No. 16-55693, No. 16-55694

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOTCONNECTAFRICA TRUST
Plaintiff-Appellee,
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al*.
Defendant-Appellant

DOTCONNECTAFRICA TRUST
Plaintiff-Appellee,
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al*.
Defendant-Appellant

and

ZA CENTRAL REGISTRY, NPC
Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-cv-00862-RGK-JC
The Honorable R. Gary Klausner

MOTION OF DOT REGISTRY, LLC FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLEE

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Pursuant to Federal Rules of Appellate Procedure 29, Dot Registry, LLC ("Dot Registry") hereby requests leave to file the concurrently submitted *amicus curiae* brief to the Court in support of Plaintiff-Appellee DotConnectAfrica Trust ("DCA Trust"). Dot Registry sought the consent of all parties to the filing of an *amicus* brief. Appellee DCA Trust consented to the filing of Dot Registry's *amicus* brief. Appellant Internet Corporation for Assigned Names and Numbers ("ICANN") and Appellant ZA Central Registry, NPC did not consent.

Dot Registry submits this *amicus* brief because it has substantial interest in the outcome of this appeal. This appeal presents questions concerning the enforceability of the broad release of liability that ICANN imposes upon applicants seeking to operate registries for generic top-level domains ("gTLDs"). In 2012, Dot Registry applied to ICANN for the rights to operate the registries for the gTLDs .CORP, .INC, .LLC, and .LLP. Although ICANN determined that Dot Registry was qualified to be the registry operator for each of these gTLDs, it wrongfully denied awarding Dot Registry .INC, .LLC, and .LLP.

Because ICANN's decision violated its own procedures and guidelines, Dot Registry sought to challenge these determinations pursuant to ICANN's internal accountability mechanisms. After ICANN declined to remedy its actions, Dot Registry commenced an Independent Review Process ("IRP"). The IRP was administered by the American Arbitration Association's International Centre for

Dispute Resolution and heard before a panel of three independent arbitrators. The majority panel concluded that ICANN's denial of Dot Registry's reconsideration request breached ICANN's own rules.[1] Although ICANN purported to accept the decision by the review panel, it has not taken any action to date to remedy the harm and injury that the Panel found it had caused to Dot Registry.

This appeal involves a dispute regarding DCA Trust's application for the gTLD .AFRICA. As part of the appeal, DCA Trust contends that the waivers and releases in Module 6.6 (the "Release") of ICANN's New gTLD Applicant Guidebook (the "Guidebook") are void as a matter of California public policy and law. This Court therefore will have the opportunity in this appeal to determine the validity of the ICANN Release.

Dot Registry has a direct interest in this appeal. As an applicant for several new gTLDs, the Guidebook and its Release apply to Dot Registry. The disposition of this appeal will thus have a direct impact on Dot Registry's available rights and remedies, and its new gTLD applications; including Dot Registry's ability to protect its rights against ICANN in light of the decision rendered from the Independent Review proceeding.

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[1] *See* Declaration of the Independent Review Panel, *Dot Registry v. ICANN*, ICDR Case No. 01-14-001-5004 (29 July 2016), https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

Dot Registry believes that its *amicus* brief will be helpful to the Court in resolving the issues in this appeal. Dot Registry's *amicus* brief reflects the experience of a gTLD applicant with significant familiarity concerning how ICANN manages the Guidebook's application and evaluation process, and with the rights and remedies that ICANN's alternative dispute resolution mechanisms actually provide to new gTLD applicants. Dot Registry can provide an important perspective to the Court based upon this experience.

For all these reasons, set forth in further detail in the attached brief, Dot Registry respectfully requests that this Court grant its motion to file the accompanying *amicus* brief.

Date: August 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing motion with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Steven A. Engel
Attorney for Amicus Curiae Dot Registry LLC

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BRIEF *AMICUS CURIAE* OF DOT REGISTRY, LLC IN SUPPORT OF APPELLEE AND SUPPORTING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

Amicus curiae Dot Registry, LLC is a Kansas Limited Liability Company. The company has no parents or stockholders.

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INTEREST OF AMICUS CURIAE

Dot Registry, LLC submits this *amicus curiae* brief in support of Appellee DotConnectAfrica Trust ("DCA Trust"), pursuant to Federal Rule of Appellate Procedure 29. Like DCA Trust, Dot Registry is an applicant to operate Internet registries maintained by Appellant Internet Corporation for Assigned Names and Numbers ("ICANN"). Dot Registry therefore has significant familiarity in how ICANN manages its application processes and a significant interest in this Court's interpretation of ICANN's guidelines.

In 2012, Dot Registry applied to ICANN for the rights to operate the registries for the generic top-level domains ("gTLDs") .CORP, .INC, .LLC, and .LLP. Although ICANN determined that Dot Registry was qualified to be the registry operator for each of these gTLDs, it wrongfully denied awarding Dot Registry .INC, .LLC, and .LLP. Because ICANN's decision violated its own procedures and guidelines, Dot Registry sought to challenge these determinations pursuant to ICANN's internal accountability mechanisms.

