 552, 554 ("The question thus remains: is the mere negligent breach of a contract sufficient? The answer is no."). Finally, Ruby Glen's assertion that ICANN failed to conduct a thorough investigation of NDC because "it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction," (ER633-634, FAC ¶ 77), is not only completely contradicted by the Guidebook itself,[16] but there is no support in the law for the notion that an

[16] The Guidebook makes clear that once the administrative costs of an

alleged profit motive converts a breach of contract into a tort. *Harris v. Atl. Richfield Co.*, 14 Cal. App. 4th 70, 82 (1993) ("The imposition of tort remedies for 'bad' breaches of commercial contracts is a substantial deviation from the traditional approach which was blind to the motive for the breach.").

Ruby Glen's UCL claim fares no better. Ruby Glen alleges an "unlawful" business practice based on inclusion of the Covenant Not to Sue in the Guidebook and a "fraudulent" business practice based on ICANN's alleged failure to abide by the Guidebook in evaluating the .WEB applications. Neither alleged UCL claim is covered by Section 1668.

As to Ruby Glen's unlawful business practice claim, Ruby Glen argues that the inclusion of the Covenant Not to Sue violates Section 1668 and that violations of Section 1668 are the type of claims protected by Section 1668. This argument is as circular as it is nonsensical. Ruby Glen does not cite a single case supporting the claim that use of a release that allegedly violates Section 1668 is the type of

(continued…)

auction are covered, "proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status." (ER920, Guidebook § 4.3 n.1) In fact, guidelines are currently being developed by ICANN's Cross-Community Working Group on New gTLD Auction Proceeds, of which Jonathon Nevett, a co-founder and co-owner of Donuts, Ruby Glen's parent, is a member. (*See* https://community.icann.org/pages/viewpage.action?pageId=63150102.)

willful misconduct that is covered by Section 1668. To the contrary, the California Supreme Court made clear in *Calvillo-Silva*, that the question under Section 1668 is not whether an act was intentional, but whether the act was one involving intentional misconduct. *Calvillo-Silva,* 19 Cal. 4th at 729 ("While the word 'willful' implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done." (citations omitted)). Ruby Glen has never alleged, nor could it, that ICANN willfully intended to violate Section 1668 by adopting the Guidebook and the Covenant Not to Sue. Rather, as the District Court found, the motivation behind the Covenant Not to Sue was not nefarious at all, but was to avoid repetitive litigation over each ICANN decision in order to allow the New gTLD Program to proceed in an orderly and predictable fashion. (ER18, MTD Minute Order ("Without the covenant not to sue, any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue.").)

As to Ruby Glen's fraudulent business practice claim, Ruby Glen alleges that ICANN failed to follow through on a representation that ICANN would evaluate the .WEB applications according to the Guidebook. (ER637-38, FAC ¶ 88.) This claim, however, is not the type of common law "fraud" that concerns

Section 1668. Indeed, UCL claims encompass much broader conduct than the intentional misrepresentations covered by Section 1668.[17]

"California courts have consistently interpreted the language of [the UCL] broadly." *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. App. 4th 499, 519 (1997). To state a claim under the UCL, a plaintiff "need not plead and prove the elements of a tort." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1267 (1992) (citing *Committee on Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 211 (1983) ("Allegations of actual deception, reasonable reliance, and damage are unnecessary.")). The critical difference between the common law tort of fraud and a fraudulent UCL claim is that a UCL claim "does not include any 'scienter' or intent requirement." *Hypertouch, Inc. v. ValueClick, Inc.*, 192 Cal. App. 4th 805, 821-22 (2011). Specifically, the California Legislature "did not intend guilty knowledge or intent to be elements of a violation." *Id*. at 821 (citation omitted); *Margarito v. State Athletic Comm'n*, 189 Cal. App. 4th 159, 168 (2010); *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 332 (1998) (noting that a UCL "fraudulent" claim does not require an intent to mislead); *State Farm Fire & Casualty Co,* 45

[17] Ruby Glen's reliance on *State Farm Fire & Casualty Co. v. Superior Court,* 45 Cal. App. 4th 1093, 1105 (1996) in its Opening Brief confirms the differences between common law fraud and a UCL fraudulent practice claim: "This means that a [UCL fraudulent practice] violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." (Opening Brief at 48.)

