16-56890

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBY GLEN, LLC

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
The Honorable Percy Anderson Presiding
(Case No. 2:16-cv-05505-PA-AS)

APPELLANT'S REPLY BRIEF

Paula L. Zecchini
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206-340-1000
Facsimile: 206-621-8783

Attorneys for Plaintiff-Appellant
RUBY GLEN, LLC

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I. INTRODUCTION

A single theme permeates the Answering Brief ("Ans. Br.") filed by Defendant-Appellee Internet Corporation for Assigned Names and Numbers ("ICANN"): avoidance at all costs. At every turn, ICANN casts the unilateral, overbroad, and unconscionable exculpatory clauses at issue (the "Exculpatory Clauses") as commonplace commercial risk-shifting provisions in a desperate attempt to shield itself from liability. In doing so, ICANN reaches far beyond the record on appeal, and injects a multitude of extraneous, unsupported facts in an effort to prejudice the Court against Plaintiff-Appellant Ruby Glen, LLC ("Ruby Glen"). The effort underscores the lengths to which ICANN will go to shield its conduct from judicial review.

Without citation to substantive authority, ICANN argues against a narrow construction of the Exculpatory Clauses because "the necessary facts have not been fully developed" as to whether ICANN should be considered the drafter of the Exculpatory Clauses. Ans. Br. at 29. In seeking to blunt the impact of the available record and the well-pled allegations in the First Amended Complaint ("FAC"), which must be taken as true, ICANN proffers dated, out-of-context statements in support of its argument that one of the principals of a company that may be tangentially related Ruby Glen was intimately involved in drafting the Exculpatory Clauses. This argument is simply not true. Moreover, to the extent ICANN desires

to argue this appeal on facts extraneous to the record, the duty of candor required it to concurrently advise the Court of the fact that during the multi-year review process that led to the creation of the Applicant Guidebook (the "Guidebook") for the New gTLD Program, the Exculpatory Clauses generated significant comment and requests for revision due to their illegal, unenforceable nature. Despite this fact, ICANN refused to modify the Exculpatory Clauses, rejecting even those arguments advanced by its Governmental Advisory Committee ("GAC"): "The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application . . . . The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the [prospective guidebook] be removed accordingly."[1] Regardless of this historical background, the well-pled allegations in the FAC support the narrow construction of the Exculpatory Clauses against ICANN and as such, a decision that the claims at issue fall outside their scope.

In seeking to save the Exculpatory Clauses from invalidation under California Civil Code section 1668 ("Section 1668"), ICANN argues that its internal redress procedures, including the non-binding quasi-arbitration process known as the Independent Review Process ("IRP"), remove the Exculpatory Clauses from the

[1] ICANN Board GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants, available at https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf (last visited on December 20, 2017)

scope of Section 1668 by providing adequate, alternative redress options. Not only is ICANN's position unsupported by any relevant, applicable law, but the available record demonstrates that the end result of proceeding through ICANN's internal procedures is a non-binding, advisory opinion that ICANN is free to—and often does—ignore. ICANN cannot hide behind the non-binding nature of its alternative accountability mechanisms, or the fact that it chooses to abide the IRP panel decisions with which it agrees, by selectively quoting language from the Guidebook that describes portions of that process as "final and hav[ing] precedential value."

ICANN alternatively argues that the validity of the Exculpatory Clauses should evade judicial review because Ruby Glen failed to allege facts sufficient to invoke either Section 1668 or the public policy dictates of the California Supreme Court's decision in *Tunkl v. Regents of Univ. of Cal*., 383 P.2d 441, 446 (Cal. 1963). ICANN's tortured parsing of Ruby Glen's claims fails to avoid the fact that the FAC is replete with allegations of wrongful and intentional conduct—conduct that, at the very least, supports a claim for gross negligence and as such, renders the Exculpatory Clauses subject to review under Section 1668. ICANN also fails to escape the impact of *Tunkl* and its progeny due to its admission in the Guidebook that overwhelming public policy issues pervade ICANN's administration of the New gTLD Program. Indeed, ICANN is hard-pressed to dispute this point given its admission in the Guidebook of the important "public interest in the allocation of

critical Internet resources," ER 283 and its position in the district court that a single lawsuit filed by an aggrieved applicant such as Ruby Glen could derail the delegation of gTLDs and as such, their availability to the public.