After ICANN denied reconsideration, Dot Registry then commenced an Independent Review Process ("IRP") proceeding against ICANN under the auspices of the American Arbitration Association's International Centre for Dispute Resolution ("ICDR"). The majority panel concluded that ICANN's denial

of Dot Registry's reconsideration request breached ICANN's own rules.[1] Although ICANN purported to accept the decision by the review panel, it has not taken any action to date to remedy the harm and injury that the Panel found it had caused to Dot Registry. Dot Registry therefore has significant experience with how ICANN manages the application process in practice and the manner in which ICANN seeks to limit the due process available to aggrieved applicants that invoke ICANN's internal and external accountability procedures.

In submitting an application for a new gTLD, Dot Registry, like every gTLD applicant, was required to accept, without any modification, the terms and conditions set forth in Module 6 of ICANN's gTLD Applicant Guidebook (the "Guidebook"), including the litigation waivers and releases in Module 6.6 (the "Release"). Dot Registry believes that the Release is unenforceable and has significant concerns about the fairness and scope of Module 6.6 as it has been applied.

This Court's interpretation of the enforceability of Module 6.6 under California law will likely have a significant impact on Dot Registry's ability to pursue its rights if the ICANN Board does not act to give effect to the IRP Panel's decision, as well as the rights of other aggrieved applicants. Dot Registry therefore

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[1] *See* Declaration of Independent Review Panel, *Dot Registry v. ICANN*, ICDR Case No. 01-14-001-5004 (29 July 2016), https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

respectfully submits this *amicus* brief to provide additional background to the Court on the law and factual context concerning the Release.[2]

SUMMARY OF ARGUMENT

The District Court was correct to hold that there were "serious questions regarding the enforceability of the Release," and the judgment should be affirmed. 1 ER 44. The District Court correctly determined that this open-ended and prospective Release would likely be void under California Civil Code § 1668, because it exempts ICANN from liability for any and all claims, including claims based on intentional, fraudulent, or willful conduct.

Alternatively, this Court may affirm because, in addition to violating the public policy set forth in § 1668, the Release is both procedurally and substantively unconscionable under California law. ICANN presents the Release as a take-it-or-leave-it waiver of liability. While ICANN purports to advise applicants of an "alternative mechanism" to redress grievances in the application process, in fact, ICANN affords applicants no such fair process. To the contrary, ICANN has taken the view that the review process is limited to a narrow subset of decisions, subject to cramped procedures, and that the final determination is not even binding on

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[2] No person or party, other than Dot Registry and its counsel, authored this brief in whole or in part; and no person or party contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

ICANN. A monopolist like ICANN cannot validly impose such a one-sided waiver on applicants.

ARGUMENT

Appellant ICANN is a unique organization, a private corporation charged with overseeing and managing the technical coordination of the Internet. In exercising this power, ICANN controls the authoritative root zone for the Internet Domain Name System and sets the process for awarding and delegating new gTLDs. These "generic top-level domains" represent the basic language of the Internet for most users, and they are the critical gateways for companies, government agencies, educational institutions, and individual users who seek to set up and operate their own Internet domains. ICANN thereby exercises sweeping power that affects literally billions of Internet users throughout the world. *See* 4 ER 730. Given ICANN's unquestionable monopoly power over these vital channels of commerce, it is critical that ICANN exercise that authority through an open, fair, and transparent process governed by law.

Unfortunately, ICANN has used its dominant position to create procedures designed to insulate its decisions and processes from scrutiny. In 2012, ICANN launched a program to greatly expand the number of available gTLDs to consumers. ICANN began accepting applications from entities that seek to obtain the rights to run and operate registries for the newly available gTLDs. As part of

that application, ICANN required each applicant to agree to the rules and terms and conditions contained in the Guidebook, a 338-page document that governs ICANN's application, evaluation, and delegation process.

Among its many provisions, the Guidebook contains a broad, non-negotiable release of liability, which purports to exempt ICANN and its affiliates from any and all liability (including future liability) that may arise from actions during the application process. Specifically, before ICANN will permit applicants to participate in the gTLD application process, each applicant must agree that it

> 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.

6 ER 1193 (minor typographical errors omitted).[3]

The Release is unenforceable and void under California law. As the District Court recognized, the Release is facially "against the policy of the law" expressed in California Civil Code § 1668, because the Release exempts ICANN from claims based on intentional, fraudulent, or willful conduct. California law specifically forbids any contractual provision that seeks to exempt parties from responsibility for intentional, fraudulent, and willful conduct. *See* Cal. Civ. Code § 1668.

In addition, although the District Court did not reach the issue, the Release is also unconscionable under California law. This provides an alternate basis for affirming the preliminary injunction. ICANN may not use its monopoly power to insulate its actions from judicial scrutiny. ICANN presents its Release on a take-it-or-leave it basis. The Release purports to offer applicants an alternative review process that is supposed to preserve an applicant's right to a hearing in front of a neutral decision-maker. In practice, however, ICANN has severely narrowed the class of decisions subject to the "Independent Review Process," limited the process afforded, and taken the position that the decisions of the tribunal are not binding upon it. ICANN cannot point to these non-mutual, cramped procedures as a way of insulating its wrongful conduct from scrutiny. The Release is unconscionable

[3] In using the phrase "ICANN Affiliated Party," the Release purports to extend to claims against ICANN's "affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents." 6 ER 1192.

because it "shocks the conscience" under well-established California law, and deprives applicants of any way to enforce their rights if ICANN refuses to give effect to the decision of an IRP tribunal.