Cal. App. 4th at 1105 (same). Thus, unlike the common law tort of fraud, the UCL makes a defendant "strictly liable" for potentially deceptive statements regardless of whether the defendant "had any intent to deceive the recipient." *Hypertouch*, 192 Cal. App. 4th at 821-22; *Hewlett*, 54 Cal. App. 4th at 520 ("The [UCL] imposes strict liability." (citations omitted)).

Put another way, the fraudulent business practice alleged by Ruby Glen does not involve the type of intentional misrepresentations that would support a common law fraud claim covered by Section 1668. Ruby Glen is not alleging that ICANN intentionally misled Ruby Glen and other applicants by making false representations in the Guidebook that ICANN did not intend to honor, nor could Ruby Glen make any such assertions. Rather, Ruby Glen is claiming that ICANN merely failed to live up to the standards set forth in the Guidebook by not conducting a complete investigation of NDC. (ER637-38, FAC ¶ 88.) In fact, Ruby Glen's opposition to ICANN's motion to dismiss in the District Court made clear that Ruby Glen was not claiming that ICANN intentionally misled Ruby Glen and other applicants, but was instead asserting a violation of the UCL for allegedly "fail[ing] to adhere to each of the promises" made in the Guidebook. (ER201, Opp'n to MTD.) Thus, the alleged fraudulent business practice set forth in Ruby Glen's UCL claim does not allege fraudulent conduct at all. Rather, Ruby Glen seeks to hold ICANN strictly liable under the UCL for allegedly failing to act in

accordance with the terms of the Guidebook. Not only is this not the type of "fraudulent" conduct covered by Section 1668, but as the California Court of Appeals has made clear: "Whatever it proscribes, this section [1668] does *not* invalidate contracts which seek to except one from liability for simple negligence or strict liability." *Hulsey*, 168 Cal. App. 3d at 342 (emphasis in original); *Baker Pacific*, 220 Cal. App. 3d at 1156 (stating that Section 1668 does not protect claims based on "strict liability.").

IV. *Tunkl's* Restriction on Releases in Transactions Involving the Public Interest Does Not Apply to Ruby Glen's .WEB Application.

Ruby Glen dedicates a large part of its Opening Brief to yet another argument raised for the first time on appeal. That is, Ruby Glen's claim that *Tunkl* is an alternative analysis that makes the Covenant Not to Sue invalid under Section 1668. Ruby Glen's new *Tunkl* argument, however, fails for multiple reasons.

As an initial matter, Ruby Glen did not present any semblance of this argument in the District Court. And, as shown by Ruby Glen's lengthy argument, the six-factor analysis Ruby Glen draws from *Tunkl* involves consideration of extended factual circumstances, which were not developed below due to Ruby Glen's failure to invoke this argument in the District Court. Ruby Glen should not be permitted to make its *Tunkl* argument for the first time on appeal. *Romain,* 799

F.2d at 1419 (arguments raised for the first time on appeal should not be considered when the necessary facts were not "fully developed" below.)

Next, *Tunkl* involved facts and circumstances vastly different from those surrounding Ruby Glen's .WEB application, making *Tunkl* absolutely irrelevant to this case. In *Tunkl*, the court announced an approach to applying Section 1668 to an "exculpatory clause" contained in a medical release form that a patient was forced to sign on admission to a hospital and similar contracts affecting the public interest. 60 Cal. 2d at 101. Here, however, the Covenant Not to Sue is not an "exculpatory clause," but instead provides alternative mechanisms for holding ICANN accountable. *Tunkl* did not address agreements that include different means of accountability, because it was concerned only with releases that remove accountability altogether. Moreover, agreements involving critical medical care (like those involving essential personal needs as provided by common carriers, public warehouses, and innkeepers) have traditionally been understood to involve a publicly mandated duty to serve without an exemption from liability for negligence. *Id.* at 99 n.12. In contrast, the law respects the right of sophisticated businesses to tailor their agreements with one another as they see fit. Indeed, the *Tunkl* Court noted that Section 1668 has had a "troubled" course as courts sought to distinguish between "private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk that the law would otherwise have placed upon the other

party," which the court observed "no public policy opposes," from an "exculpatory clause that affects the public interest," in which public policies justify limiting freedom of contract. *Id.* at 98, 101. Ruby Glen's .WEB application was a "private, voluntary transaction[]," making *Tunkl*'s analysis inapplicable in this matter.

