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SUPERIOR COURT

IN AND FOR

LOS ANGELES COUNTY, CALIFORNIA

13	FEGISTRY, LLC, RADIX DOMAIN	:	Case No.:	20STCV42881
14	SOLUTIONS PTE. LTD., and DOMAIN	:		
15	VENTURE PARTNERS PCC LIMITED,	:	COMPLAINT	
16		:		
17	Plaintiffs,	:		
18		:	DEMAND FOR JURY TRIAL	
19	vs.	:		
20		:		
21	INTERNET CORPORATION FOR	:		
22	ASSIGNED NAMES AND NUMBERS, a	:		
23	California public benefit corporation,	:		
24		:		
25	Defendants.	:		

For their Complaint against the Internet Corporation for Assigned Names and Numbers ("ICANN"), Plaintiffs allege as follows:

NATURE OF THE ACTION

1. Plaintiffs bring this action to force ICANN to implement dispute resolution procedural mechanisms and safeguards specifically required by the Accountability Mechanisms and Ombudsman articles of its bylaws (collectively, ICANN's "Accountability Mechanisms").

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25 **NATURE OF THE ACTION**

26 1. Plaintiffs bring this action to force ICANN to implement dispute resolution
27 procedural mechanisms and safeguards specifically required by the Accountability Mechanisms
28 and Ombudsman articles of its bylaws (collectively, ICANN’s “Accountability Mechanisms”).

1 Plaintiffs has stated substantive claims against ICANN in accord with the substance and
2 procedure set forth in ICANN’s bylaws. If and as those claims are to be resolved through
3 ICANN’s dispute resolution process, they should be heard in accordance with the ICANN
4 bylaws that govern that process -- as incorporated into Plaintiffs’ contracts with ICANN and
5 which are otherwise legally binding on ICANN. Those bylaws specifically require: (1) an
6 independent Ombudsman review of Plaintiffs’ “Requests for Reconsideration” to the ICANN
7 Board; (2) a specially-trained, community-chosen, expert Standing Panel from which panelists
8 will be drawn to hear and decide the merits of Plaintiffs’ disputes with ICANN pursuant to its
9 bylaws’ “Independent Review Process” (“IRP”), and which would *en banc* and *de novo* hear any
10 appeal from any IRP decision; and (3) that ICANN pay all administrative costs of the IRP.

11 2. ICANN has denied Plaintiffs’ repeated requests to provide a process that complies
12 with the clear requirements of ICANN’s bylaws. Indeed, ICANN has ignored three previous IRP
13 panels that have reprimanded ICANN for having failed to adopt the Standing Panel, the last time
14 in 2017. Therefore, Plaintiffs respectfully request this court, *inter alia*, to order ICANN to
15 provide a fair process for resolution of Plaintiffs’ claims against ICANN that complies with
16 ICANNs specific and detailed bylaws describing the Reconsideration and IRP processes.

17 THE PARTIES

18 3. Plaintiff Fegistry, LLC is a Washington limited liability company with its principal
19 place of business in Washington.

20 4. Plaintiff Radix Domain Solutions PTE Ltd. is a Singapore limited liability
21 company with its principal place of business in Singapore.

22 5. Plaintiff Domain Venture Partners PCC Ltd. is a Gibraltar limited liability
23 company with its principal place of business in Gibraltar.

24 6. Plaintiffs each effectively own and/or control independent applications to ICANN
25 to own and operate a generic top-level domain (“gTLD”) name registry -- .hotel.

26 7. Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) is a
27 California public benefit corporation with its principal place of business in Los Angeles,
28 California. ICANN is *the* entity responsible for governing the entire global domain name system
 (“DNS”), including domain name and IP address allocation throughout the world. ICANN’s

1 responsibilities include whether and how to add new gTLDs to the root zone of the internet DNS.
2 For example, whether, through whom, and on what terms to allow “.hotel” domain names such
3 as hilton.hotel, westin.hotel, best.hotel, california.hotel, etc., to be registered and used on the
4 internet for commerce, comment or any other legitimate purpose.

5 8. ICANN currently governs more than one thousand gTLD registries that sell
6 domain names for use on the internet, including legacy operations like .com and .org, and new
7 gTLDs like .vacations, .viajes, .Google, .site, .London, .gay, .guitar, .horse, .hotels, and .hoteles.
8 ICANN’s DNS governance covers virtually every web user and every website in the world,
9 including those used personally, in the public sector, and in commerce. ICANN’s governance
10 affects almost all aspects of private and public life, and trillions of dollars in commerce annually.
11 The so-called Accountability Mechanisms in the ICANN bylaws are checks on ICANN’s power
12 and actions, as it is not overseen by any governmental entity.

13 9. Indeed, ICANN promised to implement these Accountability Mechanisms as a
14 condition of the United States government terminating its formal oversight of ICANN in 2016 –
15 yet still has wholly failed to do so.

16 10. Unless this Court forces ICANN to comply with its bylaws in these critical
17 respects, ICANN will continue to force Plaintiffs and any other complaining party into the
18 current, sham “Reconsideration” and “Independent Review” processes that fall far short of the
19 Accountability Mechanisms required in its bylaws.

20 **JURISDICTION AND VENUE**

21 11. This Court has personal jurisdiction over ICANN, and venue is appropriate in this
22 Court. Defendant is a California public benefit corporation with its headquarters and principal
23 place of business in Los Angeles County. In addition, a substantial part of the events giving rise
24 to Plaintiffs’ claims occurred in Los Angeles County.

25 **GENERAL ALLEGATIONS**

26 **Plaintiffs’ Contracts With ICANN,**
27 **ICANN’s Bylaws & “Accountability Mechanisms”**

28 12. Plaintiffs each contracted with ICANN to apply for the rights to exclusively
operate the new gTLD “.hotel.” Each application required each Plaintiff to pay an application

1 fee to ICANN of \$185,000.00 and required each Plaintiff to pay consultant and technical fees of
2 hundreds of thousands of dollars more to prepare each application in accord with ICANN's
3 voluminous Applicant Guidebook.¹ Each such contract² incorporates by reference ICANN's
4 bylaw Accountability Mechanisms which, where applicable, are to be used to resolve issues and
5 disputes that arise in the application review and evaluation process and in the delegation of
6 gTLDs pursuant to ICANN's New gTLD Program. In essence, the Accountability Mechanisms
7 are bylaw-enshrined alternative dispute resolution processes set forth in great detail, based upon
8 thoughtful and comprehensive analysis by experts and the ICANN community, and promised by
9 the ICANN Board and bylaws in critical respects since 2013, and in specific detail since 2016.

10 13. Pursuant to their applications and the application process, Plaintiffs have
11 substantively challenged ICANN's decision-making and review process related to the delegation
12 of the .hotel gTLD. In essence, Plaintiffs claim that ICANN delegated the gTLD improperly to a
13 third-party competitor. In this lawsuit, Plaintiffs are asserting their "procedural" claims that arise
14 from ICANN's failure to implement and adhere to its bylaw-enshrined Accountability
15 Mechanisms.

16 14. ICANN's bylaws³ clearly state its "Mission" in Article 1.1, is "to ensure the stable
17 and secure operation of the Internet's unique identifier systems." ICANN also gives itself the
18 power "to negotiate, enter into and enforce agreements, including public interest commitments,
19 with any party in service of its Mission."