ICANN fares no better in its effort to sidestep an unconscionability determination. Contrary to ICANN's unsupported contentions, the fact that the Guidebook may have been "developed in a several-year multistakeholder policy development process," does nothing to avoid the oppressive nature of the Exculpatory Clauses. ICANN's unilateral adoption of the Exculpatory Clauses despite protests from, among others, ICANN's own governmental advisory subcommittee, only bolsters this conclusion. ICANN made no changes to the Exculpatory Clauses—other than to reference its illusory redress procedures—and did not permit any applicant to negotiate the language of the Prospective Release. ICANN also reserved the right to unilaterally alter the redress procedures after Ruby Glen paid its fee. There can hardly be a more clear-cut example of procedural unconscionability. The Prospective Release is substantively unconscionable because it requires all applicants, ***but not ICANN***, to waive all redress in court in favor of an illusory, non-binding process that is limited to addressing procedural irregularities, not substantive claims.

The allegations in the FAC and longstanding dictates of California law and public policy preclude the enforcement of contractual provisions that exempt

ICANN from the consequences of their gross misconduct in administering the .WEB auction. ICANN should not, as the district court below determined, be permitted to utilize its monopoly power to insulate its actions from judicial scrutiny. The record supports a determination that the Exculpatory Clauses are either inapplicable or invalid. As such, the Court should reverse the district court's dismissal of the FAC.

II. ARGUMENT

A. The Record on Appeal Demonstrates that the Claims at Issue Are Not Subject to the Exculpatory Clauses

As argued in the Opening Brief ("Open. Br."), the Exculpatory Clauses must be strictly and narrowly construed against ICANN, as both the drafter and the party seeking to rely upon them. *Basil Oil Co. of Cal. v. Baash-Ross Tool Co*., 271 P.2d 122, 131 (Cal. Ct. App. 1954). In a tacit admission of the controlling nature of Ruby Glen's authorities, ICANN does not present any legal argument to the contrary. Ans. Br. at 29-31. Instead, ICANN attempts to sidestep the substantive legal issue by pointing to matters outside of the record in a tortured effort to characterize Ruby Glen's straightforward claims of malfeasance in ICANN's administration of the .WEB gTLD auction as dissatisfaction with the manner in which ICANN processed Ruby Glen's own application. The FAC simply does not support ICANN's endeavor—not a single allegation in the Complaint supports the proposition that Ruby Glen's claims arise from the manner in which ICANN processed or approved

its application to participate in the .WEB auction. ER 610, 633; *see also* Open. Br. at 31-32. The district court reached the same conclusion: "the covenant not to sue only applies to claims related to ICANN's processing and consideration of a gTLD application." ER 16.

Ruby Glen submits that the Court need not consider matters outside of the record in order to render a decision on the impact of ICANN's unilateral decision to adopt Exculpatory Clauses that, by their plain language, do not apply to Ruby Glen's claims. That said, Ruby Glen cannot allow ICANN's improper insinuations and affirmative misstatements regarding "community development" of the Exculpatory Clauses to go unanswered. Ans. Br. 6, 12-15, 30-31, 55, 57-59. While it is true that individuals currently associated with Ruby Glen—and many other gTLD applicants and stakeholders—previously participated in the multi-year process leading to ICANN's adoption of the Guidebook, ICANN's suggestion that anyone other than ICANN and its lawyers are responsible for the drafting of Exculpatory Clauses at issue is simply false. Indeed, ICANN rejected ***all comments*** addressing the language of what it deems the "Covenant Not to Sue," including those from ICANN's GAC[2] that advised of its illegal, unenforceable nature: "The exclusion of ICANN liability . . . provides no leverage to applicants to challenge ICANN's determinations . . . the

[2] According to ICANN's Bylaws, the purpose of the GAC is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments." ER 145 (citing Bylaws, Article XI, § 2).

covenant not to challenge and waiver . . . is overly broad, unreasonable, and should be revised in its entirety."[3] Despite this admonition from its own internal committee, ICANN refused to revise the Exculpatory Clauses. The Answering Brief contains numerous examples of ICANN's failure and refusal to take ownership of this provision.

The FAC's straightforward allegations demonstrate that the claims asserted by Ruby Glen are wholly unconnected to ICANN's processing of Ruby Glen's application. ICANN's alternative (and unsupported) argument that this fact deprives Ruby Glen of standing to advance the claims asserted in the FAC, Ans. Br. 35, raises a more significant policy question: if, as ICANN argues, a participant in the .WEB auction does not have standing to challenge ICANN's woeful administration of the .WEB auction—and by extension, its administration of the New gTLD Program and the domain name system as a whole—***does anyone have standing to challenge ICANN's decisions***? According to ICANN, the answer is no. Ans. Br. 35.

