No. 16-56890

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBY GLEN, LLC,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, ET AL,

Defendants-Appellees.

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

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff Ruby Glen, LLC hereby files this Corporate Disclosure Statement pursuant to Federal Rule of Civil Procedure 7.1 as follows and states as follows:

1. Ruby Glen, LLC is a wholly owned subsidiary of Covered TLD, LLC.

2. Covered TLD, LLC is a wholly owned subsidiary of Donuts Inc.

3. No publicly held corporation owning 10% or more of its stock in Ruby Glen, LLC, Covered TLD, LLC, or Donuts Inc. exists.

Dated: August 30, 2017

COZEN O'CONNOR

By: *s/ Aaron M. McKown*
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INTRODUCTION

Defendant-Respondent the Internet Corporation for Assigned Names and Numbers ("ICANN") was granted a monopoly by the U.S. Department of Commerce to manage the assignment of all domain names worldwide for the benefit of the Internet community as a whole. In that capacity, ICANN developed an auction process to award qualified members of the public (known as domain name registries) the right to manage specific generic top level domains ("gTLDs"), such as .COM, .ORG, and .NET. The purpose of the process is to ensure that the domain name registry is competent to operate the gTLD, to provide a fair and level playing field for the gTLD applicants, and make sure that the management and ownership of the entity awarded the exclusive rights to operate a gTLD is transparent to the public.

In 2012, ICANN solicited qualified entities globally to apply to operate new gTLDs; it received nearly two thousand applications from the public in response. Plaintiff-Appellant Ruby Glen, LLC ("Ruby Glen") was one of seven domain name registries who applied to operate the .WEB gTLD. Where multiple applicants apply to obtain the rights to operate the same gTLD, the process may either be resolved privately among the applicants, or facilitated by ICANN as "an auction of last resort." ICANN conducts an auction of last resort only if the applicants cannot reach a unanimous private agreement. Any applicant who refuses a private agreement can force an auction of last resort for that gTLD. The process may be resolved privately

through various means, including a private auction. In a private auction, the losing bidders share the financial benefit amongst themselves. ICANN retains all of the proceeds from an auction of last resort.

In June 2016, Nu Dot Co, LLC ("NDC"), the only .WEB applicant that refused to resolve the gTLD process privately, admitted in writing to Ruby Glen that there had been an undisclosed change in both its management and its ownership in violation of the auction rules. Ruby Glen and other .WEB applicants requested that ICANN conduct a reasonable investigation into these admissions and to postpone the auction. ICANN refused and instead proceeded with the auction as scheduled. NDC won the auction with a winning bid of $135 million – all of which was paid to ICANN. Within days of the auction, third-party VeriSign, Inc. ("VeriSign") admitted in a press release that it had previously acquired from NDC, the rights to the .WEB and .WEBS gTLDs, and had funded NDC's bid in direct violation of the auction rules.

Ruby Glen filed its Amended Complaint ("FAC") in an effort to hold ICANN accountable for its refusal to investigate and unwind NDC's disqualifying sale of its application to VeriSign. In response, ICANN filed a motion to dismiss the FAC pursuant to Rule 12(b)(6), which the district court granted on the grounds that a release, covenant not to sue, and limitation of liability provision contained in

ICANN's standard adhesion contract (the "Exculpatory Clauses") barred each and every claim as a matter of law.

The district court's ruling was in error because: (1) the Exculpatory Clauses, when strictly construed, do not apply to the claims asserted in the FAC; (2) the parties' agreement involves a matter of public interest, which renders the Exculpatory Clauses void under California common law; (3) the Exculpatory Clauses are void on their face pursuant to California Code of Civil Procedure section 1668 ("Section 1668") because they release ICANN from intentional misconduct, gross negligence, and intentional or willful violations of the law; (4) Ruby Glen's second (tortious breach) and fourth (unfair business practices) causes of action specifically allege intentional misconduct, rendering the Exculpatory Clauses void as applied to each claim; (5) the enforcement of the Exculpatory Clauses to the first cause of action (breach of contract) would render the parties' agreement illusory; and (6) Ruby Glen should have been afforded at least one opportunity by the district court to amend its pleading.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. § 1332(a). On November 28, 2016, following a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the district court dismissed the underlying action in its entirety with prejudice and entered final judgment. (ER10.) Appellant

filed its notice of appeal on December 22, 2016. (ER1.) Jurisdiction is conferred in this Court under 28 U.S.C. § 1291. The filing of the appeal was timely. FRAP 4(a)(1)(A).

ISSUES PRESENTED

1. Do the Exculpatory Clauses in ICANN's Guidebook, when strictly construed, apply to any of the causes of action alleged by Ruby Glen?
2. Does the contract between the parties involve the "public interest" so as to render the Exculpatory Clauses void under California law?
3. Are the Exculpatory Clauses void on their face under Section 1668 because they release ICANN from future liability for gross negligence, intentional misconduct, and negligent or willful violation of any statute or regulation?
4. Are the Exculpatory Clauses void as applied to Ruby Glen's second and fourth causes of action given that each is based on allegations of intentional misconduct, which for the purpose of Rule 12(b)(6) must be accepted as true?
5. Are the Exculpatory Clauses void as unconscionable?
6. Would the enforcement of the Exculpatory Clauses as to Ruby Glen's first cause of action for breach of contract render the parties' agreement illusory?

7. Did the district court err in dismissing the Amended Complaint without leave to amend?

ADDENDUM

Attached hereto is the separate addendum containing legal authorities required by Circuit Rule 28-2.7.

STATEMENT OF THE CASE

The following facts are alleged in the FAC and are treated as true for purposes of this appeal:

I. ICANN

ICANN is a California non-profit corporation established "for the benefit of the Internet community as a whole . . . ." (ER644.) ICANN represents that it carries out its activities through "open and transparent processes that enable competition and open entry in Internet-related markets." (ER644.)

ICANN's ongoing role is to provide technical coordination of the Internet's domain name system by introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system. (ER613.) ICANN was delegated by the U.S. Department of Commerce with the task of administering gTLDs such as .COM, .ORG, or, in this case, .WEB. (ER613.) In that role, ICANN is the sole organization worldwide with the power and ability to administer the bid processes for, and assign rights to, gTLDs to domain

name registries, such as to Ruby Glen. (ER615.) As of 2011, there were only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG. (ER615.)

ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation. (ER614.) ICANN's Bylaws require ICANN, its Board of Directors and its staff to act in an open, transparent and fair manner with integrity. (ER614.) Specifically, the ICANN Bylaws require ICANN, its Board of Directors, and staff to:

a. "Mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness."

b. "[Act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected."

c. "Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

d. Ensure that it does "not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

e. "[O]perate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

(ER614.)

II. THE NEW gTLD PROGRAM AND THE APPLICANT GUIDEBOOK

In or about 2011, ICANN approved a significant expansion of the number of the gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains Internet Expansion Program (the "New gTLD Program"). (ER615.) In January 2012, as part of the New gTLD Program, ICANN invited eligible parties from around the world to submit applications for the rights to operate various new gTLDs, including the .WEB and .WEBS gTLDs. (ER615.) In return, ICANN agreed to (a) conduct the process in a transparent manner and (b) abide by its own bylaws and the rules and guidelines set forth in ICANN's gTLD Applicant Guidebook (the "Guidebook"). (ER615.)

The Guidebook obligates ICANN to, among other things, conduct a thorough investigation into each applicant background. (ER615.) This investigation is necessary to ensure the integrity of the application process, including a potential auction of last resort, and the existence of a level playing field among those competing to secure the exclusive rights to a particular new gTLD. (ER615.) It also ensures that each applicant is capable of administering any new gTLD, whether

secured at the auction of last resort or privately beforehand, thereby benefiting the public at large. (ER615.)

ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Program. (ER615.) This investigative authority, provided by each applicant as part of the terms and conditions in the guidelines contained in the Guidebook, is set forth in relevant part in Section 6 as follows:

> 8. … In addition, Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:
> …
> c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; …
> …
> 11. Applicant authorizes ICANN to:
> a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
> b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession…

(ER616.)

To aid ICANN in fulfilling its investigatory obligations, "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" are required to provide extensive background information in their respective applications. (ER616.) In

addition to serving the purposes noted above, this information also allows ICANN to determine whether an entity or individuals associated with an applicant have engaged in the automatically disqualifying conduct set forth in Section 1.2.1 of the Guidebook, including convictions of certain crimes or disciplinary actions by governments or regulatory bodies. (ER616.) Finally, this background information is important to provide transparency to other applicants competing for the same gTLD. (ER616.)

Indeed, ICANN deemed transparency into an applicant's background so important when drafting the Guidebook that applicants submitting a gTLD application have a continuing obligation to notify ICANN of "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant." (ER616, 617.)

III. THE EXCULPATORY CLAUSE AT ISSUE

The Guidebook, which ICANN drafted, is a 338-page electronic document available on ICANN's website. (ER717.) Applicants are deemed to have consented to the Guidebook's terms and conditions simply by submitting their gTLD application. (ER717.)

Paragraph 6 of "Module 6" on page 334 of the Guidebook contains the following release:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application.

(ER1051.) Immediately following the release, within the same paragraph, is the following covenant not to sue:

> APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION.

(ER1051.) Immediately following the covenant not to sue, also within the same paragraph, is the following limitation of liability provision:

> APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT

> TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD . . .

(ER1051.)

