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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, WESTERN DISTRICT

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

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

CASE NO. 20STCV42881

Assigned to Hon. Craig D. Karlan

DEFENDANT ICANN'S REPLY IN SUPPORT OF DEMURRER TO COMPLAINT OF FEGISTRY, LLC, RADIX DOMAIN SOLUTIONS PTE. LTD., AND DOMAIN VENTURE PARTNERS PCC LIMITED

Hearing Date: December 9, 2021
Time: 8:30 a.m.
Place: Department N

Complaint Filed: November 9, 2020

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INTRODUCTION

Plaintiffs' opposition to ICANN's Demurrer ("Opposition") confirms that this entire lawsuit must be dismissed. First and foremost, when Plaintiffs submitted their applications for the .HOTEL generic top-level domain ("gTLD") in 2012, they expressly covenanted not to sue ICANN in Court for any claims arising out of or relating to their .HOTEL applications (the "Covenant"). That Covenant precludes this lawsuit in its entirety, but it affords Plaintiffs the opportunity to pursue all of their claims using ICANN's robust dispute resolution mechanisms set forth in ICANN's Bylaws, referred to as ICANN's Accountability Mechanisms. Indeed, Plaintiffs are currently challenging the same ICANN conduct in a pending Accountability Mechanism proceeding. The Covenant is fully enforceable and each of Plaintiffs' claims falls well within its broad scope, requiring immediate dismissal of this lawsuit with prejudice.

Second, this lawsuit should be dismissed for the separate and independent reason that Plaintiffs cannot state a claim on any of their causes of action. The fatal flaw in Plaintiffs' breach of contract, fraud claims, and Plaintiffs' assertion that the Covenant was procured through fraud, is that the alleged breaches and the alleged fraudulent statements all relate to ICANN Bylaws provisions that were put in place ***after*** Plaintiffs submitted their .HOTEL applications to ICANN in 2012, which the Complaint concedes.[1] Thus, these Bylaws provisions could not have been part

[1] *See* Compl. ¶ 9 ("ICANN promised to implement these Accountability Mechanisms as a condition of the United States government terminating its formal oversight of ICANN in 2016"), ¶ 12 (Accountability Mechanism enhancements were "promised by the ICANN Board and bylaws in critical respects since 2013, and in specific detail since 2016."), ¶ 91 (ICANN promised Accountability Mechanism enhancements as part of ICANN's transition from U.S. government oversight "in 2016"), ¶ 34 (the standing panel has "been required in ICANN's Bylaws since 2013"), ¶ 45 ("Some variation of this [standing panel] bylaw has been in effect since April 2013."), ¶ 50 ("ICANN misrepresented to Plaintiffs and the community – on April 8, 2013 – that" a standing panel would be created), ¶ 59 ("In 2016, ICANN again amended its Accountability Mechanisms bylaws, revising the Standing Panel provisions as set forth above."); *compare* RJN, Ex. 5 (2012 Bylaws), Art. IV, § 3(6) ("Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.") *with* RJN, Ex. 1 (2019 Bylaws), Art. 4, § 4.3(j)(i) ("There shall be an omnibus standing panel of at least seven members"); *compare* (2012 Bylaws), Art. IV, § 2 (no Ombudsman review of reconsideration requests) *with* RJN, Ex. 1 (2019 Bylaws), Art. 4, § 4.2(l) ("the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request."); *compare* RJN Ex. 5 (2012 Bylaws), Art. IV, § 3 (12) ("The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party. . .") *with* RJN, Ex. 1

of any contract formed in 2012 with Plaintiffs and these Bylaws provisions could not have induced Plaintiffs to submit their applications in 2012. Plaintiffs' Opposition, however, imagines a world in which a contract can include terms from subsequently-published extraneous documents, contract modifications can be made without an offer, acceptance or consideration, and where "reliance" can be induced by statements made years after the parties entered their transaction. The theories advanced in Plaintiffs' Opposition completely disregard the most basic tenets of contract and fraud law, and the Complaint must therefore be dismissed.

