

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department N

20STCV42881

**FEESTRY, LLC., et al. vs INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS**

May 30, 2023

8:30 AM

Judge: Honorable Lisa K Sepe-Wiesenfeld
Judicial Assistant: S. Hwang
Courtroom Assistant: S. Mixon

CSR: Karen Vilicich, CSR # 7634
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Mike Lawrence Rodenbaugh

For Defendant(s): Eric Patrick Enson and Kelly Ozurovich-Watne

Other Appearance Notes: Casandra Furey (LACC); Amy Stathos (LACC)

NATURE OF PROCEEDINGS: Hearing on Demurrer - without Motion to Strike - to First Amended Complaint (Filed by Defendant on 04/04/2022) - Further Argument

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Karen Vilicich, CSR # 7634, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matter is called for hearing.

The Court has read and considered all documents filed hereto and the matter is argued.

The Court takes the matter under submission. Later, the Court rules as follows:

***** RULING *****

Following Hearing on Defendant's Demurrer to Plaintiffs First Amended Complaint on February 9, 2023, the Court heard further argument on May 30, 2023. Having taken the matter under submission now rules as follows:

Defendant Internet Corporation for Assigned Names and Numbers' Demurrer is **SUSTAINED**, without leave to amend.

Defendant Internet Corporation for Assigned Names and Numbers to give notice.

REASONING

Request for Judicial Notice

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**REGISTRY, LLC., et al. vs INTERNET CORPORATION FOR
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Plaintiffs request judicial notice of the ICANN application status webpages, their 2016 IRP submission from ICANN, the FINAL IRP Declaration, the Cooperative Engagement and Independent Review Status Update, and Interim Supplementary ICANN IRP Procedures. The Court GRANTS Plaintiffs' requests, pursuant to Evidence Code section 452, subdivision (h).

Demurrer

“[A] demurrer tests the legal sufficiency of the allegations in a complaint.” (Lewis v. Safeway, Inc. (2015) 235 Cal.App.4th 385, 388.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (See Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, 994 [in ruling on a demurrer, a court may not consider declarations, matters not subject to judicial notice, or documents not accepted for the truth of their contents].) For purposes of ruling on a demurrer, all facts pleaded in a complaint are assumed to be true, but the reviewing court does not assume the truth of conclusions of law. (Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal.4th 962, 967.)

Leave to amend must be allowed where there is a reasonable possibility of successful amendment. (See Goodman v. Kennedy (1976) 18 Cal.3d 335, 349 [court shall not “sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment”]; Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1037 [“A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment.”]; Vaccaro v. Kaiman (1998) 63 Cal.App.4th 761, 768 [“When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend.”].) The burden is on the complainant to show the Court that a pleading can be amended successfully. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Applicability of Covenant

Defendant contends that when Plaintiffs submitted their applications for .hotel, they agreed to be bound by a covenant that prohibits applicants from suing ICANN for any claims that “arise out of, are based upon, or are in any way related to” the new gTLD application. (Mot p. 13:12-13.) Defendant cites to this Court’s January 18, 2022 Minute Order, which states, “the complaint makes clear that Plaintiffs’ claims relate to Defendant’s processing of Plaintiffs’ applications for the rights to exclusively operate .hotel, ... the language of the covenant may apply here to preclude Plaintiffs’ claims.” (Order p. 2.) Defendant argues that the FAC continues to premise each of its causes of action on the pending IRP and that the injuries alleged and relief sought continue to relate to Plaintiffs’ .hotel applications. The Court agrees. Plaintiffs allege that

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“ICANN breached its Reconsideration obligations [by] den[ying] Plaintiffs any opportunity at all to Reconsideration of at least one disputed claim” regarding their applications. (FAC ¶ 31.) Plaintiffs allege that “they have not received the benefit of their contractual bargain” (FAC ¶ 61) and that the “improper delegation of the .hotel gTLD would cause Plaintiffs inestimable and irreparable financial damage and lost commercial opportunities.” (FAC ¶ 66.) Plaintiffs also seek “meaningful, independent Ombudsman review, [and] constitution of the expert, community-chosen Standing Panel to adjudicate Plaintiffs’ gTLD claims.” (FAC Prayer for Relief ¶ 29.) These requests are predicated on Defendant’s evaluation of Plaintiff’s applications. The Court is not persuaded by Plaintiffs’ claims that their claims do not relate to any substantive ICANN decision relating to their applications; on the contrary, Plaintiff’s allegations in the FAC continue to arise out of, are based upon, and/or relate to Defendant’s review of Plaintiffs’ applications for .hotel such that these claims are barred by the Covenant.