These consolidated clauses were not subject to negotiation. (ER617.) To the extent they were presented to an applicant, it was done on a take it or leave it basis. (ER617.) An applicant who voices an objection to any terms set forth in the Guidebook, including the Exculpatory Clauses, will not be allowed to participate in the gTLD auction. (ER617.) These clauses are entirely one-sided in that they allow ICANN to absolve itself of specified wrongdoing without affording any comparable rights or remedies to applicants. (ER617.) Nor do the clauses apply equally as between ICANN and the applicants because they lack reciprocity. (ER617.)

In lieu of the rights ICANN claims are waived by these clauses, ICANN purports to provide applicants with an optional independent review process ("IRP") as a means to challenge ICANN's final decision with respect to an applicant's gTLD application. (ER617) The IRP is essentially non-binding, non-mandatory arbitration,[1] operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators.

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[1] The language of the non-mandatory, non-binding arbitration clause contained within the same paragraph as the Exculpatory Clauses reads: "APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION." (ER1051.)

(ER617.) The IRP is officially identified by ICANN as an "accountability mechanism." (ER617.)

In accordance with the IRP, any applicant who seeks to challenge a final decision by ICANN regarding one's application may submit a request for independent review of that decision or action. (ER617-618.)

IV. THE AUCTION PROCESS FOR NEW gTLDS

A large number of new gTLDs made available by ICANN in 2012 received multiple applications. (ER618.) In accordance with the Guidebook, where multiple new gTLD applicants apply to obtain the rights to operate the same new gTLD, those applicants are grouped into a "contention set." (ER618.)

Pursuant to the Guidebook, a contention set may be resolved privately among the members of the contention set or facilitated by ICANN as an auction of last resort. (ER618.) An ICANN auction of last resort will only be conducted when the members of a contention cannot reach agreement privately. (ER618.) By refusing to agree to resolve a contention set privately, any one member of a contention set has the ability to force the other members, all of whom may be willing to resolve the contention set privately, to an ICANN auction of last resort. (ER618.)

The manner in which a contention set is resolved determines which entities will receive the proceeds from the winning bid. When a contention set is resolved privately, ICANN receives no financial benefit. (ER618.) Rather, that benefit is

shared amongst the losing bidders of the contention set. (ER618.) In contrast, if an auction is one of last resort, the entirety of the auction proceeds go to ICANN. (ER618.)

V. PLAINTIFF'S APPLICATION FOR THE .WEB gTLD

In May 2012, Ruby Glen submitted an application for the .WEB gTLD along with the mandatory application fee of $185,000. (ER619.) In consideration of Ruby Glen paying the application fee, ICANN agreed to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Guidebook and the auction rules, and in conformity with the laws of fair competition. (ER619.) Ruby Glen would not have paid the mandatory application fee absent the mutual consideration and promises set forth in ICANN's Bylaws, Articles of Incorporation, Guidebook, and auction rules. (ER619.)

Ruby Glen's application passed ICANN's "Initial Evaluation" process on July 19, 2013. As a result, Ruby Glen became an approved member of the .WEB contention set, which also included an application for the.WEBS gTLD. (ER619.)

VI. NDC'S APPLICATION FOR THE .WEB gTLD

On June 13, 2012, NDC submitted an application for the .WEB gTLD. (ER619.) Among other things, NDC provided "the identification of directors,

officers, partners, and major shareholders of that entity." (ER619.) As relevant here, NDC provided the following response to Sections 7 and 11 of its application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

By submitting its application and electing to participate in the .WEB contention set, NDC expressly agreed to the terms and conditions set forth in the Guidebook as well as auction rules, including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Guidebook. (ER619 - 620.)

The Guidebook requires an applicant to notify ICANN of any changes to its application, including the applicant background screening information required under Section 1.2.1; the failure to do so can result in the denial of an application. (ER620.) For example, Section 1.2.7 imposes an ongoing duty to update "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant." (ER620.) Similarly, pursuant to Section 6.1, "[a]pplicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading." (ER620-621.)

In addition to a continuing obligation to provide complete, updated, and accurate information related to its application, Section 6.10 of the Guidebook, strictly prohibits an applicant from "resell[ing], assign[ing], or transfer[ring] any of applicant's rights or obligations in connection with the application." (ER621.) An applicant that violates this prohibition is subject to disqualification from the contention set. (ER621.)

VII. NDC'S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS APPLICATION

On or about June 1, 2016, Ruby Glen learned that NDC was the only member of the .WEB contention set unwilling to resolve the contention set in advance and in lieu of the ICANN auction of last resort. (ER621.) At the time, Ruby Glen found

the decision unusual given NDC's historical willingness and enthusiasm to participate in the private resolution process and in the .WEB contention set. (ER621.) Overall, NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were resolved privately with NDC's agreement. (ER621.) The auction for the .WEB gTLD is the first auction in which NDC pushed for a private auction and then an ICANN auction of last resort. (ER621.)

On June 7, 2016, Ruby Glen contacted NDC in writing to inquire as to whether NDC might reconsider its decision to forego resolution of the .WEB contention set prior to ICANN's auction of last resort. (ER621.) In response, Jose Ignacio Rasco III ("Mr. Rasco"), who was identified by NDC on its .WEB application as a Manager and the CFO for NDC, stated that NDC's position had not changed. (ER621.) Mr. Rasco also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application as Secondary Contact, Manager, and COO, was "no longer involved with [NDC's] applications." (ER621.) Mr. Rasco also made statements indicating a potential change in the ownership of NDC, including an admission that the board of NDC had changed to add "several others." (ER621-622.) Mr. Rasco further stated that he had to check with the "powers that be," implying that he and his associate on the email, Juan Diego Calle, who was identified on NDC's .WEB application as a Manager and the CEO of NDC, were no longer in control. (ER622.)

Noting that NDC's conduct and statements (a) appeared to directly contradict information in NDC's application and (b) suggested that NDC had either resold, assigned, or transferred its rights in the application in violation of its duties under the Guidebook, Ruby Glen diligently contacted ICANN staff in writing with the discrepancy on or about June 22, 2016 to understand who it was competing against for .WEB and to improve transparency over the process for ICANN and the other applicants. (ER622.)

After engaging in a series of discussions with ICANN staff, Ruby Glen decided to formally raise the issue with the ICANN Ombudsman on or about June 30, 2016, which went without a response. (ER622.) At every opportunity, Ruby Glen raised the need for a postponement of the .WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the contradictory representations made by NDC in relation to its pending application; (b) address NDC's continued status as an auction participant; and (c) provide all the other .WEB applicants the necessary transparency into who they were competing against. (ER622-623.)

On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund Technologies GmbH, each .WEB applicants, sent correspondence to ICANN stating their own concerns in proceeding with the auction of last resort on July 27, 2016. (ER623.) The correspondence stated:

> We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

(ER623.)

VIII. ICANN'S DECISION TO PROCEED WITH THE .WEB AUCTION

On July 13, 2016, ICANN issued a statement denying the collective request of multiple .WEB applicants to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in NDC's application. (ER623.) Without providing any detail, ICANN rejected those requests as follows:

> Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

(ER623.)

Contrary to its obligations of accountability and transparency, ICANN's decision did not address the manner or scope of the claimed investigation nor did it address whether a specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of NDC's board, or (c) any change in ownership—the very issues raised by NDC's own admissions. (ER623-624.) The correspondence was also silent as to any investigation into whether NDC had resold, assigned, or transferred all or some of the rights to its .WEB application. (ER624.)

Ruby Glen was unable to learn any further information regarding the extent of the investigation undertaken by ICANN, other than it was limited to inquiries only to NDC and no independent corroboration was sought or obtained. (ER624.)

Despite the clear credibility issues raised by NDC's own contradictory statements, ICANN conducted no further investigation. (ER624.) Indeed, ICANN informed Ruby Glen that it never even contacted Mr. Bezsonoff or interviewed the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion. (ER624.)

The financial benefit to ICANN of resolving the .WEB contention set by way of an ICANN auction is no small matter—ICANN's stated net proceeds from the 15 ICANN auctions conducted since June 2014 total $236,357,812. (ER624.) The most profitable gTLDs from those auctions commanded winning bids of $135,000,000 (.WEB/.WEBS), $41,501,000 (.SHOP), $25,001,000 (.APP), $6,706,000 (.TECH), $5,588,888 (.REALTY), $5,100,175 (.SALON) and $3,359,000 (.MLS). (ER624.)

IX. RUBY GLEN'S REQUEST FOR RECONSIDERATION

ICANN's Bylaws provide an "accountability mechanism" by which an entity that believes it was materially affected by an action or inaction by ICANN that contravened established policies and procedures may submit a request for

reconsideration or review of the conduct at issue. (ER624.) The review is conducted by ICANN's Board Governance Committee. (ER624.)

On July 17, 2016, Ruby Glen and Radix FZC, an affiliate of another member of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in response to the actions and inactions of ICANN in connection with the decision set forth in ICANN's July 13, 2016 correspondence. (ER624-625.)

The request sought reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of the request made by multiple contention set members to postpone the .WEB auction of last resort, which would have provided ICANN the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a .WEB contention set member. (ER625.)

The request highlighted the following issues:

a. ICANN's failure to forego a full and transparent investigation into the material representations made by NDC was a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation, Bylaws and Guidebook.

b. ICANN was the party with the power and resources necessary to delay the ICANN auction of last resort while the accuracy of

NDC's current application was evaluated utilizing the broad investigatory controls contained in the Guidebook, to which all applicants, including NDC, agreed.

c. Postponement of the .WEB auction of last resort provided the most efficient manner for resolving the current dispute for all parties by (i) sparing ICANN and the many aggrieved applicants the time and expense of legal action while (ii) avoiding the possible unwinding of the ICANN auction of last resort should it proceed.

d. ICANN'S July 13, 2016 decision raised serious concerns as to whether the scope of ICANN's investigation was impacted by the inherent conflict of interest arising from a perceived financial windfall to ICANN if the auction of last resort proceeded as scheduled.

e. ICANN's New gTLD Program Auctions guidelines stated that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms,**" i.e., no pending Ombudsman complaints, Reconsideration Requests or IRPs.