B. The Exculpatory Clauses are Void under California Law

California law does not allow a party to contractually shield itself from liability for its own fraudulent or intentional acts, gross negligence, or acts of

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[3] ICANN Board GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants, available at https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf (last visited on December 20, 2017).

ordinary negligence that implicate a public interest. *Baker Pacific Corp. v. Suttles*, 269 Cal. Rptr. 709, 711-712 (Cal. Ct. App. 1990); *Arguelles-Romero v. Superior Court*, 109 Cal. Rptr. 3d 289, 300-301 (Cal. Ct. App. 2010); Cal. Civil Code § 1668. Although Ruby Glen submits that the claims asserted in the FAC are not subject to the Exculpatory Clauses as pled, the fact that the Exculpatory Clauses are void under California law provides the Court with an additional basis on which to reverse the district court's decision.

1. ICANN's Admissions on the Issues of Public Interest and Bargaining Power Void the Exculpatory Provisions

As set forth in the Opening Brief, in *Tunkl v. Regents of Univ. of Cal.*, the California Supreme Court held that a contract clause purporting to waive liability for negligence may violate public policy when it involves an important public service provided by an entity that has a bargaining advantage, uses contracts of adhesion, provides no other options, and imposes risks on others. *Tunkl,* 383 P.2d at 446. Notwithstanding the arguments contained in the Answering Brief, ICANN cannot plausibly deny that the Guidebook, and the Exculpatory Clauses contained therein, meet the *Tunkl* criteria for affecting the public interest, rendering the waiver invalid.

ICANN does not dispute that, as a general rule, an "exculpatory clause which affects the public interest cannot stand." *Tunkl*, 383 P.2d at 444. To overcome this

hurdle, ICANN argues that the transaction at issue is simply "a private, voluntary transaction[] in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party . . . [which] no public policy opposes." Ans. Br. at 51-52 (citing *Tunkl*, 383 P.2d at 446). In doing so, ICANN urges the Court to find that Ruby Glen's participation in the .WEB auction was a private, voluntary transaction wherein Ruby Glen knowingly agreed to shoulder the risk of ICANN's intentional and wrongful conduct, as well as ICANN's negligence. ICANN's own admissions bar such a claim.

ICANN's administration of the New gTLD Program readily meets the first and second *Tunkl* factors because ICANN offers "a service of great importance to the public, which is often a matter of practical necessity for some members of the public." *Tunkl*, 383 P.2d at 445 (footnotes omitted). As the sole entity charged with the admitted task of, among other things, "protect[ing] ***the public interest*** in the allocation of critical Internet resources [by way of the New gTLD Program]," ER 283 (emphasis added), ICANN's concerted effort to avoid responsibility in administering this burden is shocking. Gallingly, ICANN included this public interest statement in a section of the Guidebook, that heralds the import of applicant background screening—the very issue on which Ruby Glen bases its claims of malfeasance. ER 283 ("Background screening is in place to protect ***the public interest*** in the allocation of critical internet resources") (emphasis added). ICANN's

argument that its administration of the New gTLD Program does not implicate the public interest not only defies logic, it provides this Court with a glimpse into the depths to which ICANN will go to avoid judicial review of its decisions.

It is hard to imagine an activity that is more fundamental to modern society than, as ICANN chose to phrase it in the Guidebook, "protect[ing] the *public interest* in the allocation of critical Internet resources." ER 283 (emphasis added). Indeed, the overwhelming public discourse over the Federal Communications Commission's recent decision to roll back the net neutrality provisions demonstrates that we are living in an age where the public has a heightened awareness, concern, and interest in the administration of the Internet. Furthermore, California courts have found exculpatory clauses unenforceable under *Tunkl* in numerous cases involving services much less essential to the public than the administration of the worldwide domain name system and the introduction of new gTLDs. *See, e.g. Gavin W. v. YMCA of Metropolitan Los Angeles*, 131 Cal. Rptr. 2d 168, 173-178 (Cal. Ct. App. 2003) (finding child care program was an essential activity for working families, not a recreational activity); *Gardner v. Downtown Porsche Audi*, 225 Cal. Rptr. 757, 759–762 (Cal. Ct. App. 1986) (finding auto repair shop provided a service of great practical importance and necessity to the public); *Akin v. Business Title Corp*., 70 Cal. Rptr. 287, 289-290 (Cal. Ct. App. 1968) (escrow agents perform an important public service and it is often a practical necessity to use the designated agent, giving

them a decisive advantage in bargaining); *McCarn v. Pacific Bell Directory*, 4 Cal. Rptr. 2d 109, 112 (Cal. Ct. App. 1992) (lease of a 42-foot covered berth in a marina was a matter of practical necessity because, for persons with boats, the availability of berths in harbors is a matter of practical necessity."); *Henrioulle v. Marin Ventures, Inc.*, 573 P.2d 465, 468-470 (Cal. 1978) (invalidating releases of liability which waived the negligence of a residential landlord); *Vilner v. Crocker National Bank*, 152 Cal. Rptr. 850, 853 (Cal. Ct. App. 1979) (finding release of liability pertaining to banking services to be void for public interest).