20 15. Article IV of the ICANN bylaws is dedicated to its so-called "Accountability
21 Mechanisms," requiring detailed processes called "Requests for Reconsideration" ("RFR") and
22 the "Independent Review Process" ("IRP"), to be maintained by ICANN to help ensure
23 accountability and transparency in furtherance of fulfilling its Mission. Bylaw Article V is
24 dedicated to a purportedly independent Ombudsman office to be maintained by ICANN, also in
25 furtherance of fulfilling its Mission, requiring a specific and critical role within the
26 Reconsideration process. These processes are set forth at length, and in detail, and were
27 designed through ICANN's multi-stakeholder process, by consensus of the community, retained
28

¹ <https://newgtlds.icann.org/en/applicants/agb>.

² *See, id.*, Module 6.

³ <https://www.icann.org/resources/pages/governance/bylaws-en>.

1 experts and the ICANN Board itself, to help ensure the stable and secure operation of the DNS
2 and of the IP addressing system.

3 **Plaintiffs’ “Requests for Reconsideration”**

4 16. In accordance with ICANN bylaws, Plaintiffs have requested formal
5 Reconsideration⁴ of various substantive decisions made by a subcommittee of the ICANN Board,
6 specially empowered on behalf of the entire Board to make authoritative decisions in the first
7 instance related to the New gTLD Program. That subcommittee is called the “Board
8 Accountability Mechanisms Committee” (“BAMC”) and consists of five members.

9 17. In its bylaws, ICANN specifically represented that it would implement a
10 purportedly independent Ombudsman review process in which an independent Ombudsman
11 retained by ICANN would conduct an independent review of each Request for Reconsideration
12 and provide its advice to the subcommittee of the ICANN Board that is generally empowered on
13 behalf of the entire ICANN Board to hear all Requests for Reconsideration arising from any
14 decision of ICANN Board or Staff on any topic. That subcommittee is *also* the Board
15 Accountability Mechanisms Committee (BAMC) -- making the independent Ombudsman review
16 critical. Without it, the BAMC is simply reconsidering the BAMC’s own underlying decisions
17 without any objective input -- which was clearly not the intent of the express, community-
18 imposed bylaws. BAMC decisions are then passed to the ICANN Board for final, rubber-
19 stamped approval in all instances.

20 18. But, far from implementing a robust and fair Ombudsman review and input
21 process as it represents it will do in its bylaws, ICANN has instead, intentionally and deceitfully:
22 (1) specially empowered the BAMC to make all decisions in the first instance escalating from the
23 new gTLD program; (2) generally empowered the BAMC to make all decisions escalating from
24 formal Requests for Reconsideration, including those escalating from its own underlying
25 decisions; and (3) hired a purportedly independent Ombudsman who, while ostensibly required
26 to review all Requests for Reconsideration, also, inexplicably, apparently is bound to recuse
27 himself from reviewing all such requests. That leaves nobody but the BAMC, five members of
28

⁴ See, <https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en>, and, <https://www.icann.org/resources/pages/reconsideration-18-6-trs-et-al-request-2018-04-17-en>.

1 the 20-person ICANN Board, to make and then reconsider each and every one of its very own
2 first-instance decisions relating to the New gTLD Program -- including Plaintiffs' .hotel
3 applications and Plaintiffs' competitors' applications, and the internal reviews and investigations
4 relating to same.

5 19. In fact, the Ombudsman process, as misrepresented by ICANN in its bylaws, is a
6 sham. Not only has the Ombudsman recused himself from Plaintiffs' Requests for
7 Reconsideration, *but in fact he has recused himself from every single Request for*
8 *Reconsideration stemming from the New gTLD Program -- some 14 cases just since 2017.*
9 Neither ICANN nor the Ombudsman has provided any intelligible reason for this gross flouting
10 of ICANN's bylaws and the Ombudsman's dereliction of duty, other than a naked and vague
11 claim of "conflict of interest." The lack of any Ombudsman process not only violates ICANN's
12 bylaws and its contracts with Plaintiffs, but it renders the promise of a fair and independent
13 Reconsideration process null and illusory, and the notion of true accountability a farce.

14 20. Despite Plaintiff's repeated demands, ICANN has refused to provide an alternate
15 Ombudsman to fill this critical role, specifically required by its bylaw-enshrined, so-called
16 "Accountability Mechanisms." ICANN refuses to cure despite repeated requests and ample time
17 to do so.

18 21. Further, on information and belief, the BAMC has *never* granted any Request for
19 Reconsideration of any of its own underlying decisions in the new gTLD program -- not one.
20 Thus, the BAMC has denied each and every analogous case since 2017, including Plaintiffs'
21 requests.

22 22. On information and belief, the ICANN Board has never refused to accept the
23 BAMC subcommittee's recommendation as to any Request for Reconsideration, stemming from
24 the New gTLD Program or otherwise, including in Plaintiffs' cases.

25 23. Plaintiffs' Requests for Reconsideration were denied Ombudsman review, then
26 denied by the BAMC, then denied by the full ICANN Board -- all in quick succession.⁵ On
27 information and belief, every other similar requestor of reconsideration of a BAMC decision has
28

⁵ See <https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>, and,
<https://www.icann.org/resources/board-material/resolutions-2019-01-27-en#2.f>.

1 been denied Ombudsman review, has had reconsideration denied by the BAMC itself, and then
2 had that decision rubber-stamped by the full ICANN Board.

3 The Independent Review Process

4 24. The Independent Review Process (IRP) is an accountability mechanism prescribed
5 by the ICANN bylaws that allows for independent third-party review of ICANN Board or staff
6 actions (or inactions).

7 25. Pursuant to the bylaws, the IRP is intended to empower claimants in the internet
8 community to ensure, in certain covered disputes, ICANN's compliance with its Mission,
9 Articles and bylaws -- and its accountability and transparency -- specifically by use of
10 "meaningful, affordable and accessible expert review" and deference to prior IRP precedents.
11 ICANN thus represents in its bylaws that the purposes of the process are, *inter alia*, to:

12 (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies
13 with its Articles of Incorporation and Bylaws.

14 (ii) Empower the global Internet community and Claimants to enforce compliance with
15 the Articles of Incorporation and Bylaws through meaningful, affordable and accessible
16 expert review of Covered Actions

17 (iii) Ensure that ICANN is accountable to the global Internet community and Claimants . .
18 ..

19 (vi) Reduce Disputes by creating precedent to guide and inform [ICANN] and the global
20 Internet community in connection with policy development and implementation.

21 (vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution
22 of Disputes.

23 (viii) Lead to binding, final resolutions consistent with international arbitration norms that
24 are enforceable in any court with proper jurisdiction.

25 (ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in
26 the civil courts of the United States or other jurisdictions.

27 26. The bylaws regarding the IRP are required to be construed, implemented, and
28 administered in a manner consistent with the purposes of the IRP.

29 27. ICANN also misrepresented in its IRP-related bylaws that there will be a
30 "Standing Panel" from which three-member panels will be chosen to hear all IRP disputes:

1 There shall be an omnibus standing panel of at least seven members (the
2 "**Standing Panel**") each of whom shall possess significant relevant legal expertise
3 in one or more of the following areas: international law, corporate governance,
4 judicial systems, alternative dispute resolution and/or arbitration. Each member of
5 the Standing Panel shall also have knowledge, developed over time, regarding the
6 DNS and ICANN's Mission, work, policies, practices, and procedures. Members
7 of the Standing Panel shall receive at a minimum, training provided by ICANN on
8 the workings and management of the Internet's unique identifiers and other
9 appropriate training

10 28. The bylaws also require that each IRP Panel chosen from the Standing Panel shall
11 conduct an objective, *de novo* examination of a dispute, based specifically upon any prior
12 applicable IRP precedents.