ARGUMENT[2]

I. THE COVENANT IS ENFORCEABLE.

Plaintiffs' argument that the Covenant is unenforceable under California Civil Code section 1668 ("Section 1668") fails. By its terms, Section 1668 only applies to provisions that "***exempt*** anyone from responsibility for his own fraud, or willful injury to the person or property of another[.]" Cal. Civ. Code § 1668 (emphasis added). The Covenant, however, does not exempt ICANN because it explicitly provides for the use of ICANN's robust Accountability Mechanisms to resolve disputes, rendering Section 1668 inapplicable. (RJN Ex. 2, Module 6.6.) It is applicants' access to ICANN's Accountability Mechanisms that caused the *Ruby Glen* Courts to rule that Section 1668 does not apply to the Covenant. *Ruby Glen v. ICANN*, 740 F. App'x 118, 118 (9th Cir. 2018) ("[T]he covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668."); *Ruby Glen v. ICANN*, 2016 U.S. Dist. LEXIS 163710, at *10–11 (C.D. Cal. Nov. 28, 2016) ("Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue.").

Plaintiffs seem to claim that the Accountability Mechanisms are not a sufficient form of redress. (Opp. at 7, 8.) Plaintiffs' complaints, however, are mere statements of opinion, devoid of any facts, regarding the Accountability Mechanisms and are therefore insufficient to withstand

(2019 Bylaws), Art 4, § 4.3(r) ("ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members.").

[2] Herein, ICANN focused on the core issues relating to the Demurrer and did not address all of the extraneous arguments raised in the Opposition, given the limited amount of pages for this Reply. But ICANN will be prepared to address any questions the Court may have.

demurrer. *See Baldwin v. AAA N. Cal., Nevada & Utah Ins. Exch.*, 1 Cal. App. 5th 545, 551 (2016), as modified (July 13, 2016) (sustaining demurrer because plaintiffs' allegations were "mere conclusion[s] unsupported by any specific factual allegations"). Other courts, when faced with claims that alternative dispute resolution mechanisms were not robust enough, have found that as long as the parties "agree[] to submit a dispute for a decision by a third party," that agreement is enforceable. *Wolsey, Ltd. v Foodmaker, Inc.*, 144 F.3d 1205, 1208 (9th Cir. 1998) (quoting *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (E.D.N.Y. 1985) (ruling that an agreement to arbitrate was enforceable despite the plaintiff's complaint that it was non-binding arbitration)). Here, Plaintiffs agreed to use ICANN's Accountability Mechanisms to resolve disputes arising out of or relating to their applications, and their after-the-fact critiques of the Accountability Mechanisms cannot void that agreement. Moreover, Plaintiffs essentially have conceded that the Independent Review Process ("IRP") is a sufficient form of redress, given that they are currently challenging the exact same ICANN conduct in a related IRP. (Compl. ¶ 32.)

As anticipated, Plaintiffs rely on an unpublished order in *DotConnectAfrica Trust v. ICANN*, which is not binding on this Court, to suggest that the Covenant does not bar Plaintiffs' fraud claims. 2017 WL 5956975, at *3 (Cal. Super. Ct. Aug. 9, 2017). First, the better-reasoned position is that the Covenant is not at all an exculpatory provision as the *Ruby Glen* Courts found. Second, the *DotConnectAfrica* order is clear that non-fraud claims are barred by the Covenant; and, here, Plaintiffs' fraud claims are just dressed-up breach of contract claims, which are also deficient as a matter of law, as set forth below. As such, *DotConnectAfrica* is inapplicable here.

Plaintiffs' reliance on *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) and *OTO, L.L.C. v. Kho*, 8 Cal. 5th 111 (2019) is similarly misplaced. The court in *OTO* did not analyze the applicability of Section 1668 whatsoever. And in *Gentry*, the court relied on a case that is no longer controlling law for the notion that a class action waiver "found in a consumer contract of adhesion" that exempts a party "from responsibility for [its] own fraud or willful injury," is unconscionable under California law, where the party with "the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money[.]" *Gentry*, 42 Cal. 4th at 454 (quoting *Discover Bank v. Superior Court*, 36 Cal.