ICANN's argument that its technical function is not one that is "generally thought suitable for public [i.e. governmental] regulation" proves the necessity of applying *Tunkl* to protect the admitted "public interest in the allocation of critical Internet resources." Ans. Br. 52; ER 283. Indeed, if ICANN were an actual governmental agency, instead of a private entity, Ruby Glen could easily bring a claim under 42 U.S.C. § 1983 or a similar state law provision for ICANN's failures. Instead, as a now-private entity, ICANN utilizes exculpatory provisions in a contract of adhesion to avoid all liability for its conduct.

Under California law, exculpatory provisions and exclusions of liability such as those presented by the Exculpatory Clauses cannot be used to insulate private entities from liability for conduct in which there is a strong public interest. *Tunkl*, 383 P.2d at 445. If the lease of a boat slip, the provision of auto repair services, and

the provision of escrow services can be matters of public interest sufficient to satisfy the first and second *Tunkl* factors, ICANN's position as the sole administrator of the New gTLD Program ***for the entire world*** most certainly follows suit. *Gardner*, 225 Cal. Rptr. at 759; *Akin*, 70 Cal. Rptr. At 289-290; *McCarn*, 4 Cal. Rptr. 2d at 112.

The third *Tunkl* factor also applies here—the party seeking exculpation from negligence "holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards." *Tunkl*, 383 P.2d at 445 (footnote omitted). Although ICANN does not allow individuals and sole proprietorships to participate in the New gTLD Program, it admits that it holds itself out as willing to allow participation by all those who meet its standards (i.e., "[e]stablished corporations, organizations, or institutions in good standing."). Ans. Br. 53-54. Indeed, ICANN actively encourages global participation in the New gTLD Program. As such, ICANN effectively concedes that the New gTLD Program is open to all participants meeting "certain established standards." *Tunkl*, 383 P.2d at 445 (footnote omitted).

ICANN also fails to offer grounds on which this Court should disregard the allegations in the FAC that relate to the fourth, fifth and sixth *Tunkl* factors, all of which touch on bargaining power and control. It is undisputed that ICANN required Ruby Glen to agree to the Exculpatory Clauses as a condition of applying for consideration to bid for the .WEB gTLD, and that Ruby Glen had no option to pay

more for protection against ICANN's negligence. ER 617. These facts lay in stark contrast to those at issue in the cases that ICANN cites, where, unlike here, the parties to each contract ***actively negotiated*** terms. *See Delta Airlines, Inc. v. Douglas Aircraft Inc*., 47 Cal. Rptr. 518, 523 (Cal. Ct. App. 1965); C*AZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 48 Cal. Rptr. 3d 271, 284 (Cal. Ct. App. 2006); *Appalachian Ins. Co. v. McDonnell Douglas Corp*., 262 Cal. Rptr. 716, 731-735 (Cal. Ct. App. 1989).

Nor does this Court's decision in *Arcwell Marine, Inc. v. Southwest Marine, Inc*., 816 F.2d 468 (9th Cir. 1987), aid ICANN's cause. In *Arcwell*, the Court construed maritime law on the question of the enforceability of exculpatory clauses, finding that exculpatory clauses stand on a stronger footing under maritime law than they do under California law. *Id.* at 471. This case does not present issues of maritime law. Moreover, *Arcwell* only deemed the exculpatory clause at issue valid because the complaining party could have increased its bid price to avoid the provisions of the clause. *Id.* at 471. Ruby Glen could not have paid more to avoid the Exculpatory Clauses. Ruby Glen's only option was to "pay what we ask and sign the release," or exit the domain registry market. ER 617. This is the exact result the *Tunkl* decision seeks to avoid.