13 29. The bylaws provide that a claimant may request interim relief, including
14 prospective relief, interlocutory relief, or declaratory or injunctive relief, which specifically may
15 include a stay of the challenged ICANN action or decision until such time as the IRP Panel
16 considers the merits of the IRP complaint.

17 30. The bylaws provide that any decision of a three-person IRP panel may be appealed
18 *de novo* and *en banc* to the entire Standing Panel.

19 31. ICANN also represented in its IRP-related bylaws that it "shall bear all the
20 administrative costs of maintaining the IRP mechanism, including compensation of Standing
21 Panel members." However, on information and belief, due to its failure to appoint the Standing
22 Panel, ICANN has avoided paying some \$2.7 million in Standing Panel fees in thirteen IRP
23 cases arising from the New gTLD Program. Indeed, ICANN has been deemed the losing party,
24 and ordered to reimburse panel fees and costs paid by claimants, *nine times* out of those 13 cases
25 -- totaling \$1.2 million.

26 32. Plaintiffs are claimants⁶ in a pending IRP proceeding filed in December 2019
27 because ICANN gave them a unilateral deadline to do so or else suffer the ultimate consequence
28 -- that ICANN would delegate the .hotel gTLD to Plaintiffs' competitor and Plaintiffs would
then lose virtually their entire investment in their applications to ICANN, at least several
hundred thousand dollars each. In addition, they might also risk their ability to effectively

⁶ See Request for IRP, <https://www.icann.org/en/system/files/files/irp-registry-et-al-request-16dec19-en.pdf>.

1 challenge ICANN’s substantive decision any further, even as specifically and long-promised to
2 Plaintiffs by ICANN in its bylaws, and thus in its contracts not only with Plaintiffs but also with
3 all other parties contracting with ICANN throughout the world. Plaintiffs, however, have
4 continually objected to going forward with the IRP until the bylaw Accountability Mechanisms
5 are put in place, which ICANN has stated would take no longer than 6-12 months from now.
6 There is no urgency whatsoever, from any party or for any purpose, to move any faster. Yet,
7 ICANN obstinately refuses to stay or otherwise suspend those proceedings pending its own
8 compliance with its bylaws, and ominously threatens to delegate away the TLD to a third-party
9 competitor if those IRP proceedings are terminated.

10 **Cooperative Engagement -- Mediation**

11 33. ICANN’s ultimatum to Plaintiffs to file the IRP immediately followed a so-called
12 “Cooperative Engagement Process” (“CEP”) provided for in ICANN’s bylaws. The bylaws
13 provide for a mediation during the CEP, prior to filing of an IRP, with the CEP mediator to be
14 selected from the skilled members of the Standing Panel, and thus also provided at ICANN
15 expense.

16 34. As ICANN has failed to comply with its bylaw representations (discussed in
17 greater detail below), there is no Standing Panel, despite it having been required in ICANN’s
18 bylaws since 2013, and by separate IRP panel decisions in 2015 and 2017 finding ICANN in
19 violation of its bylaws for having failed to implement it. Thus, among other things, Plaintiffs
20 have been denied the opportunity to have their IRP issues submitted to a skilled expert mediator
21 from the Standing Panel, provided at ICANN expense, in addition to being denied the expert
22 Standing Panel in the IRP itself. On information and belief, ICANN also has failed to provide
23 this procedural safeguard and bylaw-mandated ADR process to any other CEP (or IRP)
24 participant despite the clear provisions of its bylaws.

25 35. ICANN’s failure to implement a Standing Panel has led to, among other things,
26 clearly inconsistent opinions among IRP panels which generally have had no previous, relevant
27 experience pertaining to ICANN’s IRP. Plaintiffs’ underlying, substantive claims address such
28 inconsistency as it relates to Plaintiffs’ applications and IRP claims.

36. As alleged, in the pending IRP, each Plaintiff seeks substantive relief related to

1 ICANN’s allegedly improper gTLD delegation decisions and processes.

2 37. While ICANN essentially forced Plaintiffs to file the IRP, else face termination of
3 their applications and related rights to redress, Plaintiffs objected to going forward with that
4 proceeding until ICANN complied with its bylaw representations and obligations to put in place
5 an actual, meaningful Ombudsman review process and the CEP and IRP Standing Panel to hear
6 Plaintiffs’ claims and any appeals arising therefrom, and until ICANN paid the fees it had
7 promised in its bylaws to pay.

8 38. As required by ICANN, Plaintiffs filed their IRP complaint with ICANN’s
9 exclusive, chosen IRP provider (the International Center for Dispute Resolution (“ICDR”)).
10 Plaintiffs were forced to pay a \$3,750.00 administrative fee in order for ICDR and ICANN to
11 administer their complaint, even though ICANN’s bylaws specifically require ICANN to bear all
12 administrative costs of the IRP.

13 **ICANN Forced Plaintiffs to Seek Interim Relief, and Plaintiffs Succeeded**

14 39. Almost immediately after Plaintiffs filed their IRP complaint, they were advised
15 by ICANN’s lawyers that ICANN was preparing to immediately delegate the .hotel gTLD to
16 Plaintiffs’ competitor, despite the Plaintiffs’ pending IRP that challenges ICANN’s very
17 decisions and processes related to that TLD delegation. Plaintiffs promptly responded that such
18 action would irreparably harm Plaintiffs, would blatantly subvert ICANN’s bylaws, including the
19 Accountability Mechanisms, and would utterly disregard unanimous prior IRP precedent in
20 which three different IRP panels had held that ICANN must not execute gTLD contracts while
21 an IRP remained pending as to the substantive merits or processes underlying ICANN’s decision
22 to do so.

23 40. Despite Plaintiffs’ repeated protests, ICANN and ICDR required Plaintiffs to pay
24 an additional \$18,000 fee deposit to secure the services of a so-called “Emergency Panelist,” that
25 should have been provided at no cost from the Standing Panel pursuant to specific bylaw
26 provision to that effect. Plaintiffs were also forced to pay counsel to prepare briefing and
27 evidence in support of a stay (aka a “Request for Interim Measures”).⁷ Plaintiffs were thus
28

⁷ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-claimant-request-30jan20-en.pdf>;
<https://www.icann.org/en/system/files/files/irp-fegistry-et-al-claimant-brief-interim-measures-protection-24apr20-en.pdf>.

1 forced to pay for and to attempt to persuade an ICDR-chosen panelist, with no relevant
2 experience or training, to force ICANN to stop its contracting process until such time as a
3 subsequent IRP Panel considers the merits of the matter.

4 41. The Emergency Panelist ruled in Plaintiffs' favor.⁸ He ruled that: "Claimants'
5 request for interim measures that ICANN be ordered to maintain the *status quo* as to the
6 .HOTEL Contention Set during the pendency of this IRP is granted."

7 42. Thereafter, ICANN's attorneys tried improperly to push the matter along even
8 though ICANN still has not implemented a meaningful and independent Ombudsman review
9 process or the Standing Panel. When Plaintiffs objected to going forward until at least the
10 Standing Panel was implemented and could be utilized in their IRP, ICANN's lawyers threatened
11 to seek dismissal of the IRP altogether, and to thereafter proceed with delegation of the .hotel
12 gTLD to Plaintiffs' competitor. Plaintiffs now pray for this Court's review and order compelling
13 ICANN to provide Accountability Mechanisms to Plaintiffs in accordance with ICANN's
14 bylaws.