4th 148, 162–63 (2005)). Even if the case was still good law, those facts could not be more different from the facts at issue here, where sophisticated entities entered into a transaction that is neither procedurally nor substantively unconscionable. In fact, Plaintiffs do not even argue that the Covenant is unconscionable, further demonstrating that these two cases are inapposite.

Next, Plaintiffs argue that the Covenant cannot apply to claims that were unknown at the time of contracting. This argument is contradicted by established law: California courts have "held 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." *San Diego Hospice v. Cnty. of San Diego*, 31 Cal. App. 4th 1048, 1053 (1995) (citing *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992)).

Finally, Plaintiffs' argument that the Covenant is unenforceable because Plaintiffs are "suing in part to enforce the public interest" (Opp. at 9) lacks merit. For purposes of Section 1668, agreements involving the "public interest" relate to services offered to members of the general public that are essential to their well-being, such as housing and medical treatment. *See Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 94-95 (1963). For instance, *Tunkl* considered whether Section 1668 applied to a medical release form forced on a helpless hospital patient. *Id*. In contrast, this case involves a commercial transaction, where Plaintiffs applied to operate the .HOTEL gTLD in a private and voluntary transaction between sophisticated entities. As the Ninth Circuit has explained, "[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, 471 (9th Cir. 1987); *Cont'l Airlines v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) ("[I]t makes little sense in the context of two large, legally sophisticated companies to invoke the *Tunkl* application of the unconscionability doctrine").

II. PLAINTIFFS' CLAIMS FALL WITHIN THE SCOPE OF THE COVENANT.

Plaintiffs contend that the Covenant is "narrow" and inapplicable because "Plaintiffs have not sought review of any ICANN final gLTD [*sic*] delegation decision, any interim decisions, or of anything ICANN did in connection with its review of Plaintiffs' applications." (Opp. at 8, 10–12.) The Covenant, however, is broad in scope and covers Plaintiffs' claims.

The Covenant comprises both a release and an agreement not to sue, as Plaintiffs concede. (Opp. at 7.) Plaintiffs agreed to "***release***[] 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 . . . ." (RJN Ex. 2, § 6.6 (emphasis added).) Courts construing similar language have repeatedly found it to be unambiguously expansive. *See, e.g.*, *Khalatian v. Prime Time Shuttle, Inc.*, 237 Cal. App. 4th 651, 659–60 (2015) ("The language 'arising out of or relating to' as used in the parties' arbitration provision is generally considered a broad provision[,]" and "[b]road arbitration clauses . . . are consistently interpreted as applying to extracontractual disputes between the contracting parties").

Plaintiffs also agreed not to sue ICANN in court regarding their applications: "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***." (RJN Ex. 2, § 6.6 (emphasis added).) Like the release, this language is unambiguously broad and precludes lawsuits asserting any claims with respect to applications.

Plaintiffs' Complaint and their Opposition make clear that each of their claims, no matter how styled, arise out of, are based upon and relate to ICANN's review of their .HOTEL applications. For example, Plaintiffs' Complaint expressly premises each of its causes of action on the pending IRP, in which "Plaintiffs have substantively challenged ICANN's decision-making and review process related to the delegation of the .hotel gTLD." (Compl. ¶ 13; *see also* Demurrer at 13 (quoting allegations).) Indeed, the entire impetus for this lawsuit is the pending IRP and the denied Reconsideration Requests, which challenge ICANN's review of Plaintiffs' .HOTEL applications. Stated differently, had one of Plaintiffs' applications prevailed, that Plaintiff would not have instituted an IRP challenging ICANN's conduct, and would have none of the causes of action asserted in this lawsuit. Thus, Plaintiffs' claims arise out of, are

based upon and relate to ICANN's review of their applications and are barred by the Covenant.[3]

Plaintiffs' claims also violate their agreement not to sue ICANN with respect to their applications. Plaintiffs' Opposition states that "Plaintiffs' contracts with ICANN are the Applications each submitted to obtain delegation of the .HOTEL gTLD" in 2012. (Opp. at 14.) Thus, if Plaintiffs' .HOTEL applications are the contracts that Plaintiffs claim were breached, then Plaintiffs have undeniably asserted claims in court "with respect to" their applications, which is expressly forbidden by the Covenant. (RJN Ex. 2, § 6.6.)