Finally, the six factors listed by the *Tunkl* Court to aid in distinguishing between situations "affected with a public interest" (where exculpatory clauses should be restricted) and situations involving commercial relationships (where contractual freedom should control) demonstrate that the Covenant Not to Sue is outside the proscriptions of Section 1668 and the concerns of *Tunkl*. *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 468-69 (2006) ("[I]t is difficult to imagine a situation where a contract of that type [between relatively equal business entities] would meet more than one or two of the requirements discussed in *Tunkl*.")

First, ICANN's function – technical coordination of the DNS – is not "generally thought suitable for public [*i.e.* governmental] regulation." In fact, the federal government last year completed the final steps in a lengthy process of phasing out governmental oversight of ICANN's functions.[18]

[18] *See* National Telecommunications and Information Administration, Quarterly Report on the Transition of the Stewardship of the Internet Assigned Numbers Authority ("IANA") Functions (Oct. 2016), p. 3 ("[W]e have finally realized the bipartisan goal of previous administrations to privatize the domain

Second, while the selection of qualified gTLD operators is important to ICANN and the applicants, it is not "a service of great importance to the public" that is "often a matter of practical necessity for some members of the public." *CAZA*, 142 Cal. App. 4th at 468-69 ("While the production of oil is of great importance to the public, the drilling of a particular oil well is generally only important to the party who will profit from it."); *Appalachian Ins. Co. v. McDonnell Douglas Corp*., 214 Cal. App. 3d 1, 30 (1989) (ruling that the launching of satellites for telecommunications purposes is "'essential' only to a small number of large corporations and governmental entities," not individual members of the public). Indeed, it is hard to imagine that the public at large is even aware of the particular entities and organizations serving as gTLD operators, much less view new gTLDs as a "practical necessity" like medical care, safe housing, and the like.

Third, ICANN has not held itself "out as willing to perform this service for any member of the public who seeks it" because individual members of the public were not permitted to submit applications in the New gTLD Program. The Guidebook confirms this: "Established corporations, organizations, or institutions

(continued…)

name system."), *available at* https://www.ntia.doc.gov/files/ntia/publications/final_ntia_iana_8th_quarterly_report_q4_fy_2016.pdf.

in good standing may apply for a new gTLD. ***Applications from individuals or sole proprietorships will not be considered***."[19] Ruby Glen and the other gTLD applicants are not "members of the public," like the individual seeking medical assistance in *Tunkl*, as Ruby Glen seems to suggest. Indeed, the California Court of Appeals has repeatedly found that private transactions between business entities do not involve services offered to "members of the public" under *Tunkl*. In *CAZA*, for example, the court ruled that *Tunkl* did not apply because an oil well drilling company "did not hold itself out as performing services for the public, but only for the small number of entities that happened to be oil field operators." 142 Cal. App. 4th at 469. Likewise, in *Appalachian Ins. Co.*, 214 Cal. App. 3d at 29, McDonnell Douglas's service of launching satellites into orbit fell outside the *Tunkl* analysis because the services were not offered to individual members of the public, but instead "only to a few, very large commercial and governmental entities dealing in highly specialized fields such as telecommunications." The situation is no different here. ICANN made the New gTLD Program available to established entities and organizations, not the general public.

Fourth, it is not the case that the "essential nature of the service, in the economic setting of the transaction" gives a decisive bargaining advantage over

[19] ER740, Guidebook § 1.2.1 (emphasis added); *see also* Opening Brief at 37 n.5 (only "established public or private organization[s] . . . can apply to create and operate a new gTLD Registry.").

"any member of the public who seeks [the] services." Applying to run a new gTLD is a business opportunity, not an "essential" service. Moreover, in connection with the New gTLD Program, ICANN did not negotiate against members of the public. Instead, ICANN interacted with established entities and organizations, many of whom, like Ruby Glen and its parent corporation, were well-funded and sophisticated corporations.

