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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV 16-00862-RGK

Assigned for all purposes to the Honorable R. Gary Klausner

REPLY MEMORANDUM IN SUPPORT OF ICANN'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Hearing Date: April 25, 2016
Hearing Time: 9:00 a.m.
Hearing Location: Courtroom 850

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INTRODUCTION

In submitting its application to ICANN to operate the TLD known as .AFRICA ("Application"), Plaintiff agreed to a covenant not to sue ("Covenant Not to Sue") that prevents Plaintiff from filing a lawsuit against ICANN in any way related to Plaintiff's Application. The language of the Covenant Not to Sue is clear, unambiguous, and fully applicable here, and Plaintiff does not argue otherwise.

Instead, Plaintiff argues that it should be able to avoid the consequences of the Covenant Not to Sue. However Plaintiff's First Amended Complaint ("FAC") does not state facts that would give the Court any basis to set aside this critical feature of the parties' commercial contract; instead, all of the facts before the Court demonstrate that it should enforce the Covenant Not to Sue and dismiss the case.

Nor does Plaintiff's Opposition cure the other substantive deficiencies in Plaintiff's claims. Plaintiff fails to explain how ICANN could have breached its contract with Plaintiff when the actual terms of the contract expressly permit ICANN to do what ICANN did. Likewise, Plaintiff fails to identify with the requisite specificity the nature of the "fraud" that ICANN allegedly committed with respect to Plaintiff. Accordingly, Plaintiff's FAC should be dismissed.

I. The Covenant Not To Sue Is Fully Enforceable To Bar Plaintiff's Claims.

Plaintiff argues that the Covenant Not To Sue is "void as a matter of law" (Opp'n at 9:5); however, California courts have routinely upheld such "contractual limitations on liability, even against claims that the breaching party violated a law or regulation." *CAZA Drilling, Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 472 (2006).[1] In fact, it is well settled under California law that

[1] Plaintiff implies that evaluating the Covenant Not To Sue is premature at the pleading stage without allowing further discovery. (*See e.g.* Opp'n at 1:14-15.) To the contrary, courts interpreting California law routinely consider the validity of releases and limitations on liability on motions to dismiss pursuant to Rule 12(b)(6). *See e.g., Barber v. Remington Arms Co.*, No. CV 12-43-BU-DLC, 2013 WL 496202, at *1 (D. Mont. Feb. 11, 2013), *aff'd*, 604 F. App'x 630 (9th Cir. 2015);

corporations "are entitled to contract to limit the liability of one to the other, or otherwise allocate the risk of doing business." *Philippine Airlines, Inc. v. McDonnell Douglas Corp.*, 189 Cal. App. 3d 234, 137 (1987).

A. Civil Code Section 1668 Does Not Invalidate The Covenant Not To Sue.

Plaintiff argues that the Covenant Not to Sue violates California Civil Code Section 1668. Section 1668 states that 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." Cal. Civ. Code § 1668. However, "[s]ection 1668 is not strictly applied." *Farnham v. Superior Court*, 60 Cal. App. 4th 69, 74 (1997).

Section 1668 was not meant to apply to situations where a sophisticated party such as Plaintiff agrees to release another party from liability. Indeed, the Covenant Not to Sue is no different than many similar covenants that courts have routinely enforced. For example, in *Reudy v. Clear Channel Outdoors, Inc.*, 693 F. Supp. 2d. 1091, 1115 (N.D. Cal. 2010), on which Plaintiff relies, the plaintiffs and CBS entered into an agreement and release whereby CBS agreed to purchase seven billboards for $2 million from the plaintiffs. *Id.* at 1113. The plaintiffs also agreed to release CBS from any liability related to the billboards, including any issues arising from permitting and compliance with regulatory requirements. *Id.* Despite the release, the plaintiffs subsequently sued CBS for intentional interference with prospective economic advantage, antitrust violations and other intentional wrongs related to whether the billboards were in compliance with the law. *Id.* When the

(continued...)