Although ICANN contends that Ruby Glen has relatively equal bargaining power, ICANN's own arguments opened the door to the fact that ICANN

unilaterally imposed the Exculpatory Clauses on all new gTLD applicants over the objection of a large part of the Internet community *and its own* GAC.[4] In doing so, ICANN "thereby satisf[ied] the purpose underlying" the bargaining-advantage and contracts-of-adhesion factors. *Health Net of Cal., Inc. v. Dep't of Health Servs.,* 6 Cal. Rptr. 3d 235, 246 (Cal. Ct. App. 2003). In any event, even if Ruby Glen had equal bargaining power, which as a matter of both law and common sense it does not, that fact would not be dispositive. *See Tunkl*, 383 P.2d at 444-48; *Health Net*, 6 Cal. Rptr. at 233-48. The Guidebook and its Exculpatory Clauses indisputably affect the "public interest in the allocation of critical Internet resources." ER 283. The California Supreme Court's concluding words in *Tunkl* resonate powerfully here:

> We must note, finally, that the integrated and specialized society of today, structured upon mutual dependency, cannot rigidly narrow the concept of the public interest. From the observance of simple standards of due care in the driving of a car to the performance of the high standards of hospital practice, the individual citizen must be completely dependent upon the responsibility of others.

[4] ICANN Board GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants, available at https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf (last visited on December 20, 2017).

> The fabric of this pattern is so closely woven that the snarling of a single thread affects the whole . . . [ICANN], too, is part of the social fabric, and prearranged exculpation from its negligence must partly rend the pattern and necessarily affect the public interest.

Tunkl, 383 P.2d at 448.

Liberally construing the FAC's allegations, taking into account ICANN's own admissions, and resolving doubts or ambiguities in Ruby Glen's favor, all or nearly all of the *Tunkl* factors apply here. *Buchan v. United States Cycling Fed'n*, 277 Cal. Rptr. 887, 903 (Cal. Ct. App. 1991).

2. The FAC Alleges Intentional, Wrongful and, at the Very Least, Grossly Negligent Conduct on the Part of ICANN

As set forth in detail in the Opening Brief, Ruby Glen submits that, even if the Court finds the parties' agreement does not involve a matter of public interest, the Exculpatory Clauses are nonetheless void under Section 1668. Open. Br. at 40-48. Ruby Glen maintains that the district court erred in looking to the substance of the allegations in the FAC before first determining whether the language of the Exculpatory Clauses was *facially invalid* under Section 1668, and submits that "even when a plaintiff pleads only breach of contract . . . a court may refuse to enforce a limitation of liability provision if it will serve to insulate a party from damages

resulting from its own fraudulent acts." *Navcom Tech., Inc. v. Oki Elec. Indus. Co.*, No. 5:12-cv-04175-EJD, 2014 U.S. Dist. LEXIS 32159, at *30 (N.D. Cal. Mar. 11, 2014); *see also Civic Ctr. Drive Apartments Ltd. P'ship v. Sw. Bell Video Servs*., 295 F. Supp. 2d 1091, 1106 (N.D. Cal. 2003).

The authorities ICANN relies on do not challenge the positions advanced in the Opening Brief. Although ICANN argues that *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc*., 147 Cal. Rptr. 3d 634, 642 (Cal. Ct. App. 2012), is directly on point (Ans. Br. at 43), the merits-based decision in *Food Safety* held simply that the clause at issue "effectively limited Food Safety's liability for breaches of contractual obligations and ordinary negligence[.]" *Food Safety Net Servs*., 147 Cal. Rptr. 3d at 642. However, ICANN's Exculpatory Clauses are not limited to breaches of contractual obligations or ordinary negligence. Rather, they purport to release "any and all claims" related to Ruby Glen's application and irrevocably waive the right to sue regarding any decision made as to Ruby Glen's application "or any other legal claim . . . with respect to the application."). ER 1051.

If anything, the decision in *Food Safety* supports Ruby Glen's arguments advanced *supra* and *infra*: "With respect to claims for breach of contract, limitation of liability clauses are enforceable **unless they are unconscionable**, that is, the improper result of unequal bargaining power or contrary to public policy." *Food Safety Net Servs*., 147 Cal. Rptr. 3d at 642 (citing *Markborough Cal., Inc. v. Superior*

Court, 227 Cal. Rptr. 919 (Cal. Ct. App. 1991)) (emphasis added). "Furthermore, they are enforceable with respect to claims for ordinary negligence unless the underlying transaction 'affects the public interest' under the criteria specified in *Tunkl*[.]" *Food Safety Net Servs*., 147 Cal. Rptr. 3d at 642 (citing *McCarn v. Pacific Bell Directory*, 4 Cal. Rptr. 2d 109, 110-14 (Cal. Ct. App. 1992)); *accord Fritelli, Inc. v. 350 N. Canon Drive, L.P.,* 135 Cal. Rptr. 3d 761, 769 (Cal. Ct. App. 2011), cited in the Ans. Br. at 43 ("Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs.").