(ER625-626.)

The issues raised by Ruby Glen and Radix FZC were similar to those raised by applicants for other gTLDs in similar contexts; issues that were deemed well-founded by an independent panel assigned to review ICANN's compliance with its mandatory obligations in relation to its administration of the application processes for the New gTLD Program. (ER626.)

On July 21, 2016, ICANN denied the Request for Reconsideration. (ER626.) In doing so, ICANN relied solely on statements from NDC that directly contradicted those contained in NDC's earlier correspondence. (ER626.) Once again, despite the credibility issues raised by NDC's own contradictory statements, ICANN failed and refused to contact Mr. Bezsonoff or to interview the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion. ICANN also failed to investigate whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application. (ER626.)

On July 22, 2016, Ruby Glen initiated ICANN's Independent Review Process by filing ICANN's Notice of Independent Review. (ER626.)

X. THE .WEB AUCTION RESULTS

After the district court denied Ruby Glen's ex parte application for TRO on July 26, 2017, the .WEB auction proceeded as scheduled the next day. (ER626.) ICANN subsequently reported NDC as the winning bidder of the .WEB gTLD. According to ICANN, NDC's winning bid amount was $135 million, more than

triple the previous highest price paid for a new gTLD and a sum greater than all of the prior ICANN auction proceeds combined. (ER626-627.)

On July 28, 2016, non-party VeriSign, Inc. ("VeriSign"), the registry operator for the .COM and .NET gTLDs, filed a Form 10-Q with the Securities and Exchange Commission in which it disclosed that "[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016." (ER627.)

On August 1, 2016, VeriSign confirmed via a press release that the approximately $130 million "commitment" referred to in its Form 10-Q was, in fact, an agreement entered into with NDC "wherein [VeriSign] provided funds for [NDC]'s bid for the .web TLD" in an effort to acquire the rights to the .WEB gTLD. (ER627.) VeriSign stated that its acquisition of the .WEB gTLD would be complete after NDC "execute[s] the .web Registry Agreement with [ICANN]" and then "assign[s] the Registry Agreement to VeriSign upon consent from ICANN." (ER627.)

VeriSign did not apply for the .WEB gTLD, it was not a disclosed member of the .WEB contention set, and it was not approved to participate in the auction. (ER627.) At no point prior to the .WEB auction did NDC disclose (a) its relationship with VeriSign; (b) the fact that NDC had become a proxy for VeriSign as a result of

VeriSign agreeing to fund NDC's .WEB auction bids; or (c) the fact that NDC had resold, assigned, or transferred all or some of its rights to its .WEB application to VeriSign prior to the auction date in breach of the Guidebook. (ER627.)

XI. DISTRICT COURT PROCEEDINGS

Ruby Glen filed its original complaint on July 22, 2016. (ER1057.) Concurrent with the filing of its pleading, Ruby Glen also sought a temporary restraining order to prevent ICANN from conducting the auction for the .WEB gTLD until a thorough investigation occurred. (1057.) On July 26, 2016, the district court denied Ruby Glen's request. (ER1058.)

On August 8, 2016, Ruby Glen filed its FAC, the operative pleading in the matter. (ER610.) On October 26, 2016, Ruby Glen filed a motion for expedited discovery in order to gather additional information in support of its claims. (ER245.) That same day, ICANN filed a motion to dismiss the FAC pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (ER209.) The parties filed their respective oppositions on November 7, 2016 and their respective reply briefs in support of their motions on November 14, 2016. (ER179, 69, 59, 31, 22.) After vacating oral argument on November 23, 2016, the district court issued an order on November 28, 2016 granting ICANN's motion on the single ground that the Exculpatory Clauses barred all of Ruby Glen's claims as a matter of law. (ER20, 12.) The district court

entered judgment concurrently with its order. (ER10.) On December 22, 2016, Ruby Glen filed its notice of appeal. (ER1.)

SUMMARY OF THE ARGUMENT

The law is well-settled that exculpatory clauses are disfavored generally and void as against public policy in California if they part of a contract involving a matter of public interest or if they seek to absolve a party with respect to its gross negligence, intentional misconduct, or willful or negligent violation of a statute or regulation. In the event an exculpatory provision is not void, it will be strictly construed against the person seeking enforcement.

A strict construction of the Exculpatory Clauses in the Guidebook renders them inapplicable to the claims Ruby Glen asserted in this action. Those clauses are replete with language limiting their application to actions or decisions by ICANN with respect to Ruby Glen's application. Ruby Glen, however, does not assert any claims regarding ICANN's handling of **its** application. Rather, Ruby Glen seeks to hold ICANN responsible for its intentional, negligent, and reckless refusal to conduct a reasonable investigation into NDC's application and the transfer of NDC's application rights to VeriSign in violation of ICANN's rules and procedures. As a result, the Exculpatory Clauses relied upon by the district court in dismissing Ruby Glen's case with prejudice do not apply to the claims alleged.

Even if the claims Ruby Glen asserted fall within the scope of the Exculpatory Clauses, those clauses are void because the agreement at issue concerns a matter of public interest. The California Supreme Court has established a six-part test to determine whether an agreement affects the public interest. While only some of the factors need to be met in order to void such clauses, all six factors are satisfied in this case: (1) the Internet is the type of business subject to regulation; (2) the party seeking exculpation (ICANN) is engaged in performing a service of great importance to the public; (3) ICANN holds itself out as willing to consider all qualified members of the public to operate gTLDs; (4) as a monopoly solely in charge of assigning rights to gTLDs, ICANN possesses a decisive advantage in bargaining strength over gTLD applicants; (5) in exercising that superior bargaining power, ICANN confronts all gTLD applicants with a standard adhesion contract containing the Exculpation Clauses without allowing for any gTLD applicant to pay an additional fee to avoid their effect; and (6) as a result of the transaction, Ruby Glen placed itself under the control of ICANN, subject to the risk of ICANN's carelessness. The existence of all six public interest factors renders the Exculpatory Clauses void as against California public policy.

The Exculpatory Clauses are independently void on their face under Section 1668. California law is well-settled that a contract that seeks to release a party from future liability for its intentional misconduct, gross negligence, or willful or

negligent violation of a statute is void *on its face*. The Exculpatory Clauses purport to release ICANN and its affiliates from "any and all" claims of any kind whatsoever relating to Ruby Glen's application. The Exculpatory Clauses do not carve out any exceptions, including those claims that fall within Section 1668's prohibition. As a result, the clauses are void *ab initio*.

The Exculpatory Clauses are also void in their application as to the second (tortious breach of the covenant of good faith and fair dealing) and fourth (violation of California's unfair competition law) causes of action, both of which are predicated on specifically alleged acts of intentional misconduct by ICANN. They are also void in their application as to the first cause of action (breach of contract) because enforcement would render the parties' agreement illusory, a construction prohibited by California law.

The Exculpatory Clauses are also unconscionable. The clauses are procedurally unconscionable because they are part of a standard adhesion contract that is not subject to negotiation of any kind and is a mandatory condition to participation in the gTLD process which is offered by the only entity in the world authorized to assign domain names. The clauses are also substantively unconscionable because they are egregiously one-sided, and because the mandatory requirement that an applicant agree to the Exculpatory Clauses as a condition to

participation in the gTLD auction process constitutes an unlawful agreement under Section 1668.

Lastly, given the various circumstances that preclude the enforcement of Exculpatory Clauses under California law and the fact that this was the first motion to challenge Ruby Glen's pleading, the district court erred in not granting Ruby Glen leave to amend.

STANDARD OF REVIEW

This Court "reviews *de novo* the district court's grant of a motion to dismiss pursuant to Rule 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the non-moving party." *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012).

ARGUMENT

I. THE EXCULPATORY CLAUSES DO NOT APPLY TO ANY CAUSE OF ACTION[2]

California courts have long recognized the public policy disfavoring contractual attempts to avoid future liability for one's own negligence. *See, e.g.*,

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[2] Ruby Glen acknowledges that this and several other arguments in this brief were not asserted in opposition to ICANN's dense motion to dismiss and thus, are new on appeal. While generally this Court will not consider new arguments on appeal, this case falls squarely within the exception to the general rule because "the issue[s are] purely one of law and the necessary facts are fully developed." *Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986). Moreover, this Court has stated that it "review[s] legal issues on appeal de novo, whether or not they were

Frittelli, Inc. v. 350 North Canon Drive, LP, 202 Cal.App.4th 35, 43 (2011) (citations omitted); *Basin Oil Co. v. Baash-Ross Tool Co*., 125 Cal.App.2d 578, 594 (1954). This public policy is expressed both in common law and in California Civil Code section 1668. *See City of Santa Barbara v. Superior Court*, 41 Cal.4th 747, 754-55 (2007). As a result, California courts have held that exculpatory clauses, if enforceable, are to be strictly construed against the person relying upon them. *See Frittelli*, 202 Cal.App.4th at 44 (citation omitted); *see also Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d 1148, 1153 (1990) ("For it to be valid and enforceable, a written release exculpating a tortfeasor from liability for future negligence or misconduct must be clear, unambiguous and explicit in expressing the intent of the parties[, and] . . . 'comprehensive in each of its essential details [so as to] clearly notify the prospective releasor or indemnitor of the effect of signing the agreement.'").