Nakamoto v. Lockheed Martin Corp., No. C 09-05193 JF (HRL), 2010 WL 2348634, at *5 (N.D. Cal. June 8, 2010); *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1018 (9th Cir. 2012); *Marder v. Lopez*, 450 F.3d 445 (9th Cir. 2006).

defendants pointed to the release, the plaintiffs argued that section 1668 prohibited any waiver that reached intentional conduct. *Id.* at 1115. The court disagreed, noting that the transaction involved two sophisticated parties, not a consumer and a large entity. *Id.* at 1116.

Plaintiff concedes (as it must by virtue of the fact that it applied to become the registry operator of the .AFRICA gTLD) that it is a sophisticated business entity that made a knowing and voluntary commercial decision to invest more than $185,000 for the opportunity to operate the .AFRICA gTLD. When Plaintiff submitted its Application, Plaintiff knew about and agreed to the terms and conditions set forth in Module 6 of the Guidebook, including the very prominent and unambiguous Covenant Not to Sue. Like in *Reudy*, this is simply not the type of situation in which section 1668 was meant to apply.

Further, Section 1668 is limited to contracts exempting complete responsibility for all "fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent." Cal. Civ. Code § 1668; *CAZA Drilling*, 142 Cal. App. 4th at 475. Plaintiff has not identified "a specific law or regulation potentially violated [by ICANN] so as to trigger application of section 1668." *CAZA Drilling*, 142 Cal. App. 4th at 476.[2]

The other cases Plaintiff cites are easily distinguishable. In *Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148 (1990), an employer conditioned the employment of asbestos-removal workers on the employees' agreement to release the building owner and all its agents "from and against any and all liability whatsoever." *Id.* at 1151, 1155 ("The workers are given the choice of adhering to [the release] terms or foregoing gainful employment."). Thus, *Baker* involved the abuse of unequal bargaining power that animates the policy behind section 1668.

[2] Plaintiff claims the Covenant Not to Sue "violates the law" (Opp'n at 12:21, ECF No. 66) but does not identify specifically which law Plaintiff contends has been violated.

Similarly, *Health Net of California, Inc. v. Department of Health Services*, 113 Cal. App. 4th 224 (2003) involved an exculpatory clause that shielded the party from liability for any future violation of statutory law without limitation. *Id.* at 229-32. The Covenant Not to Sue is not so broad as the contractual provision in *Health Net*. Rather than permitting ICANN to violate any and every statutory law with impunity, the Covenant Not to Sue bars suit by Plaintiff or claims with respect to Plaintiff's Application, but does not shield ICANN more generally from liability for violating various laws without a nexus to Plaintiff's Application.

In a footnote (Opp'n at 2 n.2), Plaintiff argues that the Covenant Not to Sue is invalid as against public policy under *Tunkl v. Regents of University of California*, 60 Cal. 2d 92 (1963). As explained in ICANN's opening brief, the *Tunkl* factors typifying transactions that "affect the public interest" do not apply here. (Mot. at 14:11-15:4, ECF No. 56-1.) In contrast with the situation in *Tunkl* involving a hospital and a patient in need of medical care, the relationship between ICANN and Plaintiff was a private transaction between two business entities. No government entity or regulatory scheme governs ICANN's decisions or the process of approving TLDs or registries. ICANN's review of gTLD applications is not a "necessary" service like the medical, legal, housing, transportation or other similar services contemplated by the *Tunkl* court. *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 29 (1989); *Tunkl*, 60 Cal. 2d at 98-99.

B. The Covenant Not To Sue Is Not Unconscionable.

Plaintiff argues that the Covenant Not to Sue is unconscionable. The party asserting unconscionability has the burden of proving both procedural and substantive unconscionability. *Crippen v. Central Valley RV Outlet, Inc.*, 124 Cal. App. 4th 1159, 1165 (2004). "The procedural element focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. ... Surprise involves the extent to which the terms of the bargain are hidden in a

'prolix printed form' drafted by a party in a superior bargaining position." *Crippen*, 124 Cal. App. 4th at 1165 (quoting *Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 621 (1996)).