Critically, at least one district court in this Circuit agreed with Ruby Glen's position when it examined the Exculpatory Clauses in conjunction with the issuance of a preliminary injunction in a matter that raised many of the same questions presented in this appeal. *See DotConnectAfrica Tr. v. Internet Corp. for Assigned Names & Numbers*, No. 16CV00862RGKJCX, 2016 WL 9136168 (C.D. Cal. Apr. 12, 2016), *reconsideration denied*, No. 16CV00862RGKJCX, 2016 WL 9185154 (C.D. Cal. June 20, 2016) ("*DCA*"). As stated by the district court in *DCA*, "[o]n its face, the Release is 'against the policy of the law" because it exempts ICANN from any and all claims arising out of the application process, even those arising from fraudulent or willful conduct. Cal. Civ. Code § 1668." *Id.* at *4 (citation in original). The district court also found that even if the clause at issue was not void on its face, the clause should not preclude causes of action where, as here, "the

alleged conduct giving rise to th[e] claim is intentional." *Id.* at *4. As a plain reading of the FAC demonstrates, Ruby Glen asserts claims based on ICANN's intentional conduct. ER 611, 623-624, 626-627, 632-634, 637-639; *see also* Open. Br. at 44-48.

Even if this Court finds that the FAC alleges only "want or even scant care" in ICANN's administration of the .WEB auction—a finding with which Ruby Glen would respectfully disagree—the district court's order of dismissal should be reversed. As the district court's ruling implicitly recognized, the California Supreme Court has extended the prohibitions of Section 1668 to claims of gross negligence, announcing the general rule that public policy generally "precludes enforcement of an agreement that would remove an obligation to adhere to even a minimal standard of care." *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1105 (Cal. 2007). Ruby Glen submits that, contrary to the findings of the district court, the FAC contains allegations supporting, at the very least, the reasonable inference that ICANN was grossly negligent in its administration of the .WEB auction. ER 611, 623-624, 626-627, 632-635, 637-639.

To the extent that ICANN and the district court focus on the FAC's lack of an enumerated cause of action for gross negligence, Ruby Glen was not required to assert one: California does not recognize a distinct common law cause of action for gross negligence apart from negligence. *Jimenez v. 24 Hour Fitness USA, Inc.*, 188

Cal. Rptr. 3d 228, 233 n. 3 (Cal. Ct. App. 2015). Rather, as the Supreme Court held in *City of Santa Barbara*, "gross negligence" is a factual standard of conduct that "simply imposes a limitation on the defense that is provided by a release" and not a cause of action that the must be plead. *City of Santa Barbara*, 161 P.3d at 1117 n.58; *accord Anderson v. Fitness Int'l, LLC*, 208 Cal. Rptr. 3d 792, 801 (Cal. Ct. App. 2016). California courts have applied this holding in a variety of contexts. *See*, *e.g.*, *Milwicz v. Pub. Storage*, No. B212266, 2010 WL 892298, *5-6 (Cal. Ct. App. Mar. 15, 2010) (defendant could not contractually limit liability for failing to notify customer before selling his belongings).[5]

As argued in the Opening Brief and demonstrated by the record, the FAC presents plausible allegations of intentional, wrongful and grossly negligent conduct regarding ICANN's administration of the .WEB auction. The Court should reverse the district court's decision on these grounds and "afford[] [Ruby Glenn] an opportunity to test [its] claim[s] on the merits." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

[5] Although unpublished opinions of the California Court of Appeal are non-binding, this Court may rely on them to determine whether a given proposition "accurately represents California law." *Beeman v. Anthem Prescription Mgmt.*, 689 F.3d 1002, 1008 n.2 (9th Cir. 2012).

3. The Non-Binding Nature of the Procedural Review Afforded by the IRP Renders ICANN's Accountability Mechanisms Illusory

Citing to the district court's ruling, ICANN argues that the Exculpatory Clauses cannot violate Section 1668 as a matter of law because the Guidebook "give[s] Ruby Glen meaningful redress for its claims through ICANN's accountability mechanisms, including the Independent Review Process." Ans. Br. 36-37. In support of its contention, ICANN seeks to hide from the non-binding nature of its alternative accountability mechanisms—both in form and in practice—by selectively quoting language that describes portions of that process as "final and hav[ing] precedential value." *Id.* at 37. ICANN's strained attempts to characterize the IRP as anything other than a non-binding, advisory opinion serve only to highlight the inaccuracy of that charge.