15 43. Unless ICANN relents, Plaintiffs will be forced to move this Court to continue the
16 stay imposed against ICANN by the Emergency Panelist by preliminarily enjoining ICANN
17 from contracting the .hotel gTLD to Plaintiffs' competitor. Plaintiffs will request such injunction
18 to remain in place so long as this action is pending and/or until the merits of Plaintiffs' IRP
19 complaint are adjudicated in full compliance with the Accountability Mechanisms enshrined in
20 ICANN's bylaws -- which it has egregiously and deceitfully misrepresented to date.

21 **ICANN Has Failed to Implement an IRP Standing Panel Since 2013**

22 44. As quoted above, ICANN represents in its bylaws that the Standing Panel will:

- 23 * be comprised of at least seven members
- 24 * each of whom shall possess significant relevant legal expertise in one or
25 more of the following areas: international law, corporate governance, judicial
26 systems, alternative dispute resolution and/or arbitration;
- 27 * each of whom shall have knowledge, developed over time, regarding the
28 DNS and ICANN's Mission, work, policies, practices, and procedures; and

⁸ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-emergency-panelist-decision-interim-measures-protection-07aug20-en.pdf>.

1 * each of whom shall receive, at a minimum, training provided by ICANN on
2 the workings and management of the Internet's unique identifiers and other
3 appropriate training.

4 45. Some variation of this bylaw has been in effect since April 2013. At that time, it
5 read:⁹

6 There shall be an omnibus standing panel of between six and nine members with a
7 variety of expertise, including jurisprudence, judicial experience, alternative
8 dispute resolution and knowledge of ICANN's mission and work from which each
9 specific IRP Panel shall be selected. The panelists shall serve for terms that are
10 staggered to allow for continued review of the size of the panel and the range of
11 expertise. A Chair of the standing panel shall be appointed for a term not to
12 exceed three years.

13 46. The history behind the bylaw is poignant -- and proves that ICANN's total refusal
14 to implement the Standing Panel for so many years is a matter of great public concern.

15 47. In 2012, the ICANN Board convened an "Accountability Structures Expert Panel"
16 ("ASEP") to perform a review of ICANN's accountability structures called for in prior,
17 community-driven and consensus Recommendations of an ICANN Board-appointed
18 "Accountability and Transparency Review Team" ("ATRT").¹⁰ Those ATRT Recommendations
19 were developed over several years and through many thousands of hours of community and
20 ICANN staff and Board deliberation. The ASEP produced a report¹¹ in October 2012 that was
21 posted for public comment, along with proposed bylaw revisions, intended to implement the
22 ASEP's and ATRT's recommended changes to ICANN's Reconsideration and IRP processes.

23 48. Notably, one of the ASEP's few, foundational "Guiding Principles" was stated:
24 "Accountability structures should not preclude any party from filing suit against ICANN in court
25 of competent jurisdiction."

26 49. At the ICANN Board's 20 December 2012 meeting, the Board adopted the bylaw
27 revisions as recommended by the ASEP, and directed staff to proceed with implementation
28 work.¹²

⁹ <https://www.icann.org/resources/pages/bylaws-2014-04-04-en>.

¹⁰ <https://www.icann.org/en/system/files/files/final-recommendations-31dec10-en.pdf>.

¹¹ <https://www.icann.org/en/system/files/files/report-26oct12-en.pdf>.

¹² <https://www.icann.org/resources/board-material/resolutions-2012-12-20-en#2.c>.

1 50. ICANN misrepresented to Plaintiffs and the community -- on April 8, 2013¹³ --

2 that:

3 The Board's action in accepting the report of the Accountability Structures Expert
4 Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of
5 the Board's commitment to act on the recommendations of the Accountability and
6 Transparency Review Team (ATRT). The ASEP's work . . . , including a review
7 of the recommendations from the President's Strategy Committee's work on
8 Improving Institutional Confidence, is directly aligned with the ATRT requested
9 review.

10 The adoption of the ASEP's work represents a great stride in ICANN's
11 commitment to accountability to its community The revisions are geared
12 towards instituting more predictability into the processes, and certainty in
13 ICANN's decision making, The Bylaws as further revised also address a
14 potential area of concern raised by the community during the public comments on
15 this issue, regarding the ability for ICANN to maintain a standing panel for the
16 Independent Review proceedings. If a standing panel cannot be comprised, or
17 cannot remain comprised, the Bylaws now allow for Independent Review
18 proceedings to go forward with individually selected panelists.

19 The adoption of these recommendations will have a fiscal impact on ICANN, in
20 that there are anticipated costs associated with maintaining a Chair of the standing
21 panel for the Independent Review process and potential costs to retain other
22 members of the panel. However, the recommendations are expected to result in
23 less costly and time consuming proceedings, which will be positive for ICANN,
24 the community, and those seeking review under these accountability structures.
25 The outcomes of this work are expected to have positive impacts on ICANN and
26 the community in enhanced availability of accountability mechanisms.

27 *****

28 **Immediate Adoption Is Important for Scalability**

Now that initial evaluation results for new gTLD applications are being released, it is of utmost importance that the enhanced Reconsideration and Independent Review processes be put into place. The ASEP recommendations provide more clarity for the community on scope and standing, and will allow for more scalability in proceedings, the ability for summary disposition of claims, the consolidation of proceedings where appropriate, the institution of page limitations, and more predictability on timing. To the extent that decisions arising out of the New gTLD Program result in initiation of Reconsideration or Independent Review proceedings, having the new Bylaws in place will provide consistency to those seeking reconsideration or independent review.

¹³ <https://www.icann.org/en/system/files/bm/briefing-materials-4-11apr13-en.pdf>.

Independent Review Process -- Creation of Standing Panel

ICANN has coordinated with the current IRP Provider, the International Centre for Dispute Resolution (ICDR) to determine how to best create the standing panel. The ICDR is in the process of recommending a fee structure that can help mitigate costs within the proceedings. As the ICDR is working to identify panelists for ICANN consideration, and finalizing fee structure recommendations, we recommend that the Bylaws can now be implemented. Per the 20 December 2012 resolution, additional language relating to the standing panel will provide flexibility to use either the standing panel OR individually selected panelists for any proceeding initiated when a standing panel is not comprised.

51. ICANN obviously and thoroughly understood the serious importance of enacting the standing panel reforms “**immediately**” at least as of early 2013, and promised to itself and its community (including Plaintiffs) that such implementation was imminent as of that time -- as an express condition of implementing the bylaws as of that time.

52. The Standing Panel in fact is supposed to play a role in a whole host of Accountability Measures enhancements, including mediation, interim relief, panel adjudication of all IRP complaints, and the right of *de novo* and *en banc* appeal.

53. Critically, as alleged, the bylaws provide that any IRP Panel decision may be appealed *de novo* to the entire Standing Panel, *en banc*. Because there is no Standing Panel, Plaintiffs have been denied their right to appeal the decision of the Emergency Panelist and/or any full IRP Panel that may be constituted in their pending IRP proceeding, if any.