It is also well-settled that any ambiguities in a document must be construed strictly against the drafter. *See Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal. App. 4th 1441, 1448 (1997) ("A well-settled maxim states the general rule that ambiguities in a form contract are resolved against the drafter."). Because this appeal is one from an order granting ICANN's motion to dismiss pursuant to Rule

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raised below . . . ." *United States v. United States District Court for the Southern District of California*, 384 F.3d 1202, 1205 (9th Cir. 2004) (citing *United States v. Castro*, 887 F.2d 988, 996 (9th Cir. 1989)).

12(b)(6), this Court must also accept as true all well-plead facts and it must construe those facts in the light most favorable to Ruby Glen. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). A strict construction of the Exculpatory Clauses confirms that none of Ruby Glen's asserted claims fall within their scope.

ICANN was the sole drafter of the Exculpatory Clauses. (ER1051.) The Exculpatory Clauses by their very terms are limited to Ruby Glen's application. (ER1051.) For example, the release is limited to ICANN's review of Ruby Glen's application, ICANN's investigation or verification of information in Ruby Glen's application, any characterization or description of Ruby Glen or information in Ruby Glen's application, the withdrawal of Ruby Glen's application, and any decision by ICANN to recommend or not recommend the approval of Ruby Glen's application. (ER1051 (emphasis added).)

The same limitations are expressed in the covenant not to sue, which states that it is limited to "any final decision made by ICANN **with respect to the application**" or "any other legal claim against ICANN and ICANN affiliated parties **with respect to the application**." (ER1051 (emphasis added).)

This interpretation is further supported by the limitation of liability language and the non-binding arbitration provision found at the end of the paragraph. The limitation of liability clause states that Ruby Glen's "nonentitlement to pursue any rights, remedies, or legal claims against ICANN . . . in court or any other judicial

fora **with respect to the application** shall mean that applicant will forego" start-up costs and operational profits – i.e. those damages that would result had ICANN ruled Ruby Glen ineligible to participate in the .WEB auction.[3] (ER1051 (emphasis added).) Similarly, the non-binding arbitration provision provides that an applicant may use ICANN's accountability mechanisms "for the purpose of challenging any final decision made by ICANN **with respect to the application**." (ER1051 (emphasis added).)

Ruby Glen, however, does not assert any claims arising from any alleged malfeasance by ICANN related to its own application. Ruby Glen does not claim that ICANN erred in reviewing, investigating, characterizing, considering or approving Ruby Glen's application. (ER610.) Ruby Glen also does not seek to challenge the final decision by ICANN regarding its application. (ER610.) Nor does Ruby Glen seek to recover its start-up costs or any lost profits from not operating the .WEB gTLD. (ER610.) Rather, the crux of Ruby Glen's claims is that ICANN failed to conduct a reasonable inquiry relating to the application of NDC and that, had it done so, ICANN would have discovered that NDC violated the auction rules by transferring its rights to a non-qualified participant, VeriSign. (ER633.) Ruby Glen further contends that ICANN intentionally refused to conduct

[3] ICANN approved Ruby Glen as a participant in the .WEB gTLD auction. (ER615.)

a reasonable inquiry because of its desire to enrich itself to the tune of $135 million in breach of its duties and obligations to Ruby Glen and the other gTLD applicants. (ER633.) These alleged activities fall squarely outside the scope of the Exculpatory Clauses.

ICANN drafted the Exculpatory Clauses for its own benefit. If ICANN wanted to shield itself from all liability for its own negligence in conducting all aspects of the .WEB auction, rather than just those acts specific to Ruby Glen's application, it could have stated as much. "As it did not do so, [the Court must] resolve all doubt, as [it] should, in favor of the plaintiff, and hold that it was not the intent of the parties to give the contract as written the effect claimed by [ICANN]." *Basin Oil*, 125 Cal.App.2d at 595 (quoting *Pacific Indemnity Co. v. California Electric Works, Ltd.*, 29 Cal.App.2d 260, 274 (1938)). The district court erred in finding that the Exculpatory Clauses bar each of Ruby Glen's claims as a matter of law.

II. THE EXCLUPATORY CLAUSES ARE VOID UNDER CALIFORNIA LAW

A. The Exculpatory Clauses Are Void Because the Contract Affects the Public Interest

Even if the Exculpatory Clauses apply to the claims asserted by Ruby Glen, they are nonetheless void because the agreement between the parties involves a

matter of public interest. California courts have uniformly held that contractual releases for future liability, including ordinary negligence, which purport to exempt an individual or entity in a transaction affecting the public interest are void as against public policy. *See, e.g.*, *City of Santa Barbara*, 41 Cal.4th at 754-55; *Tunkl v. Regents of Univ. of Cal.*, 60 Cal.2d 92, 96 (1963); *Farnham v. Superior Court*, 60 Cal.App.4th 69, 74 (1997); *Frittelli*, 202 Cal.App.4th at 44; *Basin Oil*, 125 Cal.App.2d at 594.

In the seminal case of *Tunkl v. Regents of University of California*, 60 Cal.2d 92 (1963), the California Supreme Court not only confirmed the categorical rule that all exculpatory clauses are void if they are in a contract involving the public interest, but the court also set forth the following "factors or characteristics" that underlie the concept of what constitutes "public interest":

> (1) The matter concerns a business of a type generally thought suitable for public regulation;
>
> (2) The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> (3) The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> (4) As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

> (5) In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
>
> (6) Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

See Tunkl, 60 Cal.2d at 96, 100-01. "To meet the test, the agreement need only fulfill some of the characteristics above . . . ." *Id.* at 101. In this case, all of the characteristics are present. The Exculpatory Clauses are void. *See City of Santa Barbara*, 41 Cal.4th at 763. The district court erred in dismissing the entire action with prejudice based upon the Exculpatory Clauses.

1. *The Operation of the Internet is the Type of Business Suitable for Regulation*

The parties' agreement relates to the assignment, management, and operation of an entire portion of the Internet – all domain names registered in a .WEB gTLD (*i.e.*, www.rubyglen.web). The management and operation of the Internet is heavily regulated and thus, is the type of business suitable for regulation. *See, e.g.*, 15 U.S.C. § 1125(d) (Anti-Cybersquatting Consumer Protection Act) (regulating the use of trademarks in domain names); 17 U.S.C. §§ 101 (Digital Millennium Copyright Act) (regulating the use of copyrighted material on the Internet); 18 U.S.C. § 2510 (Electronic Communications Privacy Act) (regulating search and seizure of electronic information); 47 U.S.C. § 230 (Communications Decency Act)

(regulating liability for Internet service providers); 47 U.S.C. § 706 (Telecommunications Act) (regulating net neutrality);[4] Cal. Bus. & Prof. Code §§ 22575-22578 (regulating privacy policies for websites and online services); Cal. Bus. & Prof. Code §§ 22580-22582 (regulating online content related to children); Cal. Civ. Code § 1798.90 (regulating maintenance of Internet browser history).

The first *Tunkl* factor is met.

2. ICANN is Engaged in Performing a Service of Great Importance to the Public

"[T]he Internet has become the most fundamental global communications and knowledge infrastructure of our age, and is fast becoming the basic data-and-control network of the coming decade." *United States v. R.V.*, 157 F.Supp.3d 207, 228 (E.D.N.Y. Jan. 21, 2016) (citation omitted). In 1995, just 14% of adults in the United States had Internet access. *See id.* at 227. By January 2014, 87% of adults in the United States used the Internet, including 99% of those living in households earning

[4] Not only is the Internet highly regulated, but providers of internet services ("ISPs") have been deemed common carriers. *See United States Telecom Ass'n v. FCC*, 855 F.3d 381, 384-89 (D.C. Cir. 2017). California has long recognized that a business related to a common carrier involves the public interest for the purpose of invalidating exculpatory clauses. *See Tunkl*, 60 Cal.2d at 97-98 (citing *Union Constr. Co. v. W. Union Tel. Co.*, 163 Cal. 298 (1912) and *Franklin v. S. Pac. Co.*, 203 Cal. 680, 686 (1928)); *see also Gavin W. v. YMCA of Metro. Los Angeles*, 106 Cal.App.4th 662, 674 (2003) (citing *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 91 (1955) (recognizing rule against common carriers releasing themselves from liability through exculpatory clauses)).

$75,000 or more, 97% of young adults between ages 18-29, and 97% of those with college degrees. *See id.* at 228.

ICANN was granted a monopoly to manage the operation of the Internet by controlling the domain name assignment process. (ER613.) ICANN admits that it was established "for the benefit of the Internet community as a whole . . . ." (ER644.) The services made available through the assignment of domain names on the Internet, including all domain names in a .WEB gTLD, constitute a practical and crucial necessity for tens of millions of persons and businesses worldwide. *See United States v. R.V.*, 157 F.Supp.3d at 228; *see also Hatch v. Superior Court*, 80 Cal.App.4th 170, 210 (2000) (citation omitted) (recognizing that "the Internet has become an important conduit for commercial activity"). As the monopoly in charge of managing the assignment of domain names, including the creation of entirely new territory on the Internet through the establishment of new gTLDs, ICANN performs a service of great importance to the public sufficient to satisfy the second *Tunkl* factor.

3. *ICANN Holds Itself Out As Willing to Assign the Operation of gTLDs to Any Member of the Public Who Meets Certain Standards Established by ICANN*

The third factor focuses on whether the party seeking exculpation offers its services to the public. In 2011, ICANN announced its intention to expand

substantially the number of gTLDs through its New gTLD Program. (ER615.) As part of that process, ICANN solicited all qualified members of the public to apply for specific gTLDs resulting in "nearly 2,000 applications" from the public, including Ruby Glen and NDC.[5] (ER239, 610, .) As such, the third *Tunkl* factor is also met.