Fifth, it is not the case that ICANN has used "a superior bargaining power" to "confront[] the public with a standardized adhesion contract of exculpation." As set forth above, ICANN has not, and could not, force the Covenant Not to Sue on "the public" in that ICANN did not contract with any individual members of the public. Moreover, ICANN did not impose a "standardized adhesion contract of exculpation" on applicants, but instead adopted the Guidebook, which was developed collaboratively with applicants and other interested parties over a period of years and offered applicants meaningful redress through ICANN's accountability mechanisms.

Sixth, by submitting its .WEB application to ICANN, Ruby Glen did not place its "person or property" under ICANN's control, the way a hospital patient hands over control to a hospital. Instead, Ruby Glen simply participated in an application process that is not that dissimilar from other commercial bidding processes.

The factors identified in *Tunkl* as important to evaluating the enforceability of "exculpatory clauses" that "affect the public interest," such as a medical release form required of a patient lying on a gurney, simply do not fit in the context of Ruby Glen's .WEB application. As this Court has previously held, "it makes little sense in the context of two large, legally sophisticated companies to invoke the *Tunkl* application of the unconscionability doctrine." *Cont'l Airlines*, 819 F.2d at 1527. And in the words of this Court in a similar case: "The commercial context presented by this case raises equities far different from those of the helpless patient entering the hospital in *Tunkl*." *Arcwell Marine, Inc.*, 816 F.2d at 470-71; *see also Delta Air Lines, Inc. v. Douglas Aircraft Co.*, 238 Cal. App. 2d 95, 102 (1965) ("Delta, bargaining for the purchase and delivery of an airplane yet to be built, is hardly the pain-wracked sufferer seeking emergency admission to the hospital whose plight secured relief in *Tunkl*."). Section 1668 does not apply on its own terms or under *Tunkl*'s analysis.

V. The Covenant Not to Sue Is Not Unconscionable.

Ruby Glen next argues that the Covenant Not to Sue is unconscionable. To establish unconscionability, Ruby Glen bears the burden of demonstrating that the Covenant Not to Sue "is both procedurally and substantively unconscionable." *Poublon v. C.H. Robinson Co.,* 846 F.3d 1251, 1260 (9th Cir. 2017). The District Court correctly concluded "that the covenant not to sue is, at most, only minimally

procedurally unconscionable" and "not substantively unconscionable." (ER18, MTD Minute Order.) These rulings should be affirmed.

Ruby Glen argues that the Covenant Not to Sue is procedurally unconscionable merely because it is contained in a purported contract of adhesion not subject to negotiation. This argument is baseless for a several reasons.

First, the Guidebook is not a contract of adhesion in that it was not unilaterally drafted by ICANN and imposed on the entities seeking to apply for new gTLDs. Instead, the Guidebook was developed in a several-year, multistakeholder policy development process,[20] with participation by a diverse group of interested parties, including prospective applicants such as Ruby Glen's owner, Donuts, and its founders. (ER612, FAC ¶ 5.) Moreover, California law recognizes that a contract is not adhesive simply because one party "insists on including a particular provision" that it deems important. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1352 (2015). And, in any event, "showing a contract is one of adhesion does not always establish procedural unconscionability." *Id.* at 1348 n.9.

[20] ER719, Guidebook Preamble; *see also* Final Declaration ¶ 18, *Amazon EU S.A.R.L. v. ICANN,* ICDR No. 01-16-0000-7056, *available at* https://www.icann.org/en/system/files/files/irp-amazon-final-declaration-11jul17-en.pdf.

Second, Ruby Glen misstates the law as to procedural unconscionability. The analysis is not whether a contract is one of adhesion, but rather "addresses the circumstances of contract negotiation and formation, focusing on ***oppression and surprise*** due to unequal bargaining power." *Id*. at 1347 (emphasis added). The sophistication of the contracting parties weighs heavily against a finding that any oppression or surprise took place. *Appalachian Ins. Co.*, 214 Cal. App. 3d at 26-27.

Neither "oppression" nor "surprise" took place with respect to Ruby Glen's acceptance of the Guidebook and Covenant Not to Sue. Ruby Glen and its parent company, Donuts, are unquestionably sophisticated, well-financed companies in a position to fully assess the ramifications of accepting the terms and conditions of the Guidebook, including the Covenant Not to Sue. Ruby Glen cannot claim to have been oppressed into agreeing to a contract it had ample sophistication to comprehend. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005) (rejecting unconscionability claim because it is reasonable to expect a merchant to "carefully read, understand, and consider" the terms of its agreements).