III. THE COVENANT WAS NOT PROCURED THROUGH FRAUD.

Plaintiffs' contention that the Covenant was procured through fraud is unsupported. "[F]raudulent inducement occurs ***before*** a contract is signed." *SI 59 LLC v. Variel Warner Ventures, LLC*, 29 Cal. App. 5th 146, 152 (2018) (emphasis added), *review denied* (Feb. 13, 2019). Here, however, each of the misrepresentations alleged in the Complaint occurred ***after*** Plaintiffs submitted their .HOTEL applications and ***after*** Plaintiffs agreed to be bound by the Covenant in 2012. (*See*, *supra*, FN 1.) Plaintiffs have not pointed to a single alleged misrepresentation that occurred before they submitted their .HOTEL applications, meaning that they could not have been induced to enter into the Covenant by any purported fraud.

Similarly, the Bylaws about which Plaintiffs complain were enacted ***after*** Plaintiffs submitted their applications in 2012. (*See*, *supra*, FN 1.) Therefore, even if ICANN's Bylaws were incorporated into Plaintiffs' 2012 applications, which they were not, the Bylaws in place at the time did not provide for a Standing Panel, Ombudsman review of Reconsideration Requests, or ICANN payment of certain IRP fees. Plaintiffs could not have been induced to enter into the Covenant based on Bylaws not in place at the time Plaintiffs agreed to be bound by the Covenant.

For this reason (and others), Plaintiffs' reliance on *Engalla v. Permanente Medical Group, Inc*, 15 Cal. 4th 951 (1997) is misplaced. There, the Court considered whether an arbitration agreement for medical malpractice claims was procured through fraud based on statements contained in the agreement. *Id.*at 973–74. The arbitration proceedings were presided over by the

[3] The Opposition also demonstrates that the Complaint arises out of the applications: "Plaintiffs were *coerced* into the pending IRP on pain of loss of their Applications (and their substantial rights, monies incurred and efforts), and they have objected all the way along." (Opp. at 12 n.3)

defendant, not a third party, and the defendant was required to convene the tribunal within 60 days after initiation of the arbitration. *Id*. at 962, 964–65. Appointment of the arbitration tribunal, however took 144 days. *Id*. at 967. In determining whether the arbitration agreement was procured through fraud, the court explained that the fraud claim must relate "specifically to the making of the agreement to arbitrate." *Id*. at 973. It held that the arbitration agreement was procured through fraud based on the misrepresentation that a tribunal would be convened within 60 days, which was at the discretion of the defendant. *Id*. at 981.

In this case, however, Plaintiffs have not identified a single misrepresentation that relates "specifically to the making of the [Covenant]." *See id*. at 973. Instead, each purported misrepresentation post-dates Plaintiffs' agreement to enter into the Covenant, and none relate at all to the Covenant itself. (*See*, *supra*, FN 1.) Moreover, unlike the process in *Engalla*, the IRP proceedings are overseen by the International Centre for Dispute Resolution, not ICANN, and there is no deadline in ICANN's Bylaws for convening the Standing Panel. Rather, the Bylaws specifically provide for a process to appoint an IRP Panel in the absence of the Standing Panel. (RJN Ex. 1, Art. 4, § 4.3 (k)(ii).) Nor is appointment of the Standing Panel at the discretion of ICANN. ICANN is required by its Bylaws to consult with the Supporting Organizations and Advisory Committees in a four-step process (which is and has been underway).

In sum, the Covenant is enforceable and covers Plaintiffs' claims. Because Plaintiffs cannot plead around the Covenant, leave to amend would be futile, and this court should sustain ICANN's demurrer with prejudice. *Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014) (dismissal with prejudice proper where "no amendment could cure the defect in the complaint.").

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF CONTRACT.