It is undisputed that ICANN's Bylaws limit the IRP's scope of review to "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws." ER 122-123 at ¶ 64 (citing ICANN Bylaws at Art. IV, § 3.4). ICANN readily admits this fact in IRP proceedings: "ICANN submits that: The IRP is a unique process available under ICANN's bylaws for [parties] that claim to have been materially or adversely affected by a decision or action of the ICANN board, but only to the extent that Board action was

inconsistent with ICANN's Bylaws or Articles." ER 121 at ¶ 64. ICANN also includes a "Standard of Review" provision in its IRP submissions acknowledging that the IRP panel is "tasked [only] with providing *its opinion* as to whether the challenged Board actions violated ICANN's Articles or Bylaws." ER 121 at ¶ 64.

Indeed, ICANN has so vigorously defended its position that IRP decisions are non-binding that one IRP panel deemed it necessary to respond, "[t]he Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, and b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN." ER 109 at ¶ 115.

In the face of these condemning positions, ICANN cites *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co*., 819 F.2d 1519 (9th Cir. 1987), for the proposition that Section 1668 does not prohibit Exculpatory Clauses where "[o]ther sanctions remain in place." Ans. Br. at 37. However, *Cont'l Airlines* does not support ICANN's position that a non-binding, advisory opinion is the type of "sanction" that this Court believed should preempt scrutiny of the Exculpatory Clauses under Section 1668. *Cont'l Airlines, Inc*., 819 F.2d at 1527.

Nor does ICANN's insistence that this case is somehow governed by *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir. 1998), and *AMF Inc. v. Brunswick*

Corp., 621 F. Supp. 456 (E.D.N.Y. 1985), find any support in those decisions. The issue in *Wolsey* and *AMF* was whether a non-binding arbitration before the American Arbitration Association was an "arbitration" within the meaning of the Federal Arbitration Act, and whether a state law procedural arbitration rule was applicable. *Wolsey*, 144 F.3d at 1207; *AMF*, 621 F. Supp. at 460. There were no issues even remotely similar to those presented here, such as whether the alternative redress options advanced by the aggrieved party were unfair, futile, or unconscionable. Indeed, *Wolsey* directly supports Ruby Glen's position because the court emphasized that the essence of arbitration is an agreement to have disputes resolved through "an award made by a third-party arbitrator." *Wolsey*, 144 F.3d at 1208. Here, the final decision as to the outcome of any dispute submitted to an IRP panel rests not with the third-party arbitrators, but with ICANN. ER 626.

Despite ICANN's vague claims about a "mandatory" and "final" IRP process, the accountability mechanisms ICANN champions offer no recourse to an aggrieved party in the event ICANN decides that it will not comply with an IRP panel decision. ER 626. It is astounding that after at least one IRP panel admonished ICANN for failing to "forthrightly explain and acknowledge" to New gTLD applicants that the IRP is a "remedial scheme with no teeth . . . [and] merely advisory," ICANN continues to hide the ball. ER 109 at ¶ 115.

C. The District Court Erred in Failing to Find the Exculpatory Clauses Unconscionable

Although ICANN disputes the unconscionable nature of the Exculpatory Clauses, it relies on case law holding that procedural unconscionability can result from "an inequality of bargaining power which result[ed] in no real negotiation and an absence of meaningful choice," Ans. Br. at 58 (citing *Appalachian Ins. Co*., 262 Cal. Rptr. at 728), and that substantive unconscionability is characterized by contractual terms that are "overly harsh," "unduly oppressive," and "unreasonably favorable," Ans. Br. 59 (citing *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1261 (9th Cir. 2017)). When viewed in conjunction with the allegations of the FAC and the record on appeal, these admissions provide the Court with a basis to reverse the district court's determination as to the enforceable nature of the Exculpatory Clauses.

In order to apply to operate the .WEB gTLD, Ruby Glen was forced to agree to the Guidebook containing the Exculpatory Clause. Ruby Glen did not negotiate any provision of the Guidebook, nor did Ruby Glen contribute to the language in the provisions at issue. Although ICANN asserts that the Exculpatory Clause was a collaborative effort because it invited comments on the draft Applicant Guidebook as a whole, ICANN unilaterally rejected calls to modify the language in the Exculpatory Clauses—even ignoring the criticism leveled at the Exculpatory Clause

by its own GAC.[6] It is not only disingenuous, but patently false for ICANN to imply that Ruby Glen had the opportunity to effectively negotiate the elimination of the release or use the comment process to avoid it. ER 617.