I. THE DISTRICT COURT CORRECTLY FOUND "SERIOUS QUESTIONS" REGARDING THE ENFORCEABILITY OF THE RELEASE UNDER CALIFORNIA CIVIL CODE § 1668

As a California company, ICANN's agreements are subject to California law. *See Semcken v. Genesis Med. Interventional, Inc*., No. 04-02654, 2004 WL 2203561, at *3 (N.D. Cal. Sept. 29, 2004), *aff'd*, 132 F. App'x 155 (9th Cir. 2005); *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 228 n. 17 (1999). California Civil Code § 1668 states that "[a]ll contracts which have for their object, directly or indirectly, to 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, are against the policy of the law." *See also Sakkab v. Luxottica Retain N.A., Inc.*, 803 F.3d 425, 430 (9th Cir. 2015) ("California Civil Code § 1668, codifies the general principle that agreements exculpating a party for violations of the law are unenforceable."). Pursuant to § 1668, any contractual term that purports to exempt persons from liability for intentional and negligent wrongs is rendered unenforceable and void. *See, e.g.*, *McQuirk v. Donnelley*, 189 F.3d 793, 797 n.5 (9th Cir. 1999) ("under § 1668, a party may not contract away liability for fraudulent or intentional acts or for negligent violations of statutory

law" (alteration omitted) (quoting *Blankenheim v. E.F. Hutton & Co.*, 217 Cal. App. 3d 1463, 1471–72 (1990))).

The District Court correctly found that the Release runs afoul of § 1668 by purporting to exempt ICANN from liability for ***any and all claims*** arising out of the application process, including claims based on intentional or fraudulent conduct. *See* 1 ER 43. Contractual waivers like the Release, which purport to shield parties from ***any*** liability, are unenforceable and void in light of § 1668. *See, e.g.*, *Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148, 1153–54 (1980) (contractual waiver of liability for intentional torts is void as against public policy articulated in § 1668); *Farnham v. Superior Court*, 60 Cal. App. 4th 69, 71 (1997) ("contractual releases of future liability for fraud and other intentional wrongs are invariably invalidated" by § 1668).

For instance, in *McQuirk v. Donnelley*, 189 F.3d 793, in connection with a new job application, a police officer signed a release that permitted his former employer, a California Sheriff's Office, to disclose information related to his job performance, and which purported to exempt the Sheriff's Office from "any liability or damage which may result" from such a disclosure. *Id.* at 795 & n.1. After the Sheriff's Office disclosed allegedly defamatory information, the plaintiff brought suit against his former employer for defamation, interference with business expectancy, and related claims. *See id.* at 794–95. The District Court granted

summary judgment based upon the waiver, yet this Court reversed. The Court recognized that § 1668 "invalidates the total release of future liability for intentional wrongs," and also prohibits "releases of liability for negligent violations of law" subject to a limited exception. *Id.* at 796–98.[4]

The Release in this case is similarly void and unenforceable. The Release purports to exempt ICANN from any and all claims, including "liability for intentional wrongs" and "liability for negligent violations of law" arising out of the application process; and contains no carve-outs sufficient to avoid a conflict with § 1668.[5] Hence, the District Court was correct to find that the Release was likely invalid and unenforceable in light of § 1668.

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[4] *See McQuirk*, 189 F.3d at 798 n.7 ("the California Supreme Court recognized that one party may shift the risk of negligence to another through a release unless the release involves 'the public interest'" (citing *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 95–99 (1963))).

[5] ICANN's Release is not severable and should be deemed unenforceable in its entirety. Even so, ICANN cannot invoke the limited exception for negligent conduct, because the Release here concerns "the public interest," since ICANN's gTLD program "concerns a business of a type generally thought suitable for public regulation"; ICANN "is engaged in performing a service of great public importance to the public"; ICANN "possesses a decisive advantage of bargaining strength" against any applicant seeking to obtain the rights to a gTLD; ICANN, in exercising that strength, confronts applicants "with a standardized adhesion contract of exculpation"; and the Release "makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence". *Tunkl*, 60 Cal. 2d at 98–101 (articulating factors placing contracts within those affecting "the public interest").

ICANN is incorrect when it argues that California Insurance Code § 533 supports an interpretation of § 1668 which would require more than "mere 'intentional' conduct."[6] (ICANN Br. at 31–30.) To the contrary, this Court has observed that § 1668 forbids contracts that exempt liability for ***even negligent*** wrongs in many cases. *See McQuirk*, 189 F.3d at 797 n.5 (quoting *Blankenheim*, 217 Cal. App. 3d at 1472–73). Moreover, § 1668 clearly applies to contractual exemptions of liability for fraud, and California's definition of "fraud" includes ***negligent*** misrepresentations. *See Blankenheim*, 217 Cal. App. 3d at 1472–73; *see also Allstate Ins. Co. v. Hansten*, 765 F. Supp. 614, 616 (N.D. Cal. 1991). For these reasons, and for those more fully explained in DCA Trust's Answering Brief (DCA Br. at 35–41), the District Court correctly held that the Release was likely invalid and unenforceable because it conflicts with California public policy set by § 1668.