4. *As a Monopoly Exclusively in Charge of Assigning Domain Names, ICANN Possesses a Decisive Advantage of Bargaining Strength Over All gTLD Applicants*

ICANN is the only entity in the world authorized to manage the assignment of domain names. (ER615.) In that role, ICANN has established procedures for those members of the public who wish to operate a gTLD, including an application process created by ICANN. (ER615.) ICANN is solely responsible for determining which applicants may participate in the auction process for any gTLD, it maintains exclusive investigative authority over all applicants throughout the application process, it has exclusive discretion to disqualify an applicant for violation of its rules, and it maintains exclusive control over a prevailing applicant once a gTLD is awarded. (ER615.)

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[5] ICANN's Frequently Asked Questions page from its website specifically states: "2.1. Who can apply for a new gTLD? Any established public or private organization that meets eligibility requirements anywhere in the world can apply to create and operate a new gTLD Registry." *See* https://newgtlds.icann.org/en/applicants/global-support/faqs/faqs-en.

In insisting that an applicant accept the Exculpatory Clauses, ICANN indisputably exercises a decisive bargaining advantage. The Exculpatory Clauses are not subject to negotiation. (ER617.) An applicant is presented all 338 pages of the Guidebook on a take-it-or-leave-it basis. (ER617.) An applicant who objects to any of the Guidebook's terms will not be allowed to participate in a gTLD process. (ER617.) A gTLD applicant is in no position to reject, bargain for, or, in lieu of an agreement, find another party from whom it can obtain the same or similar rights. These facts are sufficient to satisfy the fourth *Tunkl* factor.

5. *ICANN Presents All Applicants for gTLDs With a Standard Adhesion Contract of Exculpation Without Any Right or Ability of Applicants to Negotiate for Protection Against Negligence*

Not only does ICANN's monopolistic control over the assignment of domain names provide it with a superior bargaining position over applicants, but ICANN has exercised that bargaining position to preclude any negotiation by applicants with respect to any term in the Guidebook. (ER617.) Such practices render the Guidebook a contract of adhesion. *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (explaining that an adhesion contract is one "that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.").

A party seeking to apply for the rights to administer a gTLD is forced to agree to the terms of the Guidebook in order to participate in the gTLD process. (ER617.)

None of the terms of the Guidebook are subject to negotiation nor does an applicant have the ability to pay a higher application fee in exchange for removal of the Exculpatory Clauses (or any other term). Furthermore, a party has no way to obtain the rights to a gTLD except through ICANN's application process, as ICANN, as a monopoly, has the sole authority to assign the rights to administer new gTLDs. Hence, the fifth public interest factor is satisfied.

6. *As a Result of Applying for the .WEB gTLD, Ruby Glen Was Placed Under the Control of ICANN, Subject to the Risk of ICANN's Carelessness and/or Negligent Disregard of its Duties*

According to the Guidebook, Ruby Glen accepted its terms by submitting its application for the .WEB gTLD. (ER615). Upon submitting its application, Ruby Glen placed itself under the complete control of ICANN with respect to ICANN's management and enforcement of the .WEB contention set process and related rules, the carelessness with which ICANN may conduct the auction process, and/or ICANN's negligent and/or intentional disregard for its own rules and procedures. Accordingly, the sixth *Tunkl* factor supports a finding that the parties' agreement affects the public interest.

In light of the fact that all six of the *Tunkl* characteristics exist here, ICANN occupied a status different than a mere private party and thus, ICANN's agreement with Ruby Glen (and all other applicants) affected the public interest. The

Exculpatory Clauses are therefore void as a matter of public policy. *See City of Santa Barbara*, 41 Cal.4th at 763 ("*Tunkl* sets forth a categorical rule: Any exculpatory clause (even one releasing liability for future ordinary negligence) is unenforceable if it relates to a transaction that adequately exhibits at least some of the six characteristics set forth in that case, and thereby 'affects the public interest.'").

B. The Exculpatory Clauses Are Void Under California Civil Code Section 1668

1. The Exculpatory Clauses Are Void on Its Face

Even if the Court finds that the parties' agreement does not involve a matter of public interest, the Exculpatory Clauses are nonetheless facially void under Section 1668. Section 1668 (unchanged since its adoption in 1872) states:

> All contracts which have for their object, directly or indirectly, to exempt any one 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. In interpreting this statute, California courts have uniformly held that Section 1668 "invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs[,] gross negligence," or negligent or willful violation of a statute. *Frittelli*, 202 Cal.App.4th at 43 (citing *City of Santa Barbara*, 41 Cal.4th at 777; *Farnham*, 60 Cal.App.4th at 74). "To the extent the

challenged provisions are in violation of [Section 1668], they are void." *Ulene v. Jacobson*, 209 Cal.App.2d 139, 142-43 (1962).

Here, the Exculpatory Clauses preclude each and every plausible cause of action relating to Ruby Glen's application without restriction or exception. (ER1051 (releasing "any and all claims" related to Ruby Glen's application and irrevocably waiving the right to sue regarding any decision made as to Ruby Glen's application "or any other legal claim . . . with respect to the application").) Because the Exculpatory Clauses improperly seek to release ICANN, in violation of Section 1668, from liability for every claim that arises from ICANN's actions related to Ruby Glen's application, including those based in gross negligence, fraud, and intentional or negligent violations of the law, they are void on their face. *See Baker Pacific*, 220 Cal.App.3d at 1154 (holding that the "broad release clearly includes a release from liability for fraud and intentional acts and thus on its face violates the public policy as set forth in Civil Code section 1668"). As such, this Court need not look to the substance of Ruby Glen's allegations to find the Exculpatory Clauses invalid.

In the order granting ICANN's motion to dismiss, the district court erroneously looked to the allegations of the FAC before first determining whether the language of the Exculpatory Clauses were *facially invalid* under Section 1668. The district court found that "[t]he FAC does not seek to impose liability on ICANN

for fraud, willful injury, or gross negligence. Nor does Plaintiff allege that ICANN has willfully or negligently violated a law or harmed the public interest[6] through its administration of the gTLD auction process for .web." (ER16.) The district court went on to question whether ICANN could "ever . . . engage in the type of intentional conduct to which California Civil Code section 1668 applies." *Id.* Even if these statements and hypothecation were true (which they are not as discussed in Section II(B)(2) below), they are irrelevant to determining the enforceability of the Exculpatory Clauses under Section 1668 because the clauses are void on their face.

The district court relied upon *Burnett v. Chimney Sweep*, 123 Cal.App.4th 1057, 1066 (2004) to find that the Exculpatory Clauses barred all of Ruby Glen's claims as a matter of law. (ER16.) *Burnett*, however, does not support the district court's analysis. The fundamental flaw in the district court's ruling is that it conflates the issue of whether the allegations in a complaint fall within the scope of an otherwise enforceable exculpatory clause[7] (i.e. one that releases ordinary negligence that does not involve the public interest) with the issue of whether an exculpatory clause is enforceable even if the claims are within the clause's scope.

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[6] The district court also erred in finding that ICANN's action must "harm the public interest" in order to void the Exculpatory Clauses as no court has imposed such a heightened requirement. Rather, as discussed *supra*, the test is simply whether the parties' agreement involves or affects the public interest.

[7] The analysis performed in Section I above.

While the former requires an evaluation of the complaint's allegations in comparison to the language of the release pursuant to standard principles of contract interpretation, the latter does not. Here, the district court applied the case specific allegations while ignoring the fact that the Exculpatory Clauses themselves are void on their face.[8]

The case of *Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d 1148 (1990) illustrates the district court's error. In *Baker Pacific*, an asbestos contractor brought an action for declaratory relief against two employees who refused to sign a release as a condition to their employment. *See id.* at 1150-51. The release required the employees to assume "all risks" in connection with any asbestos exposure and to "covenant not to sue, and to release and forever discharge" various parties "for, from and against any and all liability whatsoever" and to "relinquish any and all claims of

[8] It should be further noted that the court's holding in *Burnett* belies the district court's analysis. In *Burnett*, the exculpatory clause was in a commercial lease consisting of two provisions. *See Burnett*, 123 Cal.App.4th at 1066. The first provision shielded the defendant from property damage and personal injury, but failed to identify the types of acts included within the release (ordinary or gross negligence, intentional torts, or willful violations of statutes). *See id.* The court found that where the provision does not provide such specification, courts will interpret the provision as releasing ordinary (or passive) negligence only. *See id.* at 1066-67. As for the second provision, the court found that although it expressly referenced negligence, it did not specify whether it was limited to ordinary or gross negligence. *See id.* at 1067. The court held that because the complaint alleged active or gross negligence, the trial court erred in finding that the exculpatory clause barred plaintiff's claims. *See id.* at 1067-68 (reversing summary judgment).

every nature" related to asbestos exposure. *See id.* at 1151. The court found that because the exculpatory clause "include[d] a release for fraud and intentional acts[, the release] on its face violate[d] the public policy as set forth in Civil Code section 1668." *Id.* at 1154. As the court explained, requiring a person to agree to an illegal contract is contrary to the law. *See id.*

Like the exculpatory clause in *Baker Pacific*, the Exculpatory Clauses in this case were void on their face and thus, were of no legal effect the moment ICANN conditioned Ruby Glen's participation in the .WEB gTLD process on its consent to those clauses. *See id.* ("In short, the release has already been applied illegally by conditioning employment on the execution of a contract containing terms violating the statutory law of this state."). The nature of the subsequently asserted claims by Ruby Glen in the Amended Complaint are of no consequence or relevance to the enforceability of the Exculpatory Clauses because the clauses are facially void.