On their breach of contract claim, Plaintiffs first argue that the contracts at issue "are the Applications each submitted to obtain delegation of the .HOTEL gTLD and the provisions incorporated by reference, including ICANN's bylaw ADR provisions." (Opp. at 14, 16.) Notwithstanding that Plaintiffs' reference to "ICANN's bylaw ADR provisions" is wildly vague and overbroad, Plaintiffs' argument fails because the Bylaws were not incorporated by reference into any application. While the Guidebook does state that ICANN's Accountability Mechanisms

may be invoked for disputes about ICANN's evaluation of applications, there is no Guidebook provision stating that the Bylaws are incorporated into Plaintiffs' applications. (*See generally* RJN Ex. 2.) The fact that the Guidebook refers disgruntled applicants to ICANN's Accountability Mechanisms does not mean that ICANN's lengthy Bylaws comprise a contract with the hundreds of entities that applied for a new gTLD. Indeed, more than a mere reference to and awareness of an "external document is required to find that the document is incorporated by implication." *Hua Nan Commercial Bank v. HSBC Bank USA, N.A.*, 2011 WL 13217782, at *6 (C.D. Cal. May 19, 2011); *Amtower v. Photon Dynamics, Inc.*, 158 Cal. App. 4th 1582, 1608 (2008) (agreement did not impliedly incorporate an external agreement based on mere reference to that agreement). The Central District of California considered this issue and held that ICANN is only contractually bound by the obligations to which it agreed in application documents, not other extraneous materials, such as Bylaws provisions. *See Image Online Design, Inc. v. ICANN*, 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013).

Second, even if the Bylaws were incorporated into the applications (which they were not), Plaintiffs' argument still fails because the Bylaws provisions at issue—*i.e.*, those regarding a Standing Panel, Ombudsman review of Reconsideration Requests, and payment of certain IRP fees—were not in the Bylaws when Plaintiffs submitted their .HOTEL applications in 2012; they were added in the 2013 and 2016 amendments to the Bylaws. (*See*, *supra*, FN 1.) Thus, these provisions could not be part of an agreement that ICANN and Plaintiffs entered into in 2012.

Plaintiffs contend that each time ICANN's Bylaws were amended, ICANN somehow entered into a new contract with Plaintiffs regarding those Bylaws. This argument is nonsensical. ICANN's amendment of its Bylaws in no way amounts to "bilateral amendments" with Plaintiffs or constitutes a "contractual amendment[] requested by ICANN" from Plaintiffs. (Opp. at 15.) In fact, Plaintiffs do not make, and cannot make, allegations that there was any offer, acceptance, or consideration between ICANN and Plaintiffs relating to these Bylaws amendments.[4]

[4] The cases Plaintiffs cite actually support ICANN's argument that the amended Bylaws do not form a contract with Plaintiffs because in each of those cases, the amendments were negotiated and agreed to by the parties. *R Power Biofuels, LLC v. Chemex LLC*,, 2017 WL 1164296, at *1 (N.D. Cal. Mar. 29, 2017) ("Defendant asked North Star for permission to utilize used equipment

Third, Plaintiffs' argument that ICANN breached the Bylaws is contradicted by the Bylaws themselves as well as Plaintiffs' own allegations, as set forth in detail in ICANN's Demurrer. (Demurrer at 16-17.) Therefore, Plaintiffs' contradictory allegations are not required to be taken as true and, instead, the express terms of the Bylaws govern. *See Kim v. Westmorre Partners, Inc.*, 201 Cal. App. 4th 267, 282 (2011) ("When a plaintiff attaches a written agreement to his complaint, and incorporates it by reference into his cause of action, the terms of that written agreement take precedence over any contradictory allegations in the body of the complaint.").

V. PLAINTIFFS' FRAUD-BASED CLAIMS FAIL.

Plaintiffs' Opposition does not, and cannot, refute any of the defects ICANN identified in its Demurrer with respect to the fraud in the inducement, deceit, and grossly negligent misrepresentation claims. First, Plaintiffs confirm that the alleged misrepresentations in the Complaint consist almost entirely of ICANN's Bylaws. Plaintiffs then argue that "ICANN's misrepresentations both predate and post-date Plaintiffs' 2012 Applications" (Opp. at 18), which is demonstrably false. Plaintiffs have not identified any alleged misrepresentation that predates Plaintiffs' submission of their applications in 2012 (*see*, *supra*, FN 1), and therefore cannot demonstrate that any such misrepresentation induced Plaintiffs to submit their applications.