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[6] The interplay between § 533 and § 1668, if any, involves only the California policy of "prevent[ing] insurance coverage from encouragement of willful tort" through an overly broad indemnification provisions in insurance contacts. *See, e.g., Bodell v. Walbrook Ins. Co.*, 119 F.3d 1411, 1417 (9th Cir. 1997) (quoting *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 177 (Cal. 1966)).

II. THE RELEASE IS ALSO UNENFORCEABLE BECAUSE IT IS UNCONSCIONABLE

This Court also may affirm because the Release is unconscionable under California law. DCA Trust raised this argument below, but the District Court found it unnecessary to reach it. 1 ER 44. This Court may affirm on any ground in the record, however. *See Gemtel Corp. v. Cmty. Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542, 1546 (9th Cir. 1994) ("Although the district court did not reach this issue, we may affirm the district court's dismissal on any ground supported by the record."). As explained below, ICANN's Release is a textbook example of an unconscionable contractual provision. ICANN exercises monopoly power over a critical channel of commerce. It may not lawfully use that power to exempt its decisions from any binding review by a court or arbitrator in any forum.

California courts will not enforce contracts that are unconscionable. *See Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 (9th Cir. 2003); *see also Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 782 (9th Cir. 2002) (quoting Cal. Civ. Code § 1670.5, which provides "if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract"). "Unconscionability refers to 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Ingle*, 328 F.3d at 1170 (quoting *A & M Produce Co. v. FMC Corp.*,

135 Cal. App. 3d 473, 486 (1982)). Hence, there is "both a procedural and substantive element of unconscionability." *Id.*; *see also Ferguson*, 298 F.3d at 783. But "procedural and substantive unconscionability 'need not be present in the same degree." *Ingle*, 328 F.3d at 1170 (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)); *see also Ferguson*, 298 F.3d at 783. The analysis is essentially a "sliding scale," whereby "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Ingle*, 328 F.3d at 1171 (quoting *Armendariz*, 6 P.3d at 690).

As discussed below, ICANN's interpretation and application of its own Bylaws confirm that the Release is both procedurally and substantively unconscionable. The Release forces applicants to accept its terms on a take-it-or-leave-it basis, constitutes a bait-and-switch "bargain," lacks mutuality, and is so one-sided that it shocks the conscience. It is therefore unenforceable.

A. ICANN's Accountability Mechanisms Do Not Provide An Adequate Review Process For Alleged Wrongdoing, And Merely Provide ICANN An Opportunity To Absolve Itself Of Any Misconduct

In exchange for releasing ICANN from all legal accountability for alleged wrongdoing, the Release purports to provide applicants with an "alternative," permitting them to

> 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.

6 ER 1193. The scope of ICANN's "accountability mechanism" is exceedingly narrow, and ICANN has continually revised the rules to ensure that its decisions are effectively shielded from review. In fact, time after time, applicants have learned that ICANN has adopted a much more limited view of the scope of these mechanisms than a plain reading of ICANN's Bylaws would suggest.

ICANN's Bylaws provide for three levels of review: "Reconsideration", the Cooperative Engagement Process ("CEP"), and the IRP. *See* 6 ER 1206–15. The first two accountability mechanisms are run entirely within ICANN. The third, the IRP, calls for the appointment of a tribunal of outside decision-makers. Significantly, ICANN vigorously opposes the use of its accountability mechanisms for the purposes of challenging any final decisions, and, instead, claims that only limited categories of procedural violations are reviewable. In addition, ICANN has

taken the view that none of these accountability mechanisms, including the IRP, is actually binding on ICANN's Board, which ultimately remains the final and reviewable judge of its own actions.

Reconsideration. The first step in the escalating set of review processes available to applicants is Reconsideration. According to ICANN's Bylaws, any person or entity adversely affected may submit a request to ICANN for "reconsideration or review" of an action or inaction by (1) ICANN staff that contradicts ICANN policies, or (2) the ICANN Board that was "taken or refused to be taken without consideration of material information" or was taken based on "false or inaccurate material information." 6 ER 1206–07. This narrow review process precludes reconsideration of the substance of staff decisions (or decisions by third-party evaluators reporting to ICANN staff) on gTLD applications. Rather, ICANN claims that it is limited to procedural violations.

Unless an applicant, without the benefit of discovery, can identify and produce evidence of a specific policy that staff violated, ICANN will not reconsider staff decisions. As the panel in the *Despegar Online SRL v. ICANN* IRP noted, "[i]t is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance" that the staff or third party evaluator "has correctly applied the policy." Final Declaration, *Despegar Online SRL v. ICANN*, ICDR Case No. 01-15-0002-

8061, ¶ 69 (Feb. 11, 2016), https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf.

This is significant because ICANN staff decide whether gTLD applications pass or fail; whether ICANN should accept the findings of the third-party evaluators it hires; and whether certain applications are entitled to priority over competing applications. Extremely valuable rights are at stake. Where ICANN resolves the competition for a gTLD among qualified competing applicants through an auction, the winning bids are often in the millions.[7] Remarkably, however, this incredibly limited procedure is the ***only*** review mechanism available for applicants to challenge these consequential ICANN staff actions.