Nor can Ruby Glen claim that it was surprised by the Covenant Not to Sue. Drafts of the Guidebook and the operative Guidebook were widely publicized and the founder of Ruby Glen's parent corporation was involved in the policy-development work leading to the Guidebook. In addition, Donuts, Ruby Glen's parent company, agreed to the Covenant Not to Sue ***over 300 times*** in connection

with its applications. Finally, as the district court in the Western District of Kentucky recently held in connection with a lawsuit filed by another disgruntled gTLD applicant, the Covenant Not to Sue is "clear and comprehensive." *Commercial Connect, LLC v. Internet Corp. for Assigned Names & Nos.*, No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9-10 (W.D. Ky. Jan. 26, 2016). Ruby Glen can claim no surprise that the Covenant Not to Sue was part of the bargain for submission of its .WEB application.

Given Ruby Glen's sophistication and its awareness of the Covenant Not to Sue, there is no basis to conclude that the Covenant Not to Sue is procedurally unconscionable. As the District Court correctly found, "the nature of the relationship between ICANN and [Ruby Glen], the sophistication of [Ruby Glen], the stakes involved in the gTLD application process, and the fact that the Application Guidebook 'is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period,' militates against a conclusion that the covenant not to sue is procedurally unconscionable."

The District Court also correctly held that the Covenant Not to Sue is not substantively unconscionable. California courts have used different words to characterize substantive unconscionability, including "overly harsh," "unduly oppressive," "unreasonably favorable," and "shock[ing] the conscience," to

distinguish from "a simple old-fashioned bad bargain." *Poublon,* 846 F.3d at 1261 (citing *Sanchez v. Valencia Holding Co.,* 61 Cal. 4th 899, 910-11 (2015)). Importantly, to be substantively unconscionable, terms must not be just one-sided, but must be unjustifiably so. *Walnut Producers of California v. Diamond Foods, Inc.,* 187 Cal. App. 4th 634, 647 (2010).

In requiring applicants to resolve disputes through ICANN's accountability mechanisms, the Guidebook sought to invoke a curative process appropriate to the competitive context of the New gTLD Program. As the District Court noted, otherwise "any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs." (ER18, MTD Minute Order.) The Covenant Not to Sue is therefore not substantively unconscionable.

VI. Leave to Amend Was Not Required.

In its final argument, Ruby Glen asserts that the District Court's failure to grant Ruby Glen leave to amend its complaint for a second time "constitutes reversible error." This argument is based Ruby Glen's misquotation of *National Council of La Raza v. Cegavske,* 800 F.3d 1032, 1041 (9th Cir. 2015). Accurately quoted, that decision has an important qualification: "It is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, ***absent a clear showing that amendment would be futile***." *Id*. Ruby

Glen's quotation of *National Council of La Raza* ignores the qualification highlighted above.

Allowing Ruby Glen to amend its claims for a second time would not have resulted in Ruby Glen pleading around the essential problem with Ruby Glen's lawsuit: In submitting its application, Ruby Glen agreed that disputes would proceed using ICANN's accountability mechanisms, including the Independent Review Process, rather than mounting its challenge "in court or in any judicial fora." As shown above, Ruby Glen's promise to utilize ICANN's accountability mechanisms, rather than litigation, is enforceable and precludes any further amendments.

Furthermore, the District Court's order denying Ruby Glen's TRO application provided Ruby Glen with the District Court's view of the viability of Ruby Glen's claims: "Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims." (SER4, TRO Order at 4.) And after providing its view of Ruby Glen's allegations, the District Court granted

Ruby Glen leave to amend its complaint to address subject matter jurisdiction deficiencies as well as any other deficiencies highlighted by the District Court's order denying the TRO application, which lead to Ruby Glen's filing of the FAC. Thus, Ruby Glen was given an opportunity to amend its claims and the District Court was correct to not grant Ruby Glen another.