Second, Plaintiffs fail to identify any facts supporting their contention that ICANN knew statements it made were false or that they were false at all. Plaintiffs merely point to the same conclusory allegations that ICANN demonstrated in its Demurrer were devoid of any facts (Opp. at 19 (citing Compl. ¶¶ 91, 97)) and which are insufficient to plead fraudulent inducement or deceit. *Goldrich v. Natural Y Surgical Specialties, Inc.*, 25 Cal. App. 4th 772, 782 (1994) (Plaintiffs must plead "the *facts* constituting every element of the fraud . . . with particularity").

Third, Plaintiffs do not refute that their fraud claims are predicated entirely on the alleged breach of contract claim, and that reframing breach of contract claims "in the traditional words of

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from Defendant's storage yard, rather than new equipment," as specified in the original contract); *Lewis v. McClure*, 127 Cal. App. 439, 443-44 (1932) (modified contract negotiated and executed by both parties); *Lee v. Fed. St. L.A., LLC*, 2016 WL 2354835, at *4, 5 (C.D. Cal. May 3, 2016) ("[P]laintiff's claim is premised on a promise by defendant Fishman that, in exchange for plaintiff's commitment not to cancel the [agreement], FSLA would complete construction and deliver plaintiff's condominium units to her by December 31, 2011."); *Intelligraphics, Inc. v. Marvell Semiconductor, Inc.*, 2008 WL 3200212, at *10 (N.D. Cal. Aug. 6, 2008) (considering fraudulent inducement of an amendment expressly negotiated, and agreed to, by the parties).

fraud, without any supporting facts" is "simply not enough" to state a claim for fraud. *See Goldrich*, 25 Cal. App. 4th at 782–83; *see also Unterberger v. Red Bull N. Am., Inc.*, 162 Cal. App. 4th 414, 423 (2008) (sustaining summary adjudication of fraud claim because it was "merely a breach of contract claim dressed in the language of fraud"). Instead, Plaintiffs merely conclude that "ICANN acted in an intentionally tortious manner" and that the misrepresentation claims include "extra-contractual misrepresentations." (Opp. at 19.) But these "conclusions" still fail to identify a single fact to support these claims and are insufficient to withstand demurrer.[5]

VI. PLAINTIFFS' BYLAWS ENFORCEMENT AND UCL CLAIMS FAIL.

Plaintiffs do not address the fact that they lack standing to pursue a bylaws enforcement claim. Instead, Plaintiffs repeat, without any factual or legal support, that because they may qualify as an IRP Claimant or a Requestor, they likewise qualify to bring a claim in court for enforcement of ICANN's Bylaws. (Opp. at 20.) The ability to institute an IRP or a Reconsideration Request ***does not*** confer standing on Plaintiffs to bring a claim in court under Section 14623. (Demurrer at 21-22.)

Plaintiffs' Unfair Competition Law ("UCL") claim fails for the same reasons that its underlying breach of contract, fraud, and gross negligence claims fail and because Plaintiffs lack standing to pursue the claim. (Demurrer at 22.) Plaintiffs have not alleged any unfair conduct occurring before Plaintiffs submitted their applications. (*See*, *supra*, FN 1.)

CONCLUSION

ICANN respectfully requests that this Court sustain ICANN's Demurrer with prejudice.

Dated: December 2, 2021

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson
Attorneys for Defendant ICANN

[5] Plaintiffs also argue that "ICANN (i) had material knowledge that Plaintiffs did not know, and (ii) uttered half-truths" (Opp. at 19), citing to *San Diego Hospice*, which is inapposite. 31 Cal. App. 4th at 1054. In that case, the Court explained the standard for fraudulent nondisclosure, which Plaintiffs have not alleged and could not because any alleged misrepresentation occurred ***after*** Plaintiffs submitted their applications. *See id*. (acknowledging that a party can rescind a contract only where he was ***induced to enter*** the agreement by fraudulent conduct).