ICANN's Bylaws provide that a subset of the ICANN Board of Directors, known as the Board Governance Committee (the "BGC"), shall conduct the Reconsideration process. ICANN's Bylaws theoretically provide the BGC with the authority to conduct a meaningful review, including the authority to "conduct whatever factual investigation is deemed appropriate"; to "request additional written submissions from the affected party, or from other parties"; and to conduct in-person hearings. 6 ER 1207, 1209. However, in practice, they are almost never meaningfully utilized. Instead, ICANN's legal counsel provides the BGC with

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[7] *See* ICANN Auction Results, https://gtldresult.icann.org/application-result/applicationstatus/auctionresults.

recommendations on how to rule and draft determinations, and those recommendations are adopted without further investigation.[8] For instance, in a recent IRP involving Dot Registry, the majority panel noted the exceedingly thin record in its Declaration:

> The only documents of the BGC that were disclosed to the Panel [in response to the Panel's document requests] are the denials of the relevant Reconsideration Request themselves, the agendas for the relevant BGC meetings found on the ICANN website, and the Minutes of those meetings also found on the ICANN website. . . . Thus apart from *pro forma* corporate minutes of the BGC meeting, no evidence at all exists to support a conclusion that the BGC did more than just accept without critical review the recommendations and draft decisions of ICANN staff [with respect to Dot Registry's reconsideration request].

Declaration of Independent Review Panel, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, ¶¶ 132, 139 (July 29, 2016), https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf; *see also id.* at ¶ 134 ("There is nothing in either the document production record or the privilege log to indicate that the denials drafted by ICANN staff were modified in any manner after the presentation by the staff to the BGC. Rather, from the record it would appear that the denials were approved without change.").

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[8] *See* Declaration of Independent Review Panel, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, ¶¶ 141–48 (July 29, 2016), https://www.icann.org/en/system/ files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

ICANN's Bylaws authorize the BGC to make a final determination on any requests regarding staff action or inaction, or alternatively, to make a recommendation to the Board on how to rule. However, when it comes to a complaint concerning a ***Board*** action, the BGC is authorized to make only a recommendation to the Board, which the Board is not bound to follow.[9] Not surprisingly, the Board has granted only two out of the 134 Reconsideration Requests that have reached a decision to date.[10]

Cooperative Engagement Process. If the BGC denies the party's Reconsideration Request (which, as noted, it has done 98.5% of the time), then the party is directed to engage in the CEP. ICANN encourages claimants to participate in the CEP for the purpose of "resolving or narrowing the issues that are contemplated to be brought to the IRP." 6 ER 1213. Although ICANN's CEP guidelines provide that CEP "is expected to be among ICANN and the requesting party, without reference to outside counsel," ICANN is itself represented by its Legal Department.[11] This leaves applicants without in-house legal departments in

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9 The members of the BGC are not required to recuse themselves from the full Board's discussion and vote on the BGC's recommendation.

10 *See* ICANN Requests for Reconsideration, https://www.icann.org/resources/pages/accountability/reconsideration-en.

11 *See* Cooperative Engagement Process – Requests for IRP (11 Apr. 2013), https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf.

the vulnerable position of negotiating with either ICANN's in-house counsel or individuals represented by ICANN's in-house counsel, to the extent ICANN abides by its obligation to participate.[12] Although CEP purports to be a voluntary process, ICANN's Bylaws provide that if a party starts the IRP without first participating "in good faith" in CEP, then the IRP Panel may award all reasonable fees and costs, including legal fees, to ICANN, if ICANN ultimately prevails.

Independent Review Process. If a party is unable to resolve its issues through the CEP, then the Bylaws provide that the party may file an IRP. The IRP is the third level of review and the only mechanism that provides for independent review by neutral third-party decision-makers. Unlike Reconsideration and CEP, the IRP is administered by a provider of international arbitration services (the ICDR)—not ICANN—and conducted pursuant to independently developed international arbitration rules (the ICDR International Arbitration Rules), supplemented by ICANN's Supplementary Procedures for IRP. "Any person materially affected by a decision or action by the Board that he or she asserts is

[12] In Dot Registry's experience, ICANN failed to participate (inadvertently, according to ICANN), despite the fact that Dot Registry had email "read receipts" confirming that Dot Registry's notice invoking CEP was delivered to ICANN and viewed by an individual or individuals with icann.org email addresses no fewer than 14 times in the four days following receipt, including 8 times on the very same day Dot Registry sent it. *See Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, Ex. C-023, https://www.icann.org/en/system/files/files/dot-registry-irp-exhibit-c021-22sep14-en.pdf.

inconsistent with [ICANN's] Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action." 6 ER 1211. The neutral decision-makers have the authority to declare whether the complained-of action or inaction of the Board was inconsistent with ICANN's governing documents; recommend that the Board stay any action or decision or take interim action; and issue a written final declaration that designates the prevailing party and awards costs. *See* 6 ER 1213–14.