54. Yet in fact, ICANN did virtually nothing to implement the Standing Panel until after Plaintiffs filed their IRP complaint in November, 2019 -- more than six years later -- yet again raising the issue. And today, the Standing Panel still is not in place to hear Plaintiffs’ IRP complaint, as promised by the bylaws for so long. ICANN now claims yet again that is in process of choosing members of the Standing Panel, and has recently represented to the Emergency Panelist and Plaintiffs that the delay to implementation at this point is only in the range of six more months from now.¹⁴ That is an insignificant amount of time, as there is no demonstrable urgency, and the Plaintiffs’ applications have been pending with ICANN for more than eight years already.

¹⁴ See, <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-icann-opp-claimant-amended-request-12may20-en.pdf>.

ICANN Has Ignored Three Prior IRP Decisions Regarding the Standing Panel

55. Meanwhile, ICANN blatantly ignored the protestations and specific recommendations of three different IRP panels, in 2015 and in 2017, to get the Standing Panel in place as so clearly required by the bylaws.

56. In 2015, ICANN lost an IRP case involving the .Africa gTLD application. In the early stages of that case, an emergency IRP panelist issued an order that excoriated ICANN for, among other things -- at that point, not having got the Standing Panel in place. The panelist stated:¹⁵

29. First, the Panel is of the view that this IRP could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel [with] "knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an IRP as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

57. Later in the same case, a different and unanimous, three-person panel issued another excoriating declaration,¹⁶ arguing that IRP decisions must be binding on ICANN because it had (even as of then) failed to create the Standing Panel:

The need for a compulsory remedy is concretely shown by ICANN's longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust's claim, and also prejudicing the interest of a competing .AFRICA applicant.

58. The ICANN Board formally, nominally accepted the final decision of that IRP panel, but said nothing, and again did nothing, about the Standing Panel. This in turn violated another ICANN bylaw that requires: "Where feasible, the Board shall consider its response to

¹⁵ <https://www.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf>.

1 IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the
2 decision on the public record based on an expressed rationale.”

3 59. In 2016, ICANN again amended its Accountability Mechanisms bylaws, revising
4 the Standing Panel provision as set forth above.

5 60. In 2017, ICANN lost another IRP case, involving the .Islam and .halal gTLD
6 applications. Those claimants also raised the Standing Panel issue in the IRP, arguing that
7 ICANN should immediately implement the Panel pursuant to its bylaws. The unanimous IRP
8 panel cited to the *DCA Trust* precedent on this issue, and found in claimants’ favor, stating:¹⁷

9 [T]he Articles of Incorporation and Bylaws requires a 'Standing Panel'
10 be established, and this Panel recommends, along with previous IRP
11 panel recommendations that one is created. However, for clarity, this
12 is not to be taken as or in any way inferred as a binding order (as the
13 Panel has no such authority).

14 61. Again, the ICANN Board purportedly accepted the final decision of the IRP panel,
15 but said and did nothing about the Standing Panel -- again in violation of its bylaws.

16 62. ICANN’s refusal to act in the face of these panel decisions obviously illustrates
17 why court intervention is required here: Even if Plaintiffs litigate their procedural bylaw issues
18 in the context of an ICANN-sponsored IRP and prevail, ICANN won’t abide by the decision,
19 rendering Plaintiffs’ efforts futile. ICANN has absolutely proved this by its own conduct in the
20 two prior matters. So again, by insisting that Plaintiffs go forward with the IRP under threat of
21 its dismissal and concomitant loss of their applications altogether, ICANN is trying to herd
22 Plaintiffs into a flawed process, violative of its own bylaws, while at the same time hiding behind
23 a purported covenant not to sue whose enforcement would thus preclude review of ICANN’s
24 related conduct altogether. In the same vein, ICANN’s position, essentially that it can
25 implement the Standing Panel whenever it chooses no matter how many years down the road, if
26 ever, renders its promises hollow and worthless and, legally, false, the bylaw provision itself
27 superfluous, and the obligation illusory.

28 **This Action Is Brought in the Public Interest**

63. Plaintiffs’ action in this Court is in furtherance of and in accordance with the

¹⁷ <https://www.icann.org/en/system/files/files/irp-agit-final-declaration-30nov17-en.pdf> (Sec. 146).

1 public interest and with ICANN's Mission. Indeed, ICANN's most recent Board Resolution¹⁸
2 mentioning the Standing Panel (on November 3, 2019) stated that the resolution was:

3 in the public interest as part of implementing and achieving the enhanced outcomes of the
4 IRP in accordance with the recommendations of the community. This action is also within
5 ICANN's Mission and is in the public interest as it is important to ensure that, in carrying
6 out its Mission, ICANN is accountable to the community for operating within the Articles
7 of Incorporation, Bylaws, and other established procedures, by having a process in place
8 by which a person or entity materially affected by an action of the ICANN Board or Staff
9 may request third-party review of that action or inaction by the Board.

10 64. On March 31, 2020, four months *after* Plaintiffs filed their IRP Complaint, ICANN
11 finally made a purported public "Call for Expressions of Interest" from prospective members of a
12 Standing Panel.¹⁹

13 65. On May 12, 2020, ICANN filed a brief²⁰ opposing Plaintiffs' Request for Interim
14 Measures, in which ICANN stated it expected that IRP to last 12-18 months from then, and
15 ICANN also stated that implementation of the Standing Panel would take some two years from
16 then. Thus, ICANN, by its own admission, believes implementation of the Standing Panel --
17 required since 2013 -- would only delay this proceeding an additional 6 to 12 months. The
18 substantive delegation process for the .hotel gTLD has already consumed some 7+ years, but
19 ICANN claims it won't take another 6 or so months to comply with bylaws it should have
20 complied with in 2013 so as to provide a fair adjudicatory process to Plaintiffs to which they
21 (and the public at large) are contractually entitled.

22 66. Plaintiffs have repeatedly requested that ICANN consent to suspend the IRP case
23 until the Standing Panel is in place to hear it. Plaintiffs request that the IRP panel in their case be
24 selected from that trained, expert, community-chosen Standing Panel as required by ICANN's
25 bylaws, and that Plaintiffs also be ensured their right to an *en banc* appeal of any adverse
26 decision to that full Standing Panel. Despite Plaintiffs' several requests for this curative action,
27 and despite affording ICANN ample opportunity to cure, ICANN has denied the requests.

28 67. Plaintiffs have also requested that ICANN meanwhile hire an independent

¹⁸ <https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.c>.

¹⁹ <https://www.icann.org/news/announcement-3-2020-03-31-en>.

²⁰ <https://www.icann.org/en/system/files/files/irp-fegistry-et-al-icann-opp-claimant-amended-request-12may20-en.pdf>.

1 Ombudsman to review their Requests for Reconsideration, as also required by ICANN's bylaws.
2 Again, despite Plaintiffs' several requests for this curative action, and despite affording ICANN
3 ample opportunity to cure, ICANN has denied the requests.

4 68. Plaintiffs have also requested that ICANN reimburse them for all ICDR
5 administrative expenses. After a pointed question from the Emergency Panelist, ICANN agreed
6 to repay the \$18,000.00 panelist fee deposit they had forced Plaintiffs to pay, but has still refused
7 to repay the \$3,750.00 administrative fee that Plaintiffs were forced to pay.

8 69. Plaintiffs are harmed far more than anyone from delay in resolution of their .hotel
9 gTLD applications, because, as alleged, each application has cost each Plaintiff a \$185,000.00
10 filing fee paid to ICANN, and at least several hundred thousand dollars more for consulting and
11 carrying costs -- not to mention legal fees incurred in the application, review and IRP processes.
12 ICANN can show no harm whatsoever from any further modest delay in adjudicating Plaintiffs'
13 substantive dispute, as ICANN by its own admission is solely responsible for many years of the
14 prior delay.