VII. Alternatively, Dismissal Should Be Affirmed Based on Ruby Glen's Failure to State a Claim Against ICANN.

This Court may affirm dismissal of Ruby Glen's FAC "on any basis supported by the record even if the district court did not rely on that basis." *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 830 (9th Cir. 2017) (quoting *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992)). In addition to the enforceability of the Covenant Not to Sue, this Court may affirm the District Court's dismissal of the FAC because it fails to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). As the District Court observed in denying Ruby Glen's TRO, there is a notable "weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook" and that weakness carried through to Ruby Glen's FAC. (SER 4.)

Ruby Glen's First Cause of Action for breach of contract fails for a number of reasons. First, ICANN's scheduling of the .WEB auction, on April 27, 2016,

was fully consistent with the terms of the Guidebook and the auction rules because no ICANN accountability mechanisms regarding .WEB were pending at that time. (ER226-227, MTD.) Second, Ruby Glen is legally incapable of asserting a breach of ICANN's Articles and Bylaws in court because Ruby Glen is not a statutory member of ICANN and therefore has no standing to sue under ICANN's Articles or Bylaws. (ER227-228, MTD.) Third, based on Ruby Glen's own factual allegations, the steps ICANN took regarding NDC in response to Ruby Glen's complaints complied with ICANN's Articles and Bylaws, as well as the terms of the Guidebook. (ER228-231, MTD.)

Ruby Glen's Second Cause of Action, for violation of the Implied Covenant of Good Faith, fails as a matter of law because Ruby Glen did not allege facts plausibly suggesting that ICANN's actions were impermissible under the Guidebook and because Implied Covenant of Good Faith claims are "circumscribed by the purposes and express terms of the contract. . . . 'not to protect some general public policy interest not directly tied to the contract's purpose.'" *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992) (citation omitted); ER231, MTD.

Likewise, Ruby Glen's Third Cause of Action for negligence is barred by the economic loss rule, which holds that "purely economic damages to a plaintiff which stem from disappointed expectations from a commercial transaction must be

addressed through contract law; negligence is not a viable cause of action for such claims." *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012); ER231-232, MTD. Moreover, Ruby Glen did not allege any facts suggesting that ICANN owed Ruby Glen some duty of care, *Walters v. Fid. Mortg. of Cal., Inc.*, 730 F. Supp. 2d 1185, 1206 (E.D. Cal. 2010) (a contractual relationship does not give rise to a duty of care), or that ICANN breached such a duty. (ER232-233, MTD.)

Ruby Glen's Fourth Cause of Action, for violation of the UCL, is deficient on a number of grounds. First, in that Ruby Glen has not "lost money or property" as a result of ICANN's alleged violation of the UCL, Ruby Glen lacks standing under the UCL. (ER233-234, MTD.) Second, Ruby Glen did not allege facts plausibly suggesting that ICANN acted "unlawfully" by including the Covenant Not to Sue in the Guidebook, that ICANN acted "unfairly" in performing its investigation of NDC, or that ICANN acted "fraudulently" by taking the actions ICANN had the discretion to take regarding NDC and the .WEB auction. (ER234-236, MTD.)

Finally, Ruby Glen's Fifth Cause of Action seeking a declaration invalidating the Covenant Not to Sue fails as a matter of law because, for all of the reasons set forth above, the Covenant Not to Sue is enforceable.

CONCLUSION

In submitting its .WEB application, Ruby Glen agreed that it would not file a lawsuit against ICANN "in court or in any judicial fora." In exchange, ICANN agreed to consider Ruby Glen's .WEB application and resolved that Ruby Glen could challenge ICANN's treatment of Ruby Glen's application through ICANN's accountability mechanisms, including the Independent Review Process. These agreements between sophisticated entities in a commercial transaction are reasonable, justifiable, and enforceable. The District Court's dismissal of Ruby Glen's FAC should be affirmed.

Dated: October 30, 2017

Respectfully submitted,

JONES DAY

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and Numbers

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 13895 words.

Dated: October 30, 2017

Respectfully submitted,

/s/ Eric P. Enson
Eric P. Enson

STATEMENT OF RELATED CASES

No Ninth Circuit cases are deemed related.

9th Circuit Case No. 16-56890

CERTIFICATE OF SERVICE

I, Eric P. Enson, certify that I electronically filed the foregoing **Appellee's Answering Brief** with the Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on October 30, 2017.

I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Eric P. Enson
Eric P. Enson