ICANN, however, has ensured that the IRP does not provide applicants with a meaningful opportunity to be heard or to present a case. Notwithstanding having adopted the ICDR International Arbitration Rules (the "ICDR Rules"), which are among the most well-respected international arbitration rules, ICANN has interpreted the IRP procedure in such a way as to limit applicant's procedural rights, narrow the scope of the IRP, and restrict arbitral tribunals from conducting proceedings according to a procedural framework commensurate with the rights at stake. In practice, ICANN's interpretation of the IRP procedure nearly guts the ICDR Rules of any meaningful effect. Indeed, ICANN has defied efforts by IRP panels to require fair process and claimed that it "was not required to establish ***any***

internal corporate accountability mechanism," and therefore, applicants do "not have any 'due process' . . . rights with respect to Independent Review process."[13]

After ICANN lost its first ever IRP in a case involving ICM Registry, LLC, ICANN revised its Supplementary Procedures to significantly narrow the procedures governing an IRP.[14] Even though ICANN's decisions with respect to gTLDs involve rights that are worth tens of millions of dollars, ICANN's Supplementary Procedures treat the IRP as though it were a small claims dispute. These rules require, among other things, that the written submission filed with the notice of IRP be limited to 25 pages; that the submission should contain all

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13 ICANN's Further Memorandum Regarding Procedural Issues, *DCA Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13, ¶ 12 (May 20, 2014), https://www.icann.org/en/system/files/files/icann-memo-procedural-issues-20may14-en.pdf ("ICANN was not required to establish ***any*** internal corporate accountability mechanism, but instead did so ***voluntarily***. Accordingly, DCA does not have any 'due process' . . . rights with respect to the Independent Review process."). *Compare* ICDR Rules, Art. 20 ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."), *with* Letter from ICANN to DCA Trust Panel 2 (Apr. 8, 2015), https://www.icann.org/en/system/files/correspondence/icann-to-irp-panel-redacted-08apr15-en.pdf (ICANN refusing to present its witnesses for examination by the DCA Trust IRP panel, despite an IRP panel declaration to do so; instead offering to transmit written questions from the Panel to the witnesses before the hearing).

14 *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08 (19 Feb. 2010), https://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf.

evidence; that proceedings take place by "electronic means to the extent feasible," dispensing with in-person hearings except in "extraordinary" cases; and that, to the extent an in-person hearing is deemed necessary, it be limited to argument only, without oral testimony from or cross-examination of witnesses and experts.[15]

The IRP's effectiveness is further undermined by the limited jurisdiction that ICANN has granted to IRP panels. The panel is to review only whether the Board acted or failed to act consistently with ICANN's Articles of Incorporation, Bylaws, and the Guidebook. *See* 6 ER 1211–12.

Remarkably, even though a recent IRP Panel determined that the IRP provides a final and binding resolution of disputes—and ICANN's Bylaws provide that IRP decisions "are final and have precedential value"—ICANN has declared that the final declarations of IRP Panels are merely ***advisory recommendations*** to the Board. *See* 4 ER 830, 850–57; 6 ER 1214–15.[16] As ICANN has stated, "ICANN's Board is required to 'review[]' and 'consider' the declaration, thereby

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15 *Compare* Supplementary Procedures for ICANN IRP, https://www.icdr.org/icdr/ShowPDF?url=/cs/groups/international/documents/document/z2uy/mde5/~edisp/adrstage2019470.pdf (Amended Supp. Proc.), *with* Supplementary Procedures for ICANN IRP, https://www.icdr.org/icdr/ShowPDF?url=/cs/groups/international/documents/document/dgdf/mday/~edisp/adrstg_002001.pdf (Original Supp. Proc.).

16 *See also* Supplementary Procedures for ICANN IRP, https://www.icdr.org/icdr/ShowPDF?url=/cs/groups/international/documents/document/z2uy/mde5/~edisp/adrstage2019470.pdf (Amended Supp. Proc.).

exercising discretion as to whether and in what manner to adopt and implement that declaration."[17] Accordingly, ICANN's Board meets after each IRP final declaration is issued to decide whether or not to "accept" the decision of the IRP panel regarding the Board's own compliance with ICANN's governing documents. This amounts to the accused deciding whether or not it is guilty.

Indeed, Dot Registry's experience highlights how even a prevailing party in an IRP cannot require ICANN to remedy its wrongdoing. In *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004, the IRP panel found that "ICANN failed to apply the proper standards" to Dot Registry's and the National Association of Secretaries of State's joint reconsideration requests, and that "the actions and inactions of the Board were inconsistent with ICANN's Articles of Incorporation and Bylaws."[18] However, the IRP panel majority did not address the possible remedies for the harm suffered by Dot Registry as a result of such actions and inactions. Therefore, an applicant can "win" a finding that ICANN has

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17 ICANN's Response to Procedural Order No. 8 at 5, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004 (Oct. 12, 2015), https://www.icann.org/en/system/files/files/icann-response-procedural-order-8-redacted-12oct15-en.pdf. (*See also* ICANN Br. at 43 ("ICANN's Board specifically voted to adopt the recommendations in the IRP Declaration in their entirety").)