15 70. However, the procedural safeguards that ICANN promised over and over, by
16 ICANN's own admissions, are intended to provide real and indeed critical benefits to Plaintiffs
17 and to the internet community at large which must deal with ICANN. Moreover, there is
18 absolutely no harm to ICANN (or anyone else) caused by such a relatively short delay given the
19 long history of the .hotel gTLD applications, and ICANN's own long history of willfully failing
20 to provide Accountability Mechanisms promised by its bylaws since 2013. Since 2016,
21 ICANN's bylaws have been amended on three separate occasions, yet still ICANN has made
22 minimal progress in enacting promises made in previous bylaws.

23 71. These issues are critically important to Plaintiffs, not only with respect to their
24 pending IRP complaint, but also because they each have executed multiple other Registry
25 Agreements with ICANN and operate many other TLDs as their core business activity -- always
26 and forever pursuant to ICANN regulations and fiat. At any time, any Plaintiff -- or any other
27 party contracting with ICANN anywhere in the world -- could have a dispute with ICANN, and
28 then also would be denied all of these critical procedural rights guaranteed to them by its bylaws.
ICANN has done precious little in seven years. While it continues to make related promises, at

1 this point ICANN cannot be trusted to do anything in any time frame.

2 72. For all of those same reasons, this matter is important to the entire internet
3 community -- consisting not only of domain name registries like Plaintiffs, but also all
4 businesses, individuals and organizations that rely upon the global DNS governed by ICANN.
5 Therefore, this matter strongly enhances the public interest and should proceed without negative
6 consequence to Plaintiffs' gTLD applications pending with ICANN.

7 73. ICANN has failed to pursue its general public benefit purpose of providing
8 Accountability Mechanisms as required by its bylaws, designed by the community and ICANN's
9 own retained experts to ensure the integrity and security of the global, critical DNS and IP
10 addressing systems and infrastructure. The importance of ICANN's Mission is difficult to
11 overstate. The Accountability Mechanisms are critical, as they were specifically designed to
12 help ensure that Mission is fulfilled. There is also no legitimate reason why Plaintiffs and the
13 whole internet community should not be afforded the full procedural rights set forth specifically
14 in ICANN's bylaws.

15 **Plaintiffs' Injuries & Damages**

16 74. As a direct and proximate result of ICANN's breaches of contract, its intentional
17 and grossly negligent misrepresentations, its intentional misfeasance and gross negligence in
18 performance of its bylaw obligations, and its other unfair and unlawful acts, Plaintiffs have each
19 been injured and damaged contractually, practically, financially and irreparably.

20 75. First, Plaintiffs have not received the benefit of their contractual bargain.

21 76. Second, Plaintiffs are left to pursue claims against ICANN within its flawed and
22 non-compliant dispute resolution framework, without critical procedural safeguards but at greater
23 expense.

24 77. Third, within that framework Plaintiffs are left without any, much less meaningful
25 and independent, Ombudsman review of their issues made subject to Reconsideration, which
26 causes Plaintiffs irreparable harm by materially compromising the process, its fundamental
27 quality and its substantive outcome, in addition to also causing more protracted proceedings and
28 far greater expense.

78. Fourth, Plaintiffs suffer the absence of specially trained and community-chosen

1 expert Standing Panelists to resolve their issues (which even ICANN admits are critical), and
2 they are denied their right of *de novo* appeal to the *en banc* Standing Panel. Instead, Plaintiffs
3 are left with untrained and partisan panelists and partisan processes. This, again, causes
4 Plaintiffs irreparable harm by materially compromising the process, its fundamental quality and
5 its substantive outcome, in addition to also causing more protracted proceedings and far greater
6 expense.

7 79. A portion of Plaintiffs' related injuries are qualitative and inestimable -- the value
8 of fairness of proceedings and quality of adjudication and outcome is not capable of
9 quantification. And it would not be debatable if ICANN simply followed the rules that it enacted
10 in its own bylaws. And of course, Plaintiffs have had to pay more because ICANN is supposed
11 to pay for the Standing Panel if it existed. Plaintiffs also suffer under the greater expense of
12 potentially unnecessary litigation caused by decisions that a bylaw-compliant Standing Panel
13 might make differently, and without appellate review. The lack of a Standing Panel results in
14 less adherence to panel precedents, and so again, less certainty of outcome and greater expense
15 where none would be incurred at all if an effective Ombudsman process was in place and the
16 Standing Panel was properly constituted. Plaintiffs are left with an inferior and flawed dispute
17 resolution process that ignores many specific and admittedly critical features of ICANN's so-
18 called Accountability Mechanisms, and greater expense. At the same time, Plaintiffs are also left
19 to labor under ICANN's purported, related covenant not to sue and release to the extent these
20 may be applicable to a given issue or dispute. In other words, ICANN wants to keep people out
21 of court and in its dispute resolution process, but it doesn't want to follow its own rules for that
22 process, or to pay for it.

23 80. Finally, the improper delegation of the .hotel gTLD would cause Plaintiffs
24 inestimable and irreparable financial damage and lost commercial opportunities.

25 81. Because at their core Plaintiffs' injuries and damages are chiefly qualitative and
26 irreparable rather than quantitative, and because it may not even be possible to quantify many
27 such injuries and damages, Plaintiffs have no adequate remedy at law. As such, Plaintiffs seek
28 specific performance of the contractual bylaws' provisions regarding ICANN's so-called
Accountability Mechanisms. Moreover, Plaintiffs seek both mandatory and prohibitory public

1 injunctions directing ICANN and its officers to implement the promised dispute resolution
2 procedures and safeguards prior to adjudicating Plaintiffs' substantive claims thereunder.

3 **Plaintiffs' Injury and Their Discovery of the Falsity of ICANN's Representations**

4 82. Plaintiffs were injured by ICANN's breaches and misrepresentations at
5 approximately the same time in 2019 when they were forced into the pending IRP and, as such,
6 were denied the bylaw Accountability Mechanisms. Each Plaintiff discovered ICANN's fraud at
7 about the same time, although each's discovery may have been at different specific times. While
8 Plaintiffs became aware of ICANN's representations at varying times, all Plaintiffs relied on
9 ICANN's repeated and continuing representations and promises of performance and renewed
10 promises of performance, i.e., of implementation and adherence to its Accountability
11 Mechanisms bylaws. ICANN, moreover, continues to make such promises even up until today.
12 Plaintiffs discovered ICANN's true intent as it affected Plaintiffs, when Plaintiffs repeatedly
13 requested and were denied implementation and use of the bylaw Accountability Mechanisms.
14 Prior to that time, Plaintiffs relied on ICANN's plainly stated, supposed intent to implement the
15 Accountability Mechanisms. They relied on its very public statements to that effect. They relied
16 on its enactment of bylaws to that effect. They relied on its successive revision and amendment
17 of those bylaws, each time stating more detailed descriptions of the procedural mechanisms and
18 safeguards, and their fundamental importance to ICANN's Mission, and describing the
19 implementation efforts as ongoing and imminent. Plaintiffs relied on ICANN's *seriatim* public
20 statements, including its experts' and attorneys' pronouncements that the Accountability
21 Mechanisms bylaws should and would be implemented soon after the bylaws were enacted.
22 Plaintiffs did not and could not have discovered that ICANN had no real intention to comply,
23 because ICANN continually misrepresented its intentions, stating repeatedly that compliance was
24 both important to ICANN and its Mission, and imminent. In sum, ICANN concealed its true
25 intentions by continuing to make exactly contrary -- equally misleading -- representations,
26 precluding Plaintiffs' discovery of the true facts. Together with Plaintiffs' participation in
27 ICANN's ultimately flawed dispute resolution process, ICANN's concealment of the related,
28 true facts not only prevented discovery of Plaintiffs' claims, but also requires equitable tolling of
any intervening statute, if any.