Plaintiff argues that the Covenant Not to Sue is unconscionable because it is "one-sided," and Plaintiff "did not have a meaningful opportunity to negotiate it." (Opp'n 13-14). But Plaintiff fails to respond to ICANN's argument that the mere fact that a contract is "standardized" or "take it or leave it" is not, in and of itself, reason for invalidating a contract. *Crippen*, 124 Cal. App. 4th at 1165. Rather, procedural unconscionability arises from the manner in which the contract is presented to the party in the alleged weaker position. *Id.*

The FAC makes clear that Plaintiff is a sophisticated business entity that was required to demonstrate that it had the significant technical and financial capacities required to operate a gTLD registry. (FAC¶¶ 7,19, 21-22, 24); RJN Ex. C (Guidebook Module 2) at 47-48 §§ 2.2.2.1; 2.2.2.2, ECF No. 56-2.) Simply because Plaintiff did not prevail in the application process after it had already agreed to the terms and conditions governing that process does not render the terms and conditions, and in particular the Covenant Not to Sue, unconscionable (procedurally or substantively). Plaintiff was not required to apply for .AFRICA or any gTLD. And Plaintiff's claim that it expected to go through the application process "to obtain the right[] to operate" the .AFRICA gTLD (Opp'n at 3:12-18) does not mean it actually had a "right" to do so.

Substantive unconscionability is evaluated as of the time the contract was made and consists of an allocation of risks in an objectively unreasonable manner. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113-114 (2000). Only a compelling showing of substantive unconscionability supersedes a weaker showing of procedural unconscionability. *Woodside Homes v. Superior Court*, 107 Cal. App. 4th 723, 730, 736 (2003). California courts have recognized that there is a sliding scale or a balancing relationship between the two elements of

unconscionability. The greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract, and vice versa. *Crippen*, 124 Cal. App. 4th at 1165; *see Woodside*, 107 Cal. App. 4th at 730 (low level of procedural unconscionability required high level of substantive unconscionability; agreements for judicial reference held enforceable).

To find "unconscionability," the terms must "shock the conscience." *Marin Storage & Trucking v. Benco Contracting & Eng'g*, 89 Cal. App. 4th 1042, 1055 (2002) (finding indemnification clause/release was neither hidden nor disguised and, in part, that it was not so unreasonable, unjustified, or one-sided as to shock the conscience to show substantive unconscionability), citing *American Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1391 (1996). But there is no shock here: Plaintiff was fully aware of and agreed to the plainly labeled "Terms and Conditions" of the Application (Module 6 of the Guidebook), which include the Covenant Not to Sue as well as the explicit condition that ICANN reserves the right to "determine not to proceed with any and all applications for new gTLDs." (RJN Ex. B (Guidebook Module 6) at 34-35 ¶ 3, ECF No. 56-2.) Plaintiff's knowing choice to proceed with the Application, despite the Covenant Not to Sue, and despite knowing there was a risk the Application could not be successful, does not "shock the conscience," particularly when unconscionability must be assessed at the moment the contract was entered into and not in light of subsequent events. *See American Software, Inc.*, 46 Cal. App. 4th at 1391 (citation omitted).

Furthermore, Plaintiff relies on factually inapposite case law as support for its claim that the Covenant Not to Sue is unconsicionable. *Ting v. AT & T*, 319 F.3d 1126 (9th Cir. 2003) dealt with the unconscionabilty of an arbitration provision (not present here) and involved a drafting party of superior bargaining strength, AT&T, versus the powerless and unsophisticated consumer plaintiff. Indeed, in *Ting*, the element of 'surprise' was present because "AT&T mailed the

[agreement] in an envelope that few customers realized contained a contract." *Id.* at 1149. Obviously there was nothing of the sort here, where from the beginning of the application process Plaintiff was fully aware of the clear unambiguous terms and conditions applicable to the Application, including the Covenant Not To Sue. *Armendariz* dealt with an arbitration provision "imposed on employees as a condition of employment," again an unequal bargaining dynamic between sophisticated and unsophisticated parties that was not present here. 24 Cal. 4th at 115. Finally, *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257 (2006) involved an arbitration clause, not a Covenant Not to Sue, as well as a sophisticated franchisor versus a franchisee in a "substantially weaker bargaining position." *Id.* at 1282. [3]