Plaintiffs contend the covenant is unenforceable as a matter of law because it seeks to exempt Defendant from intentional wrongdoing. Plaintiffs rely on Civil Code section 1668, which provides that “[a]ll contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” (Civ. Code, § 1668, emphasis added.) However, according to Plaintiffs’ own allegations, Defendant has provided for a reconsideration process and an Independent Review Process:

“In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.” (FAC ¶ 33.)

The covenant, therefore, does not appear to exempt Defendant from liability, as there is an independent review process for claims of the nature raised here, such that Civil Code section 1668 would seem to be inapplicable. Plaintiff alleges that the “[IRP] process is a sham because the arbitrators have no power whatsoever to require ICANN to do anything at all, even in cases where it violates its articles of incorporation or bylaws. Instead, the arbitrators’ only power is to

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decide if there was a violation, and it is left to ICANN whether it will comply.” (FAC ¶ 18.) Plaintiffs argue this exempts Defendant from liability since the IRP Panel cannot force Defendant to do anything. However, as this Court found in its prior order, “Civil Code section 1668 only applies where the contract itself seeks to make a party exempt from liability; Plaintiffs’ allegations here are not that the contract makes Defendants exempt but that the review process is insufficient, and such an allegation cannot support an invocation of Civil Code section 1668.” (Order p. 3.) Plaintiffs’ dissatisfaction with a determination of conflict of interest for reconsideration by an Ombudsman or delay in the composition of a Standing Panel do not support a claim that Defendant is exempt from liability. The fact that there are measures in place to address Defendant’s potential violations makes Civil Code section 1668 inapplicable here.

Insofar as Plaintiffs contend the covenant cannot apply to claims which were unknown at the time of contracting, such as fraud claims, or the covenant is inapplicable under the facts alleged, this argument is contradicted by law. (See *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1053 [holding “that a general release can be completely enforceable and act as a complete bar to all claims (known or unknown at the time of the release) despite protestations by one of the parties that he did not intend to release certain types of claims.”].) As this Court previously found, “[t]he covenant prohibited actions for any claims that ‘arise out of, are based upon, or are in any way related to’ [Defendant]’s review of the application...[and] there is no other way to read the pleading except to conclude that the purported fraud arose out of Plaintiffs’ application(s) with [Defendant],” such that a general release of claims is enforceable. (Order p. 3.)

Plaintiffs’ contention that their claims relate to the public interest is also not persuasive. *Tunkl v. Regents of Univ. of Cal.* (1960) 60 Cal.2d 92, 95 involved the application of Section 1668 to a medical release form on a hospital patient. Plaintiffs’ reliance on this case is misplaced since this case involves a commercial transaction between sophisticated, corporate entities who voluntarily entered into a contract.

Plaintiffs’ argument that the covenant is unenforceable as it was procured by fraud remains unsupported. Plaintiffs fail to identify any misrepresentation in which Defendant misrepresented facts that induced Plaintiffs to submit their applications. Thus, there continues to be no facts specifically demonstrating fraud as it relates to the subject covenant.

Plaintiffs fail to show that there is a reasonable possibility of successful amendment. (See *Goodman v. Kennedy*, supra 18 Cal.3d 335.) It does not appear that there are any facts which Plaintiffs may include to cure the defects present in the FAC. Accordingly, Defendants’

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Demurrer is SUSTAINED without leave to amend. All of Plaintiffs' causes of action remain deficient in their FAC such that this Court's prior analysis as to each individual claim remains in effect.

*** END OF RULING ***

Defendant Internet Corporation for Assigned Names and Numbers shall submit a proposed judgment for the Court's signature.

Clerk to give notice to Defendant Internet Corporation for Assigned Names and Numbers who shall give notice to all other relevant parties.

Certificate of Mailing is attached.