2. Ruby Glen Alleged Sufficient Facts to State Claims for Intentional Misconduct Thereby Rendering the Exculpatory Clauses Void in Their Application

Even if the Court finds that the Exculpatory Clauses are not void on their face, they are still void in their application to Ruby Glen's second and fourth causes of action under Section 1668. As discussed above, Section 1668 precludes the release of future liability for one's intentional misconduct. *See* Cal. Civ. Code § 1668;

Frittelli, 202 Cal.App.4th at 43. Ruby Glen's second and fourth causes of action sufficiently state claims based on intentional misconduct by ICANN. The district court erred in finding that the Exculpatory Clauses barred each of these causes of action.

(a) Ruby Glen's Second Cause of Action Specifically Alleges an Intentional Tort

The second cause of action asserts a claim for tortious breach of the implied covenant of good faith and fair dealing. (ER632.) By its very nature, a tortious breach of the covenant is an intentional tort. "A cause of action for tortious breach of the covenant of good faith and fair dealing requires the existence and breach of an enforceable contract as well as an independent tort." *Innovative Business Partnerships, Inc. v. Inland Counties Regional Center, Inc.*, 194 Cal.App.4th 623, 631-32 (1988). "Generally, outside the insurance context, 'a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.'" *Erlich v. Menezes*, 21 Cal.4th 543, 553-54

(1999) (quoting *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 105 (1995)).

The FAC alleges facts sufficient to state a claim for tortious breach of the covenant of good faith and fair dealing.[9] Specifically, Ruby Glen alleged that ICANN intentionally refused to conduct a reasonable investigation into the written admissions made by NDC regarding its change of management and ownership in order to deprive Ruby Glen and the other .WEB gTLD applicants of the benefits of the private agreement procedure. (ER623-624, 633-634.) Ruby Glen further alleges that ICANN "**intentionally failed** to abide by its obligations to conduct a full and open investigation into NDC's admission[s] because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction," which resulted in ICANN's receipt of $135 million. (ER634 (emphasis added); *see also* ER611, 624, 626-627.) ICANN did so knowing that it would cause substantial consequential damages to Ruby Glenn and the other .WEB applicants to the tune of $22.5 million each. (ER632.) Because Ruby Glen's second cause of action is predicated entirely on the wrongful intentional acts of ICANN, Section 1668 precludes the enforcement of the Exculpatory Clauses as to this cause of action.

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9 Notably, ICANN did not argue that the FAC fails to sufficiently allege facts supporting a claim for tortious breach. (ER231.)

(b) Ruby Glen's UCL Claim is Predicated on ICANN's Intentional Misconduct

Section 17200 of California's Business & Professions Code prohibits "any unlawful, unfair or fraudulent business act or practice." *Cel-Tech Commc'ns v. Los Angeles Cellular Tel.*, 20 Cal.4th 163, 180 (1999). The statute is written in the disjunctive so a violation of any of the foregoing prongs constitutes a statutory violation. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). Courts have consistently interpreted the language of the UCL broadly. *See Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 519 (1997).

i. ICANN's Conduct Violates the Unlawful Prong

The "unlawful" prong under Section 17200 "borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*, 69 Cal.App.4th 1494, 1505 (1999). "'[V]irtually any law or regulation—federal or state, statutory or common law—can serve as [a] predicate for a . . . [section] 17200 "unlawful" violation.'" *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal.App.4th 659, 681 (2006). As discussed above, ICANN's requirement that all gTLD applicants agree to the Exculpatory Clauses violates Section 1668. *See Baker Pacific*, 220 Cal.App.3d at 1154.

ii. *ICANN's Conduct Violates the Fraudulent Prong of the UCL*

ICANN's actions independently violate the fraudulent prong of the UCL. "'Fraudulent,' as used in the statute, does not refer to the common law tort of fraud but only requires a showing that members of the public "are likely to be deceived." *Saunders v. Superior Court*, 27 Cal.App.4th 832, 839 (1994) (citing *Bank of the West v. Superior Court*, 2 Cal.4th 1254, 1267 (1992)). "This means that a [fraudulent prong] violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal.App.4th 1093, 1105 (1996).

Ruby Glen sufficiently stated a claim under the fraudulent prong based on the intentional misconduct of ICANN. Specifically, Ruby Glen alleged that ICANN affirmatively represented to all gTLD applicants that it would conduct the .WEB assignment process according to a specific set of rules and that it would enforce those rules objectively, neutrally, and fairly. (ER637.) These affirmative representations are alleged to be a material inducement for Ruby Glen's submission of its mandatory application fee. (ER637-638.) Ruby Glen further alleges that ICANN knowingly and intentionally failed to adhere to these promises because it sought to enrich itself to the detriment of Ruby Glen and the other gTLD applicants. (ER638-639.) As alleged, Ruby Glen's fourth cause of action sufficiently alleges the type of intentional misconduct that, under Section 1668, precludes the application of the Exculpatory Clauses to it.

C. The Exculpatory Clauses are Unconscionable

The Exculpatory Clauses are further void because they are unconscionable. "In California, a contract or clause is unenforceable if it is both procedurally and substantively unconscionable." *Ting*, 319 F.3d at 1148 (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 114 (2000)). Courts consider these elements on a sliding scale, such that "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the contract is unenforceable, and vice versa." *Armendariz*, 24 Cal. 4th at 114. The FAC sufficiently alleges both elements.

The Exculpatory Clauses are procedurally unconscionable because they are not subject to negotiation. (ER617.) "A contract is procedurally unconscionable if it is a contract of adhesion, *i.e.*, a standardized contract . . . that relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Ting*, 319 F.3d at 1148. A party seeking to apply for the rights to administer a gTLD is forced to agree to the Exculpatory Clauses as a mandatory condition to participate in the gTLD auction process. (ER615.) An applicant has no way to obtain the rights to a gTLD except through ICANN's application process, as ICANN, as a monopoly, has the sole authority to assign the rights to administer new gTLDs. (.)

The Exculpatory Clauses are also substantively unconscionable because of their one-sidedness. *See Solo v. Am. Ass'n of Univ. Women*, Case No. 15cv1356-

WQH-JMA, 2016 WL 2868693, at *5-6 (S.D. Cal. May 17, 2016) (finding a unilateral arbitration agreement unconscionable, and noting that, absent a "reasonable justification for a one-sided arrangement . . . we assume that it is [unconscionable]"). The Exculpatory Clauses are entirely unilateral because: (a) they absolve ICANN of all wrongdoing relating to a registry's application without affording the registry with a genuine remedy, and (b) they do not apply equally as between ICANN and the applicant, because they do not prevent ICANN from pursuing litigation against an applicant. (ER640.)

ICANN is unable to justify the imposition of this unilateral release on Ruby Glen and all gTLD applicants. The purported business justification ICANN raises fails because it is not a part of the FAC, and thus should not be considered at this stage. (ER241.) Furthermore, the basis that ICANN offers, "prevent[ing] a dispersed flood of litigation" is no justification for the unilateral nature of the clauses because, as explained above, the mandatory requirement that an applicant agree to the Exculpatory Clauses as a condition to participation in the gTLD auction process constitutes an unlawful agreement under Section 1668. *See Baker Pacific*, 220 Cal.App.3d at 1154. The Exculpatory Clauses should be deemed void as both procedurally and substantively unconscionable.

D. Applying the Exculpatory Clauses to Ruby Glen's Breach of Contract Claim Would Render the Parties' Agreement Illusory

"In order for a contract to be valid, the parties must exchange promises that represent legal obligations." *Harris v. TAP Worldwide, LLC*, 248 Cal.App.4th 373, 385 (2016) (citations omitted). "A contract is unenforceable as illusory when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder." *Id.* (citations omitted).

Enforcement of the Exculpatory Clauses, as interpreted by ICANN and the district court, would render the parties' agreement illusory. By their terms, Ruby Glen is barred from asserting "any and all claims" relating to its application, including a claim against ICANN for breach of its contractual obligations. The absence of an ability to enforce the terms of the parties' agreement results in affording ICANN unfettered discretion regarding whether to perform any of its contractual obligations. Such a result would mean that ICANN did not assume any contractual obligations at all.

ICANN will likely argue that Ruby Glen was not without a remedy because the Guidebook provides for alternative "accountability mechanisms." Those mechanisms, however, are neither binding nor mandatory. (ER626.) ICANN is free to ignore, as it regularly does, any adverse "recommendations" secured by applicants through these non-bindingalternative mechanisms. Conversely, Ruby Glen is

provided no mechanism to challenge any adverse ruling obtained through these "accountability mechanisms" even though they are non-binding.[10]

Because the enforcement of the Exculpatory Clauses as to the first cause of action for breach of contract would render the parties' agreement illusory, the clauses are void under California law. *See Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 953-54 (2008) ("If a contract is capable of two constructions courts are bound to give such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect . . . .") (citations and quotations omitted); Cal. Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect . . . ."); Cal. Civ. Code § 3541 ("An interpretation which gives effect is preferred to one which makes void.").

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[10] The enforcement of the Exculpatory Clauses would effectively convert the non-binding arbitration clause contained in the Guidebook into a binding arbitration provision even though neither ICANN nor the applicants expressly consented to resolve any disputes between them through binding arbitration. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (2014) ("'While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.' *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). One such principle is the requirement that '[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract.' (*Sprecht v. Netscape Communc'ns Corp.*, 306 F.3d 17, 29 (2d Cir. 2002) (applying California law).").