C. The Covenant Not To Sue Bars Plaintiff's Claims.

Plaintiff makes two additional arguments for why the Covenant Not to Sue is invalid. First, Plaintiff argues that its fraud and conspiracy to commit fraud claims arise not from Plaintiff's Application but out of "ICANN's improper processing of ZACR's application" (Opp'n at 9 n.1), and for that reason, the Covenant Not to Sue does not apply to bar those claims. This argument makes no sense because, in order to state a claim for fraud, Plaintiff would need to allege damage and would only be able to do so by showing injury to its Application. *See In re Estate of Young*, 160 Cal. App. 4th 62, 79 (2008) (setting forth elements for fraud claim in California). ICANN's "improper processing of ZACR's application," even if fraudulent, allegedly injured Plaintiff, not ZACR, meaning that the Covenant Not to Sue clearly covers this claim.

Second, Plaintiff asserts that the Covenant Not to Sue is invalid because ICANN refuses to recognize the independent review process as binding. (Opp'n at 11:6-12:1.) Plaintiff does not explain how these two issues are connected, nor does

[3] As noted above, *Woodside Homes* involved agreements for judicial reference that were held enforceable, and thus the case supports ICANN's position, not Plaintiff's. 107 Cal. App. 4th at 736.

Plaintiff clarify when or how ICANN ever represented to Plaintiff that the independent review process was binding (an allegation not in the FAC). Even more importantly, ICANN accepted the decision of the DCA IRP Panel, meaning that even if ICANN "misrepresented" to Plaintiff that IRP decisions are not binding (which it did not do), Plaintiff was not injured by that misrepresentation.

In sum, the Covenant Not to Sue is valid and proper under California law. *Markborough Cal, Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714, (1991) ("limitation of liability provisions have long been recognized as valid in California"). The Covenant Not to Sue is not procedurally or substantively unconscionable. Because Plaintiff offers no principled basis to disregard the clear provisions of the Covenant Not to Sue, Plaintiff's FAC should be dismissed with prejudice. *See Grillo v. State of Cal.*, No. C 05-2559 SBS, 2006 WL 335340, at *7-8 (N.D. Cal. Feb. 14, 2006) (dismissing claims with prejudice where plaintiff failed to set forth facts showing that release of claims was either invalid or inapplicable).

II. In Addition, Plaintiff's Claims Are Insufficiently Pled.

As discussed above, the Covenant Not to Sue disposes of Plaintiff's entire case; but separate and apart from that basis for dismissal, Plaintiff's claims should also be dismissed with prejudice for failure to state a claim.

A. Plaintiff's Breach Of Contract Claim Should Be Dismissed.

As set forth in detail in ICANN's moving papers, ICANN complied with its obligations to consider Plaintiff's Application in accordance with the procedures set forth in the Guidebook. (*See* Mot. at 5:19-6:13.) But even if Plaintiff could show that ICANN did not comply (which Plaintiff cannot show), Plaintiff's claim still fails because, under the terms of Plaintiff's Application, ICANN "has the right to determine not to proceed with any and all applications for new gTLDs" and "[t]he decision to review, consider and approve an application . . . is entirely at ICANN's discretion." (RJN Ex. B (Guidebook Module 6) at 34-35 ¶ 3.)

Plaintiff attempts to circumvent these clear contractual terms providing

ICANN the discretion to proceed or not proceed with any application by claiming that the provision is ambiguous. Plaintiff asserts "[i]t cannot mean that ICANN can decide to reject a qualified applicant for any reason whatsoever." (Opp'n at 16: 24-26.) However, that is exactly what the contract term means. *Thor Seafood Corp. v. Supply Management Services*, 352 F.Supp.2d 1128, 1131 (2005) ("Where the contract is clear and explicit, the plain language of the contract governs.").