18 *See* Declaration of the Independent Review Panel, *Dot Registry v. ICANN*, ICDR Case No. 01-14-0001-5004 (July 29, 2016) ¶ 151, https://www.icann.org/en/system/files/ files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf.

violated its own rules—a finding that the applicant has suffered "injury or harm that is directly and causally connected" to the Board's violations—yet still find itself without a remedy and without any meaningful recourse for compelling the Board to remedy such injury or harm. *See* 6 ER 1211. Under the terms of the Release, the only mechanism available to applicants to challenge the Board's inaction is the IRP procedure. ICANN's Release, therefore, on its face serves to insulate even intentional violations of the Bylaws from outside scrutiny. ICANN's cramped and evolving interpretation of its "accountability" procedures confirms that the Release is both procedurally and substantively unconscionable under California law.

B. The Release Is Procedurally Unconscionable Because It Is Offered On A Take-It-Or-Leave-It Basis And Constitutes A Bait-And-Switch Scheme

Procedural unconscionability focuses on "the manner in which the contract was negotiated and the circumstances of the parties at that time." *Ingle*, 328 F.3d at 1171 (quoting *Kinney v. United Healthcare Servs., Inc.*, 70 Cal. App. 4th 1322, 1329 (1999)); *see also Ferguson*, 298 F.3d at 783. Central to that inquiry are the concepts of oppression and surprise. *See Ingle*, 328 F.3d at 1171; *Ferguson*, 298 F.3d at 783. "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice." *Ferguson*, 298 F.3d at 783 (quoting *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1532

(1997)); *see also Ingle*, 328 F.3d at 1171. Normally, "[s]urprise involves the extent to which the supposedly agreed-upon terms of the bargain are hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms." *Ingle*, 328 F.3d at 1171 (quoting *Stirlen*, 51 Cal. App. 4th at 1532); *see also Ferguson*, 298 F.3d at 783. But California courts have held that surprise is also "a function of the disappointed reasonable expectations of the weaker party." *Harper v. Ultimo*, 113 Cal. App. 4th 1402, 1406 (2003) (citing *Armendariz*, 6 P.3d at 689); *see also Net Global Marketing, Inc. v. Dialtone, Inc.*, 217 F. App'x 598, 601 (9th Cir. 2007) (unpublished).

The Release is procedurally unconscionable because it is oppressive and disappoints the reasonable expectations of the applicants regarding the accountability mechanisms available to challenge alleged misconduct on the part of ICANN. As discussed above, ICANN has a monopoly over the process of awarding and delegating new gTLDs. Other than through ICANN's application process, there is no other avenue for obtaining the rights to operate a registry for a gTLD. ICANN exercises this extraordinary leverage by requiring all applicants to agree to a standard set of terms and conditions in the application process, including the Release. *See* 5 ER 891. Indeed, the Guidebook specifically states that all applicants must agree to all the terms and conditions contained in the Guidebook, including the Release, "without modification." 6 ER 1191. The Release's non-

negotiable, take-it-or-leave-it nature, coupled with ICANN's enormous leverage, clearly renders it procedurally oppressive. *See Ingle*, 328 F.3d at 1172 (holding arbitration agreement procedurally unconscionable because plaintiff "had no meaningful opportunity to opt out," "nor . . . any power to negotiate the terms of the agreement," and the agreement was offered "on an adhere-or-reject basis"); *Ferguson*, 298 F.3d at 784 (arbitration agreement was procedurally unconscionable because plaintiff "was in a position of unequal bargaining power and was presented with offending contract terms without an opportunity to negotiate").

Moreover, although claiming to provide an alternative accountability mechanism, the Release, in practice, is just a bait-and-switch scheme, offering applicants a sham accountability procedure. Indeed, at the time ICANN solicited applications for the 2012 gTLD process, it was not apparent that ICANN would treat a final IRP declaration as merely advisory or that it would take the position that the IRP tribunal could not provide any remedy for a violation of the ICANN Articles of Incorporation, ICANN's Bylaws, the Guidebook, or California or international law.

To the contrary, ICANN's Bylaws suggested that the IRP would be a dispute resolution process akin to an arbitration and which would lead to a final and complete resolution of the issues in dispute. Yet ICANN only later made clear that, in its view, it has the discretion to ignore the IRP panel's determination and to

fashion its own remedy to address its own wrongful conduct. ICANN's subsequent decisions to disregard and narrow these rights present a clear case of unfair surprise.

Indeed, the "accountability" mechanism is nothing of the sort; and, instead of providing applicants a way to challenge actions or inactions by ICANN, it gives lip-service to legitimate grievances while rubber-stamping decisions made by ICANN and its staff. Accordingly, the surprise caused by how ICANN actually interprets its terms also renders the Release procedurally unconscionable. *See Harper*, 113 Cal. App. 4th at 1406 (finding procedural unconscionability where surprise was that arbitration rules provided "no relief . . . even if out and out fraud has been perpetrated, or even if he or she merely wants to be fully compensated for damaged property").

C. The Release Is Substantively Unconscionable Because It Is Non-Mutual And Is So One-Sided In Favor Of ICANN That It Shocks The Conscience

"Substantive unconscionability centers on the 'terms of the agreement and whether those terms are so one-sided as to shock the conscience.'" *Ingle*, 328 F.3d at 1172 (quoting *Kinney*, 70 Cal. App. 4th at 1130); *see also Ferguson*, 298 F.3d at 784. "[M]utuality is the 'paramount' consideration when assessing substantive unconscionability." *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 997 (9th Cir. 2010). In analyzing the mutuality of an agreement's terms, courts often look "beyond

facial neutrality and examine the actual effects of the challenged provision." *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003) (citing *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1101–02 (2002)).