III. THE DISTRICT COURT ERRED BY NOT GRANTING LEAVE TO AMEND

This Court has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted). Despite Ruby Glen's request for leave to amend (its first in the case) and the district court's recognition of the limitations Section 1668 places on the enforceability of exculpatory clauses, the district court refused to grant Ruby Glen leave to amend. The district court's refusal to grant Ruby Glen at least one attempt to amend its pleading constitutes reversible error. *See National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) ("It is black-letter law that a district court must give plaintiffs at least one chance to amend if their complaint was held insufficient.").

CONCLUSION

The Exculpatory Clauses do not apply to the claims alleged in the FAC. To the extent they apply, they are void as against California public policy, including as codified in Section 1668, and are unconscionable. The district court erred not only in applying the Exculpatory Clauses to dismiss each of Ruby Glen's claims, but also in not affording Ruby Glen at least one opportunity to amend to state additional facts

that, if true, would preclude the enforcement of the Exculpatory Clauses under *Tunkl* and/or Section 1668. Ruby Glen respectfully requests that the Court reverse the order dismissing all of its claims on the grounds that the Exculpatory Clauses are either not applicable and/or not enforceable, and to remand this case back to the district court for further proceedings.

Dated: August 30, 2017

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no known related cases pending in the 9th Circuit Court of Appeals.

Dated: August 30, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 32(a)(7) of the Federal Rules of Appellate Procedure, I hereby certify that this brief contains 12,633 words/pages, including foot notes. In making this certification, I have relied on the word count of the computer program used to prepare the brief. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

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

By: *s/ Aaron M. McKown*

No. 16-56890

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBY GLEN, LLC,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, ET AL,

Defendants-Appellees.

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

APPELLANT'S ADDENDUM

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28 U.S.C. § 1332

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the

insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1291

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §48, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 97–164, title I, §124, Apr. 2, 1982, 96 Stat. 36.)

FRAP 4(A)(1)(A)

FRAP 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

CAL. CIV. CODE §1668

§1668.

All contracts which have for their object, directly or indirectly, to exempt any one 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.

(Enacted 1872.)

15 U.S.C. § 1125(D)

(d) Cyberpiracy prevention

(1)

(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of title 18 or section 220506 of title 36.

(B)

(i) In determining whether a person has a bad faith intent described under subparagraph (A), a court may consider factors such as, but not limited to—

(I) the trademark or other intellectual property rights of the person, if any, in the domain name;

(II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;

(III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;

(IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;

(V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;

(VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's

intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c).

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2)

(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if—

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and

(ii) the court finds that the owner—

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by—

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which—

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

CAL. BUS. & PROF. CODE §§ 22575-22578

CHAPTER 22. Internet Privacy Requirements [22575 - 22579]

§22575.

(a) An operator of a commercial Web site or online service that collects personally identifiable information through the Internet about individual consumers residing in California who use or visit its commercial Web site or online service shall conspicuously post its privacy policy on its Web site, or in the case of an operator of an online service, make that policy available in accordance with paragraph (5) of subdivision (b) of Section 22577. An operator shall be in violation of this subdivision only if the operator fails to post its policy within 30 days after being notified of noncompliance.

(b) The privacy policy required by subdivision (a) shall do all of the following:

(1) Identify the categories of personally identifiable information that the operator collects through the Web site or online service about individual consumers who use or visit its commercial Web site or online service and the categories of third-party persons or entities with whom the operator may share that personally identifiable information.

(2) If the operator maintains a process for an individual consumer who uses or visits its commercial Web site or online service to review and request changes to

any of his or her personally identifiable information that is collected through the Web site or online service, provide a description of that process.

(3) Describe the process by which the operator notifies consumers who use or visit its commercial Web site or online service of material changes to the operator's privacy policy for that Web site or online service.

(4) Identify its effective date.

(5) Disclose how the operator responds to Web browser "do not track" signals or other mechanisms that provide consumers the ability to exercise choice regarding the collection of personally identifiable information about an individual consumer's online activities over time and across third-party Web sites or online services, if the operator engages in that collection.

(6) Disclose whether other parties may collect personally identifiable information about an individual consumer's online activities over time and across different Web sites when a consumer uses the operator's Web site or service.

(7) An operator may satisfy the requirement of paragraph (5) by providing a clear and conspicuous hyperlink in the operator's privacy policy to an online location containing a description, including the effects, of any program or protocol the operator follows that offers the consumer that choice.

(Amended by Stats. 2013, Ch. 390, Sec. 1. Effective January 1, 2014.)

§22576.

An operator of a commercial Web site or online service that collects personally identifiable information through the Web site or online service from individual consumers who use or visit the commercial Web site or online service and who reside in California shall be in violation of this section if the operator fails to comply with the provisions of Section 22575 or with the provisions of its posted privacy policy in either of the following ways:

(a) Knowingly and willfully.

(b) Negligently and materially.

(Added by Stats. 2003, Ch. 829, Sec. 3. Effective January 1, 2004. Section operative July 1, 2004, pursuant to Section 22579.)

§22577.

For the purposes of this chapter, the following definitions apply:

(a) The term "personally identifiable information" means individually identifiable information about an individual consumer collected online by the operator from that individual and maintained by the operator in an accessible form, including any of the following:

(1) A first and last name.

(2) A home or other physical address, including street name and name of a city or town.

(3) An e-mail address.

(4) A telephone number.

(5) A social security number.

(6) Any other identifier that permits the physical or online contacting of a specific individual.

(7) Information concerning a user that the Web site or online service collects online from the user and maintains in personally identifiable form in combination with an identifier described in this subdivision.

(b) The term "conspicuously post" with respect to a privacy policy shall include posting the privacy policy through any of the following:

(1) A Web page on which the actual privacy policy is posted if the Web page is the homepage or first significant page after entering the Web site.

(2) An icon that hyperlinks to a Web page on which the actual privacy policy is posted, if the icon is located on the homepage or the first significant page after entering the Web site, and if the icon contains the word "privacy." The icon shall also use a color that contrasts with the background color of the Web page or is otherwise distinguishable.

(3) A text link that hyperlinks to a Web page on which the actual privacy policy is posted, if the text link is located on the homepage or first significant page after entering the Web site, and if the text link does one of the following:

(A) Includes the word "privacy."

(B) Is written in capital letters equal to or greater in size than the surrounding text.

(C) Is written in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks that call attention to the language.

(4) Any other functional hyperlink that is so displayed that a reasonable person would notice it.

(5) In the case of an online service, any other reasonably accessible means of making the privacy policy available for consumers of the online service.

(c) The term "operator" means any person or entity that owns a Web site located on the Internet or an online service that collects and maintains personally identifiable information from a consumer residing in California who uses or visits the Web site or online service if the Web site or online service is operated for commercial purposes. It does not include any third party that operates, hosts, or manages, but does not own, a Web site or online service on the owner's behalf or by processing information on behalf of the owner.

(d) The term "consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes.

(Added by Stats. 2003, Ch. 829, Sec. 3. Effective January 1, 2004. Section operative July 1, 2004, pursuant to Section 22579.)

§22578.

It is the intent of the Legislature that this chapter is a matter of statewide concern. This chapter supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by a city, county, city and county, municipality, or local agency regarding the posting of a privacy policy on an Internet Web site.

(Added by Stats. 2003, Ch. 829, Sec. 3. Effective January 1, 2004. Section operative July 1, 2004, pursuant to Section 22579.)

§22579.

This chapter shall become operative on July 1, 2004.

(Added by Stats. 2003, Ch. 829, Sec. 3. Effective January 1, 2004. Note: This section prescribes a delayed operative date for Chapter 22, commencing with Section 22575.)

CAL. BUS. & PROF. CODE §§ 22580-22582

CHAPTER 22.1. Privacy Rights for California Minors in the Digital World [22580 - 22582]

§22580.

(a) An operator of an Internet Web site, online service, online application, or mobile application directed to minors shall not market or advertise a product or service described in subdivision (i) on its Internet Web site, online service, online application, or mobile application directed to minors.

(b) An operator of an Internet Web site, online service, online application, or mobile application:

(1) Shall not market or advertise a product or service described in subdivision (i) to a minor who the operator has actual knowledge is using its Internet Web site, online service, online application, or mobile application and is a minor, if the marketing or advertising is specifically directed to that minor based upon information specific to that minor, including, but not limited to, the minor's profile, activity, address, or location sufficient to establish contact with a minor, and excluding Internet Protocol (IP) address and product identification numbers for the operation of a service.

(2) Shall be deemed to be in compliance with paragraph (1) if the operator takes reasonable actions in good faith designed to avoid marketing or advertising under circumstances prohibited under paragraph (1).

(c) An operator of an Internet Web site, online service, online application, or mobile application directed to minors or who has actual knowledge that a minor is using its Internet Web site, online service, online application, or mobile application, shall not knowingly use, disclose, compile, or allow a third party to use, disclose, or compile, the personal information of a minor with actual knowledge that the use, disclosure, or compilation is for the purpose of marketing or advertising products or services to that minor for a product described in subdivision (i).

(d) "Minor" means a natural person under 18 years of age who resides in the state.

(e) "Internet Web site, online service, online application, or mobile application directed to minors" mean an Internet Web site, online service, online application, or mobile application, or a portion thereof, that is created for the purpose of reaching an audience that is predominately comprised of minors, and is not intended for a more general audience comprised of adults. Provided, however, that an Internet Web site, online service, online application, or mobile application, or a portion thereof, shall not be deemed to be directed at minors solely because it

refers or links to an Internet Web site, online service, online application, or mobile application directed to minors by using information location tools, including a directory, index, reference, pointer, or hypertext link.