1
2 **COUNT ONE**

3 **(Breach of Contract -- Violation of Bylaws)**

4 83. Plaintiffs incorporate by reference each and every paragraph above as if restated
5 here.

6 84. ICANN's bylaws form part of its contractual terms with each Plaintiff. Those
7 bylaws are expressly incorporated by this reference and require, *inter alia*, that ICANN
8 implement the Standing Panel, that it provide Ombudsman review of Requests for
9 Reconsideration, and that it pay all IRP "administrative" fees -- each requirement as set forth
10 specifically in detail in the bylaws.

11 85. ICANN has materially breached each of the related bylaw provisions and thus
12 breached its contracts with Plaintiffs. ICANN, contrary to the advice of its attorneys and experts,
13 and the pronouncements of at least three separate IRP Panel decisions, has not constituted the
14 Standing Panel nor made significant progress towards doing so. Nor has ICANN provided for
15 any meaningful Ombudsman review or input into Request for Reconsideration decisions, or paid
16 IRP fees -- each as promised by its bylaws.

17 86. Plaintiffs supplied legally sufficient consideration for their contract with ICANN,
18 including gTLD name application fees of \$185,000.00 each, reciprocal promises and related
19 obligations, modified promises and related obligations. Plaintiffs have performed all of the
20 obligations they are required to perform under their contracts with ICANN, save for those that
21 have been excused by ICANN's material breaches. All conditions precedent to ICANN's
22 performance have been satisfied.

23 87. As a direct and proximate result of ICANN's material breaches, Plaintiffs have
24 each been injured and damaged contractually, practically, financially and at least in part
25 irreparably, as alleged above.

26 88. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

27 //

28 //

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1
2 **COUNT TWO**

3 **(Fraud-in-the-Inducement -- Deceit, Civil Code Section 1709, 1710, et seq. -- Specific**
4 **Contractual Provisions)**

5 89. Plaintiffs incorporate by reference each and every paragraph above as if restated
6 here.

7 90. ICANN and its authorized agents made continuing false representations over time
8 to its community, and Plaintiffs, regarding ICANN's Accountability Mechanisms that induced
9 Plaintiffs to accept and/or adhere to several specific terms contained in their contracts with
10 ICANN including the at issue bylaws themselves and ICANN's purported, related covenant not
11 to sue and release terms. Thus, as alleged, ICANN and its agents represented repeatedly in its
12 Board Resolutions, bylaws and other public documents, and continue to represent, that it would
13 implement all of the bylaw provisions covering the Accountability Mechanisms. ICANN and its
14 agents' specific misrepresentations, and the dates and media thereof, are set forth above.

15 91. Each such representation was false when made and ICANN and its agents knew of
16 that falsity, in that, *inter alia*, ICANN never intended to implement an effective Ombudsman
17 procedure, the promised Standing Panel, nor to pay IRP fees. ICANN and its agents made such
18 misrepresentations regarding the dispute resolution process specifically to induce the ICANN
19 community, including Plaintiffs, to contract and to continue to contract with ICANN. Indeed,
20 ICANN promised the Accountability Mechanism enhancements as a specific condition of the
21 community's acceptance of ICANN's proposal to divorce itself from U.S. Government oversight
22 over its core decisions. On specific condition that those enhancements would be timely made,
23 the community approved ICANN's proposal in 2016 -- relinquishing the accountability
24 mechanism of U.S. Government oversight -- and receiving nothing in return as ICANN has still
25 yet to implement the mechanisms designed to take its place.

26 92. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
27 agents' misrepresentations, to Plaintiffs' detriment. In reliance on the misrepresentations, in
28 example, Plaintiffs contracted with ICANN and accepted the bylaw Accounting Mechanisms and
the purported, related covenant not to sue and release, continued in their contracts with ICANN,
and agreed to bilateral contractual amendments requested by ICANN. Plaintiffs also continued

1 both their financial and work efforts and outlays within the application and delegation process.
2 Plaintiffs also paid fees to ICANN, in part for the guarantee of accountable and fair application
3 review and dispute resolution processes as designed by the community and promised by ICANN
4 in its bylaws. And Plaintiffs have been forced to pay IRP fees that ICANN, pursuant to specific
5 provisions of its bylaws, is responsible to incur.

6 93. As a direct and proximate result of ICANN's material misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 94. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT THREE**

11 **(Deceit, Civil Code Section 1709, 1710, et seq.)**

12 95. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 96. ICANN and its authorized agents made continuing false representations over time
15 to Plaintiffs regarding ICANN's dispute resolution processes that induced Plaintiffs to accept
16 and/or to adhere to their contracts with ICANN. Thus, as set forth above, ICANN and its agents
17 represented repeatedly in its Board Resolutions, bylaws and other public documents that it would
18 implement all of the bylaw-enshrined Accountability Mechanisms. ICANN and its agents'
19 specific misrepresentations, and the dates and media thereof, are set forth above.

20 97. Each such representation was false when made and ICANN and its agents knew of
21 that falsity, in that, *inter alia*, ICANN never intended to implement an effective Ombudsman
22 procedure, the promised Standing Panel, nor to pay IRP fees. ICANN and its agents made such
23 misrepresentations regarding the dispute resolution process specifically to induce Plaintiffs to
24 contract and to continue to contract. For example, ICANN amended its bylaws to include the
25 Accountability Mechanisms, but then intentionally and deceitfully undermined and refused to
26 implement them as designed and specified in the bylaws.

27 98. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
28 agents' deceit, to Plaintiffs' detriment. In reliance on the misrepresentations, in example,
Plaintiffs contracted with ICANN, continued in their contracts with ICANN, and agreed to

1 contractual amendments requested by ICANN. Plaintiffs also continued both their financial and
2 work efforts and outlays within the application and delegation processes. Plaintiffs also paid
3 fees to ICANN, in part for the guarantee of accountable and fair contract review and dispute
4 resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP fees
5 that ICANN, pursuant to specific provisions of its bylaws, is responsible to incur.

6 99. As a direct and proximate result of ICANN's material misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 100. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT FOUR**

11 **(Grossly Negligent Misrepresentations)**

12 101. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 102. ICANN and its authorized agents made several false representations to Plaintiffs
15 regarding ICANN's Accountability Mechanisms that induced Plaintiffs to accept and/or to
16 continue in their contracts with ICANN. Thus, as set forth above, ICANN and its agents
17 represented repeatedly in its Board Resolutions, bylaws and other public documents that it would
18 implement all of the bylaw provisions' Accountability Mechanisms.

19 103. Each such representation was false when made and ICANN and its agents should
20 have known of that falsity and were grossly negligent and/or willfully blind in making the related
21 representations. ICANN and its agents made such misrepresentations regarding the
22 Accountability Mechanisms specifically to induce Plaintiffs to contract and to continue to
23 contract. ICANN failed then to comply with the most basic of its obligations; it did nothing at
24 all, notwithstanding the facts that its experts and attorneys advised ICANN on several occasions
25 that it should implement the Accountability Mechanisms "immediately," as designed and
26 specified in the bylaws and at least three IRP panels declaring ICANN in violation of its bylaws
27 for failing to have done so.