Under the terms and conditions of the Application, ICANN has the right to reject Plaintiff's Application for any reason. None of the cases Plaintiff cites changes that fact, as they are all cases where there was a contract term susceptible to more than one reasonable interpretation, which is not the case here. *See e.g., Oceanside 84, Ltd. v. Fid. Fed. Bank*, 56 Cal. App. 4th 1441, 1447 (1997) (construing ambiguous term in contract); *Garcia v. Stonehenge, Ltd.*, No. C-97-4368-VRW, 1998 U.S. Dist. LEXIS 23565 (N.D. Cal. Mar. 2, 1998) (same); *Chastain v. Belmont*, 43 Cal. 2d 45, 51-52 (1954) (same).

ICANN acted in full compliance with its obligations under the Guidebook. For the reasons set forth in ICANN's moving papers, Plaintiff's breach of contract claim should be dismissed.

B. Plaintiff Does Not Rehabilitate Its Inadequately Pled Fraud Claims.

Certain of Plaintiff's claims sound in fraud and are therefore subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b). *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Jenkins v. Commonwealth Land Title Ins. Co.*, 95 F.3d 791, 796 (9th Cir. 1996).

Plaintiff's fraud claims fail for four reasons: (1) the FAC does not identify who at ICANN made any allegedly fraudulent representations; (2) the FAC does not identify when or where any allegedly fraudulent representations were made; (3) the FAC does not state facts that ICANN knew of the falsity of any representations; and (4) the FAC does not state facts that ICANN intended to

defraud Plaintiff. "The circumstances of fraud or mistake [that shall be stated with particularity under Rule 9(b)] include 'the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997) (citation omitted); *see also Vess*, 317 F.3d at 1106 ("Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.") (citation omitted). The FAC must also "set forth facts from which an inference of scienter could be drawn." *Cooper v. Pickett*, 137 F.3d 616, 628 (9th Cir. 1997) (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1546 (9th Cir. 1994)).

Plaintiff's Opposition does little to refute these deficiencies. Fraud claims have five elements: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *In re Estate of Young*, 160 Cal.App.4th 62, 79 (2008) (citation omitted). Plaintiff's Opposition repeats several of the FAC's allegations, including language taken out of context from ICANN's Bylaws and Guidebook, but provides literally no further information. (Opp'n at 19.) There is no doubt that the FAC fails to identify who at ICANN made the alleged misrepresentations, and fails to identify where or when such representations were made (notably because none were made). And merely quoting statements from the Guidebook – without specific allegations as to how those statements are fraudulent, that ICANN knew of the falsity of any purported representations, or that ICANN intended to defraud Plaintiff – is insufficient to meet the requirements of Rule 9(b).

Moreover, Plaintiff's cases do not assist Plaintiff's argument. *Pedersen v. Greenpoint Mortg. Funding, Inc.*, No. 2:11-CV-00642-KJM-EFB, 2013 U.S. Dist. LEXIS 109111 (E.D. Cal. Aug. 1, 2013), does not, as Plaintiff implies, stand for the

proposition that simply attaching the Guidebook and other documents without any further detail somehow overcomes the requirements for particularity under 9(b). See *Id.* at *17-18. To the contrary, the court in *Pedersen* noted the deficiencies in the complaint, including the lack of identifying information and specificity regarding when representations were made and by whom, and only allowed one representation to survive because the plaintiffs had attached specific information including "records of the first names, employee numbers, and dates for each conversation." *Id.* at *17.

Prakash v. Pulsent Corp. Emple. Long Term Disability Plan, No. C-06-7592 SC, 2008 U.S. Dist. LEXIS 120366 (N.D. Cal. Aug. 20, 2008), is similarly inapposite. In *Prakash*, the court struck an affirmative defense based on failure to meet heightened pleading standards because the parties had already extensively litigated the counterclaim and "any concern that they did not adequately understand the allegations against them [was] unwarranted." *Id.* at *3-10.

Accordingly, the Court should dismiss Plaintiff's claims against ICANN that sound in fraud (the claims for intentional misrepresentation, for fraud and conspiracy to commit fraud, and under the fraudulent prong of the California Business and Professions Code section 17200).

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CONCLUSION

For the foregoing reasons, ICANN respectfully requests that the Court grant ICANN's Rule 12(b)(6) motion and dismiss Plaintiff's entire FAC with prejudice.

Dated: April 11, 2016

JONES DAY

By: */s/ Jeffrey A. LeVee*
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