(f) "Operator" means any person or entity that owns an Internet Web site, online service, online application, or mobile application. It does not include any third party that operates, hosts, or manages, but does not own, an Internet Web site, online service, online application, or mobile application on the owner's behalf or processes information on the owner's behalf.

(g) This section shall not be construed to require an operator of an Internet Web site, online service, online application, or mobile application to collect or retain age information about users.

(h) (1) With respect to marketing or advertising provided by an advertising service, the operator of an Internet Web site, online service, online application, or mobile application directed to minors shall be deemed to be in compliance with subdivision (a) if the operator notifies the advertising service, in the manner required by the advertising service, that the site, service, or application is directed to minors.

(2) If an advertising service is notified, in the manner required by the advertising service, that an Internet Web site, online service, online application, or mobile application is directed to minors pursuant to paragraph (1), the advertising

service shall not market or advertise a product or service on the operator's Internet Web site, online service, online application, or mobile application that is described in subdivision (i).

(i) The marketing and advertising restrictions described in subdivisions (a) and (b) shall apply to the following products and services as they are defined under state law:

(1) Alcoholic beverages, as referenced in Sections 23003 to 23009, inclusive, and Section 25658.

(2) Firearms or handguns, as referenced in Sections 16520, 16640, and 27505 of the Penal Code.

(3) Ammunition or reloaded ammunition, as referenced in Sections 16150 and 30300 of the Penal Code.

(4) Handgun safety certificates, as referenced in Sections 31625 and 31655 of the Penal Code.

(5) Aerosol container of paint that is capable of defacing property, as referenced in Section 594.1 of the Penal Code.

(6) Etching cream that is capable of defacing property, as referenced in Section 594.1 of the Penal Code.

(7) Any tobacco, cigarette, or cigarette papers, or blunt wraps, or any other preparation of tobacco, or any other instrument or paraphernalia that is designed

for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance, as referenced in Division 8.5 (commencing with Section 22950) and Sections 308, 308.1, 308.2, and 308.3 of the Penal Code.

(8) BB device, as referenced in Sections 16250 and 19910 of the Penal Code.

(9) Dangerous fireworks, as referenced in Sections 12505 and 12689 of the Health and Safety Code.

(10) Tanning in an ultraviolet tanning device, as referenced in Sections 22702 and 22706.

(11) Dietary supplement products containing ephedrine group alkaloids, as referenced in Section 110423.2 of the Health and Safety Code.

(12) Tickets or shares in a lottery game, as referenced in Sections 8880.12 and 8880.52 of the Government Code.

(13) Salvia divinorum or Salvinorin A, or any substance or material containing Salvia divinorum or Salvinorin A, as referenced in Section 379 of the Penal Code.

(14) Body branding, as referenced in Sections 119301 and 119302 of the Health and Safety Code.

(15) Permanent tattoo, as referenced in Sections 119301 and 119302 of the Health and Safety Code and Section 653 of the Penal Code.

(16) Drug paraphernalia, as referenced in Section 11364.5 of the Health and Safety Code.

(17) Electronic cigarette, as referenced in Section 119405 of the Health and Safety Code.

(18) Obscene matter, as referenced in Section 311 of the Penal Code.

(19) A less lethal weapon, as referenced in Sections 16780 and 19405 of the Penal Code.

(j) The marketing and advertising restrictions described in subdivisions (a), (b), and (c) shall not apply to the incidental placement of products or services embedded in content if the content is not distributed by or at the direction of the operator primarily for the purposes of marketing and advertising of the products or services described in subdivision (i).

(k) "Marketing or advertising" means, in exchange for monetary compensation, to make a communication to one or more individuals, or to arrange for the dissemination to the public of a communication, about a product or service the primary purpose of which is to encourage recipients of the communication to purchase or use the product or service.

(Added by Stats. 2013, Ch. 336, Sec. 1. Effective January 1, 2014. Section operative January 1, 2015, pursuant to Section 22582.)

§22581.

(a) An operator of an Internet Web site, online service, online application, or mobile application directed to minors or an operator of an Internet Web site, online service, online application, or mobile application that has actual knowledge that a minor is using its Internet Web site, online service, online application, or mobile application shall do all of the following:

(1) Permit a minor who is a registered user of the operator's Internet Web site, online service, online application, or mobile application to remove or, if the operator prefers, to request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the user.

(2) Provide notice to a minor who is a registered user of the operator's Internet Web site, online service, online application, or mobile application that the minor may remove or, if the operator prefers, request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the registered user.

(3) Provide clear instructions to a minor who is a registered user of the operator's Internet Web site, online service, online application, or mobile application on how the user may remove or, if the operator prefers, request and

obtain the removal of content or information posted on the operator's Internet Web site, online service, online application, or mobile application.

(4) Provide notice to a minor who is a registered user of the operator's Internet Web site, online service, online application, or mobile application that the removal described under paragraph (1) does not ensure complete or comprehensive removal of the content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the registered user.

(b) An operator or a third party is not required to erase or otherwise eliminate, or to enable erasure or elimination of, content or information in any of the following circumstances:

(1) Any other provision of federal or state law requires the operator or third party to maintain the content or information.

(2) The content or information was stored on or posted to the operator's Internet Web site, online service, online application, or mobile application by a third party other than the minor, who is a registered user, including any content or information posted by the registered user that was stored, republished, or reposted by the third party.

(3) The operator anonymizes the content or information posted by the minor who is a registered user, so that the minor who is a registered user cannot be individually identified.

(4) The minor does not follow the instructions provided to the minor pursuant to paragraph (3) of subdivision (a) on how the registered user may request and obtain the removal of content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the registered user.

(5) The minor has received compensation or other consideration for providing the content.

(c) This section shall not be construed to limit the authority of a law enforcement agency to obtain any content or information from an operator as authorized by law or pursuant to an order of a court of competent jurisdiction.

(d) An operator shall be deemed compliant with this section if:

(1) It renders the content or information posted by the minor user no longer visible to other users of the service and the public even if the content or information remains on the operator's servers in some form.

(2) Despite making the original posting by the minor user invisible, it remains visible because a third party has copied the posting or reposted the content or information posted by the minor.

(e) This section shall not be construed to require an operator of an Internet Web site, online service, online application, or mobile application to collect age information about users.

(f) "Posted" means content or information that can be accessed by a user in addition to the minor who posted the content or information, whether the user is a registered user or not, of the Internet Web site, online service, online application, or mobile application where the content or information is posted.

(Added by Stats. 2013, Ch. 336, Sec. 1. Effective January 1, 2014. Section operative January 1, 2015, pursuant to Section 22582.)

§22582.

This chapter shall become operative on January 1, 2015.

(Added by Stats. 2013, Ch. 336, Sec. 1. Effective January 1, 2014. Note: This section prescribes a delayed operative date for Chapter 22.1, commencing with Section 22580.)

CAL. BUS. & PROF. CODE §17200

§17200.

As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

(Amended by Stats. 1992, Ch. 430, Sec. 2. Effective January 1, 1993.)

CAL. CIV. CODE § 1798.90

§1798.90.1.

(a) (1) A business may swipe a driver's license or identification card issued by the Department of Motor Vehicles in any electronic device for the following purposes:

(A) To verify age or the authenticity of the driver's license or identification card.

(B) To comply with a legal requirement to record, retain, or transmit that information.

(C) To transmit information to a check service company for the purpose of approving negotiable instruments, electronic funds transfers, or similar methods of payments, provided that only the name and identification number from the license or the card may be used or retained by the check service company.

(D) To collect or disclose personal information that is required for reporting, investigating, or preventing fraud, abuse, or material misrepresentation.

(2) (A) An organ procurement organization may swipe a driver's license or identification card issued by the Department of Motor Vehicles in any electronic device to transmit information to the Donate Life California Organ and Tissue Donor Registry established pursuant to Section 7150.90 of the Health and Safety Code for the purposes of allowing an individual to identify himself or herself as a

registered organ donor. Information gathered or transmitted pursuant to this paragraph shall comply with the Department of Motor Vehicles Information Security Agreement.

(B) Prior to swiping a driver's license or identification card issued by the Department of Motor Vehicles, an organ procurement organization shall provide clear and conspicuous notice to the applicant and shall follow the procedure prescribed in this subparagraph:

(i) Once the applicant's information is populated on the electronic form, the applicant shall verify that the information is accurate and shall click "submit" after reading a clear and conspicuous consent message, which shall not be combined with or contained within another message, acknowledging that the applicant's information will be used for the sole purpose of being added to the registry.

(ii) The applicant shall provide his or her signature to complete registration.

(iii) The organization or registry system shall provide a written confirmation to the applicant confirming that he or she is signed up as an organ and tissue donor.

(3) A business or organ procurement organization shall not retain or use any of the information obtained by that electronic means for any purpose other than as provided herein.

(b) As used in this section:

(1) “Business” means a proprietorship, partnership, corporation, or any other form of commercial enterprise.

(2) “Organ procurement organization” means a person designated by the Secretary of the federal Department of Health and Human Services as an organ procurement organization.

(c) A violation of this section constitutes a misdemeanor punishable by imprisonment in a county jail for no more than one year, or by a fine of no more than ten thousand dollars ($10,000), or by both.

(Amended by Stats. 2014, Ch. 569, Sec. 1. Effective January 1, 2015.)

CAL. CIV. CODE § 1643

§1643.

A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

(Enacted 1872.)

CAL. CIV. CODE § 3541

§3541.

An interpretation which gives effect is preferred to one which makes void.

(Enacted 1872.)

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system.

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

By: /s/ Aaron M. McKown