In contrast to the situations raised by ICANN's citation to *Grand Prospect*, *Appalachian Ins., and Morris*—all of which involved ***active negotiations***—there was ***no negotiation*** between ICANN and Ruby Glen. As such, Ruby Glen faced the procedurally unconscionable choice to submit to ICANN's contract (with its harsh exculpatory terms), or exit the domain registry market.

In attempting to avoid a finding that the Exculpatory Clauses are substantively unconscionable, ICANN argues that the Exculpatory Clauses are necessary because, without them, as stated by the district court, "any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs." ER 18. However, this determination fails to recognize that the Exculpatory Clauses wholly absolve ICANN of any liability, effectively ensconcing ICANN as the ultimate arbiter of its own conduct, and mandating that New gTLD Program applicants give up ***any and all rights*** to judicial redress for ICANN's actions while ICANN retains its full judicial rights. *Id.* This outcome is the essence of substantive unconscionability.

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[6] ICANN Board GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants, available at https://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf (last visited on December 20, 2017)

Over significant protest from the Internet community, and despite the obviously one-sided, substantively and procedurally unconscionable nature of the Exculpatory Clauses, ICANN made a calculated decision to adopt the language in those clauses without modification. It cannot now avoid the impact of that ill-advised decision.

D. The District Court Erred In Denying Ruby Glen Leave to Amend

ICANN urges the Court to uphold the district court's decision to dismiss Ruby Glen's claims with prejudice by mischaracterizing the procedural posture surrounding Ruby Glen's initial amendment of its pleading, and ignoring the mandates of Federal Rule of Civil Procedure 15(a)(2), which provides that leave to amend a pleading "shall be freely given when justice so requires."

The United States Supreme Court and the Ninth Circuit have repeatedly affirmed that leave to amend is to be granted with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted); *see e.g, Foman v. Davis*, 371 U.S. at 182, (leave to amend should be freely given); *Eminence Capital, LLC v. Aspeon, Inc*., 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend.") (emphasis in original); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (courts should be guided by policy favoring decisions on the merits "rather than on

the pleadings or technicalities"); *see also* Moore, 3-15 Moore's Federal Practice - Civil § 15.14 ("A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a).").

The primary factors relied upon by the Supreme Court and the Ninth Circuit in denying a motion for leave to amend are "bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs*, 833 F.2d at 186. No such circumstance is present here. ICANN does not argue that it will be prejudiced by allowing a further amendment nor are there any facts that support the existence of bad faith or undue delay on the part of Ruby Glen.

Nor would amendment be futile. Ruby Glen submits that despite the district court's prior denial of its motion for limited discovery, ER 598-609, which provides a compelling justification for amendment in itself, *Werner v. Werner*, 267 F.3d 288 (3d Cir. 2001), it has discovered additional facts to bolster the claims asserted in the FAC. Ruby Glen also has grounds to assert a direct claim for fraudulent inducement by alleging facts demonstrating that ICANN falsely indicating that it would abide by its Bylaws and Articles of Incorporation, as well as the provisions contained in the Guidebook and New gTLD Program Auction Rules in administering the .WEB auction in an effort to fraudulently induce Ruby Glen to submit its application. A similar claim survived summary judgment in the DCA matter and is currently

scheduled for trial.[7] *See DotConnect Africa Trust v. Internet Corp. for Assigned Names and Numbers,* No. BC607494, 2017 WL 5956975, at *5 (Cal. Super. Ct. August 9, 2017). Ruby Glen deserves the same opportunity.

III. CONCLUSION

For the foregoing reasons and those contained in its Opening Brief, Ruby Glen respectfully requests that this Court reverse the district court's order dismissing Ruby Glen's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) and allow this matter to proceed on the merits.

DATED: December 20, 2017

COZEN O'CONNOR

By: /s/ Paula L. Zecchini

Paula L. Zecchini
E-mail: pzecchini@cozen.com
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206-340-1000
Facsimile: 206-621-8783
Attorneys for Plaintiff-Appellant Ruby Glen, LLC

[7] Although originally pending before the Central District of California, ICANN appealed the district court's issuance of a preliminary injunction in favor of DCA, discussed *supra* at Section II., B. 2. After briefing on the merits but before oral argument, this Court dismissed ICANN's appeal (Case No. 16-55693) due to the existence of a subject matter jurisdiction issue at the district court level. The matter is currently proceeding before the Superior Court for California in Los Angeles County, as Case No. BC607494.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 6,416 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief. 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 proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

DATED: December 20, 2017 COZEN O'CONNOR

By: s/ Paula L. Zecchini
Paula L. Zecchini

Attorneys for Plaintiff-Appellant
Ruby Glen, LLC

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: *s/ Paula L. Zecchini*