The Release is substantively unconscionable because it is entirely non-mutual—placing obligations on applicants but not on ICANN—and is dramatically one-sided. Specifically, the Release requires that all applicants resolve all disputes relating to the application process through the ICANN-provided accountability mechanisms. But ICANN need not resolve any disputes it has with applicants through those same procedures. And even in the rare case where an applicant is successful in challenging a specific action or inaction of ICANN or its staff in the course of a gTLD application procedure, ICANN does not consider itself to be bound by any adverse decision. At the same time, if ICANN is successful in its defense, then it certainly considers the dispute resolved and the applicant bound by the decision reached.

Courts have consistently held unconscionable agreements containing similar provisions or having similar effects. *See, e.g.*, *Pokorny*, 601 F.3d at 998 (holding agreement which required one party to submit claims to an alternative dispute resolution, but not the drafting party, was substantively unconscionable under California law); *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 1282–83 (2004) (similar); *Saika v. Gold*, 49 Cal. App. 4th 1074, 1080 (1996)

(rejecting application of arbitration provision where although it "purports to apply to both parties," it was a "heads I win, tails you lose" proposition favoring the drafting party); *Bayon v. Garden Grove Medical Group*, 100 Cal. App. 3d 698, 706 (1980) (rejecting arbitration provision where it provided the drafter a "unilateral right to reject an arbitration award without cause and to require rearbitration").

ICANN contends that the Release has a "well-founded justification," because of its fear of "frivolous and costly legal actions" brought by "unsuccessful applicants." (ICANN Br. at 41.) Yet ICANN offers zero evidence that it faces a particularized fear of frivolous litigation, or that in the alternative, a mutually binding arbitration could not address that concern. ICANN could similarly protect itself against the unjustified expenditure of legal fees through contractual fee-shifting provisions or the like. What ICANN is seeking to do through the Release, however, is protect itself against accountability, not frivolous litigation.

Indeed, the Release's non-mutuality only emphasizes its wholly one-sided nature. The terms and conditions applicants must accept to participate in the gTLD application process favor one party and one party only: ICANN. In accepting the Release and its related conditions, applicants not only release ICANN from "any and all claims" arising from the application process, but also agree to "indemnify, defend and hold harmless" ICANN from and against "any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and

expenses" relating to ICANN's actions. 6 ER 1192–93. ICANN does not make any similar offer or provide any similar defense to applicants injured by its own willful violations of its rules.

Indeed, the Release's unreasonable nature is further confirmed by its protections for ICANN Affiliated Parties.[19] Although the applicant releases ICANN Affiliated Parties from all liability and indemnifies them against third party claims relating to the application, ICANN has argued that applicants cannot challenge the decisions of certain ICANN Affiliated Parties through ICANN's accountability mechanisms (including consultants, evaluators, and agents hired by ICANN),[20] even though ICANN often delegates important aspects of its evaluation of gTLD applications to third-party consultants and evaluators.[21]

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19 As discussed as *supra* note 3, ICANN Affiliated Parties means ICANN's "affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents." 6 ER 1192.

20 *See*, *e.g.*, Determination of the BGC Reconsideration Requests 14-30, 14-32, 14-33, 7-8 (24 July 2014), https://www.icann.org/en/system/files/files/determination-dotregistry-24jul14-en.pdf.

21 For example, ICANN delegated its community priority evaluation process to a third-party evaluator. Applications granted community priority by the third-party evaluator are awarded the applied-for gTLD over qualified competing applicants. But if the third-party evaluator denies an application community priority, the competition for the gTLD is resolved via an auction where the highest bidder wins. Despite the fact that valuable rights are at issue (the 17 ICANN-administered auctions conducted to date have generated proceeds of more than $240 million), ICANN has taken the position that the decisions of third party evaluators may be reviewed only for

These facts, the Release, and the practical manner in which ICANN has implemented its terms, demonstrate that the Release embodies "an insidious pattern" to "tilt[] the playing field" in favor of ICANN and against all gTLD applicants. *See Ferguson*, 298 F.3d at 787. Because it "unduly favors [ICANN] at every turn," the Release is substantively unconscionable. *Id.* Accordingly, the Court may affirm the District Court's injunction on the alternative ground that the Release is unconscionable under California law.

CONCLUSION

For the reasons discussed, the Order granting the preliminary injunction should be affirmed.

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violations of policy or procedure. *See* ICANN's Response to Claimant Dot Registry LLC's Request for Independent Review Process, *Dot Registry v. ICANN*, ICDR Case No. 01/14-0001-5004, ¶ 48 (27 Oct. 2014), https://www.icann.org/en/system/files/files/icann-response-dot-registry-irp-27oct14-en.pdf. This leaves applicants absolutely no recourse with respect to factually incorrect or otherwise substantively deficient decisions of third-party evaluators.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. R. 32(a)(7) and 29(d) because this brief contains less than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2013's 14-point font Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2016, I electronically filed the foregoing brief with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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