28 104. Plaintiffs were ignorant of the true facts and reasonably relied on ICANN and its
agents' grossly negligent misrepresentations, to Plaintiffs' detriment. In reliance on the

1 misrepresentations, in example, Plaintiffs contracted with ICANN, continued in their contracts
2 with ICANN, and agreed to contractual amendments requested or imposed by ICANN. Plaintiffs
3 also paid fees to ICANN, in part for the guarantee of accountable and fair contract review and
4 dispute resolution processes as promised by ICANN. And Plaintiffs have been forced to pay IRP
5 fees that ICANN, under specific provision of its bylaws, is responsible to incur.

6 105. As a direct and proximate result of ICANN's grossly negligent misrepresentations,
7 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
8 in part irreparably, as alleged above.

9 106. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

10 **COUNT FIVE**

11 **(Gross Negligence)**

12 107. Plaintiffs incorporate by reference each and every paragraph above as if restated
13 here.

14 108. ICANN was grossly negligent in the performance of its promises made to
15 Plaintiffs in their contracts. ICANN failed to comply with the most basic of its obligations; it did
16 nothing at all for at least six years. For example, ICANN amended its bylaws to include the
17 Accountability Mechanisms, but then, with gross negligence, undermined and refused to
18 implement them as designed and specified in the bylaws. Notwithstanding the fact that its
19 experts and attorneys advised ICANN on several occasions that it should implement the Standing
20 Panel immediately, and notwithstanding at least three IRP decisions so prescribing as well,
21 ICANN has yet to do so.

22 109. ICANN has also admitted that at least some of the Accountability Mechanisms it
23 has failed to implement are, essentially, critical ones -- in particular the Standing Panel.
24 Nonetheless, ICANN has done nothing at all to implement them for at least six years, without
25 any excuse or rationale whatsoever. ICANN says it will only take six or so months to provide
26 the Standing Panel for Plaintiffs' IRP, yet ICANN also refuses to stay the IRP proceedings to
27 comply with its own obligations.

28 110. As a direct and proximate result of ICANN's gross negligence, Plaintiffs have each
been injured and damaged contractually, practically, financially and at least in part irreparably,

1 as alleged above.

2 111. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

3 **COUNT SIX**

4 **(Public Benefit Corporation Bylaw Enforcement -- Cal. Corp. Code Section 14623)**

5 112. Plaintiffs incorporate by reference each and every paragraph above as if restated
6 here.

7 113. ICANN is an entity subject to the California Public Benefit Corporation law.
8 Under that law, this Court has the power to require ICANN to comply with its bylaws.

9 114. Cal. Corp. Code section 14623 provides that: “A benefit enforcement proceeding
10 may be commenced or maintained [by] persons as have been specified in the articles or bylaws
11 of the benefit corporation.”

12 115. ICANN’s bylaws also state that “. . . ICANN shall have a separate process for
13 independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant
14 . . .” Bylaws, Section 4.3(a). Such third party review may be brought to “[e]nsure that ICANN
15 does not exceed the scope of its Mission and otherwise complies with its Articles of
16 Incorporation and Bylaws.” Bylaws, Section 4.3(a). A Claimant is defined by ICANN as “any
17 legal or natural person, group, or entity . . . that has been materially affected by a Dispute. To be
18 materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and
19 causally connected to the alleged violation.”

20 116. Plaintiffs in this case have standing as IRP “Claimants” because they have suffered
21 harm directly caused by ICANN’s violations of its own bylaws. Accordingly, ICANN’s own
22 bylaws contemplate and explicitly describe persons and/or parties that are afforded standing to
23 bring such a claim against ICANN, including Plaintiffs. A guiding principle of ICANN’s
24 Accountability Mechanism enhancements was that those Accountability Mechanisms were not
25 intended to be exclusive of other remedies at law or equity, in any court or forum. And indeed,
26 ICANN has not challenged Plaintiffs’ standing as “Claimants” in the IRP.

27 117. Plaintiffs have been injured and damaged by ICANN’s failure to adhere to its
28 bylaws, as alleged, which also form part of ICANN’s contracts with each Plaintiffs.

118. As a direct and proximate result of ICANN’s failure to adhere to its bylaws as

1 alleged, Plaintiffs have each been injured and damaged contractually, practically, financially and
2 at least in part irreparably, as alleged above.

3 119. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

4 **COUNT SEVEN**

5 **(False Advertising Law – Cal. B&P Sections 17500 *et seq.*)**

6 120. Plaintiffs incorporate by reference each and every paragraph above as if restated
7 here.

8 121. As alleged above, ICANN has made many statements in connection with its
9 offering of gTLD registry application services, which it knew or should have known were false
10 at the time they were made, and which would be likely to deceive the public and Plaintiffs.

11 122. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

12 **COUNT EIGHT**

13 **(Unfair Competition -- Cal. B&P Code Sections 17200 *et seq.*)**

14 123. Plaintiffs incorporate by reference each and every paragraph above as if restated
15 here.

16 124. ICANN's conduct and failures to act, as alleged above, and in particular its
17 intentional misrepresentations as alleged, are both unfair and unlawful pursuant to the above-
18 referenced statutes and the common law of contract, fraud and deceit. ICANN's unfair and
19 unlawful acts also affect not only Plaintiffs but the entire, worldwide internet community and the
20 public generally.

21 125. As a direct and proximate result of ICANN's unfair and unlawful acts as alleged,
22 Plaintiffs have each been injured and damaged contractually, practically, financially and at least
23 in part irreparably, as alleged above.

24 126. Wherefore, Plaintiffs pray for judgment as set forth below in their prayer for relief.

25 **PRAYER FOR RELIEF**

26 Wherefore, Plaintiffs respectfully request that this Court enter judgment in their favor on
27 each and every count set forth above and award them relief including, but not limited to, the
28 following:

- 1. Specific performance of ICANN's contractual Accountability Mechanisms as set

1 forth in its bylaws, including meaningful, independent Ombudsman review of Plaintiffs’
2 Requests for Reconsideration, constitution of the expert, community-chosen Standing Panel to
3 adjudicate Plaintiffs’ IRP complaint and to provide *en banc* appeal of any IRP panel decision,
4 and payment of all IRP administrative fees and costs.

5 2. A mandatory public injunction requiring ICANN to implement the Accountability
6 Mechanisms in its bylaws as aforesaid, and a prohibitory public injunction forbidding ICANN
7 from flouting any such bylaws in the future.

8 3. An award of Plaintiffs’ reasonable attorneys’ fees pursuant to both, or either, the
9 California Public benefit corporation law and/or the private attorney general statute (Cal. Civ.
10 Proc. Code section 1021.5), as this is an action to enforce important rights affecting the public
11 interest.

12 4. Compensatory, general and/or special damages to be proven at trial, including for
13 attorneys’ and consultants’ fees otherwise not awarded.

14 5. Punitive damages to be proven at trial.

15 6. All recoverable costs.

16 7. Any other relief as the Court may deem appropriate.

17
18 **JURY DEMAND**

19 Plaintiffs respectfully request trial by jury as to all issues so triable.

20
21 Dated: October 30, 2020

Respectfully submitted,

22
23 By: /s/ *Mike Rodenbaugh*
24 Michael L. Rodenbaugh
25 LOZA & LOZA LLP
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