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 9 INTERNET CORPORATION FOR ASSIGNED
 NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12
 13 RUBY GLEN, LLC,
 14 Plaintiff,
 15 v.

16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,
 18 Defendant.

Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the
 Honorable Percy Anderson

DEFENDANT INTERNET
 CORPORATION FOR ASSIGNED
 NAMES AND NUMBERS'
 MEMORANDUM OF POINTS
 AND AUTHORITIES IN
 SUPPORT OF MOTION TO
 DISMISS FIRST AMENDED
 COMPLAINT

[[Proposed] Order filed
 concurrently herewith]

Hearing Date: November 28, 2016
 Hearing Time: 1:30 p.m.
 Courtroom: 15

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1 **I. INTRODUCTION**

2 Plaintiff Ruby Glen LLC’s (“Plaintiff’s”) First Amended Complaint (“FAC”)
3 fails to plausibly allege the elements of any of its five causes of action, mainly for
4 the very same reasons that led this Court to deny Plaintiff’s application for a
5 temporary restraining order. (*See* ECF No. 21.) Likewise, all of Plaintiff’s claims
6 are barred by a covenant not to sue acknowledged and accepted by Plaintiff in
7 2012. The FAC is further deficient because it fails to name a party necessary to
8 resolving this dispute—namely, Nu Dotco LLC (“NDC”), the applicant whose
9 winning auction bid Plaintiff challenges. Taken together or individually, these key
10 flaws require that the FAC be dismissed.

11 The FAC largely reiterates the allegations of the original Complaint, which
12 alleged that: (1) ICANN did not sufficiently investigate Plaintiff’s claim that
13 another applicant to operate the .WEB new gTLD, non-party NDC, had undergone
14 a change in ownership or management since the time it submitted its application to
15 operate .WEB; and (2) ICANN should have delayed the .WEB auction (“Auction”)
16 to investigate. In addition, the FAC newly alleges that ICANN conducted an
17 insufficient investigation into an agreement between NDC and Verisign, Inc.
18 (“Verisign”), another non-party to this action, whereby Verisign agreed to provide
19 NDC with funds to bid for .WEB in the Auction.

20 While rife with conclusions, the FAC fails to plausibly allege any causes of
21 action against ICANN. As the Court observed in denying the TRO, there is a
22 notable “weakness of Plaintiff’s efforts to enforce vague terms contained in the
23 ICANN bylaws and Applicant Guidebook.” (ECF No. 21 at 4.) In short, Plaintiff’s
24 claims all fail as a matter of law because: (1) the allegations, even if true, do not
25 state grounds for relief; and (2) Plaintiff is contractually obligated “NOT TO
26 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL
27 DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION”
28 (FAC, Ex. C (Applicant Guidebook § 6.6)) and instead to utilize the alternative

1 dispute resolution mechanisms set forth in ICANN’s Bylaws. This provision was
2 well-known to, and accepted by, Plaintiff, which is part of a corporate family that
3 applied for 307 new gTLDs in 2012. Moreover, the FAC must be dismissed under
4 Federal Rule of Civil Procedure 12(b)(7) because Plaintiff failed to join NDC, a
5 necessary party to this action that will not destroy diversity.

6 **II. SUMMARY OF THE ALLEGATIONS**

7 ICANN is a California not-for-profit public benefit corporation that oversees
8 the technical coordination of the Internet’s domain name system (“DNS”) on behalf
9 of the Internet community, ensuring the DNS’s continued security, stability and
10 integrity. (FAC ¶¶ 1, 10.) The portion of a domain name to the right of the last dot
11 (such as “.GOV” and “.ORG”) is a generic top-level domain (“gTLD”). (FAC ¶
12 11.) In 2012, ICANN launched a “New gTLD Program” application round, in
13 which it invited any interested party to apply for the creation of a new gTLD and
14 the opportunity to be the operator of that gTLD. (FAC ¶ 16.) In connection with
15 the New gTLD Program, ICANN published the Applicant Guidebook
16 (“Guidebook”), which prescribes the requirements for new gTLD applications to be
17 approved, and the criteria by which they are evaluated. (FAC ¶ 16 & Ex. C.)

18 The Guidebook includes terms and conditions that all applicants, including
19 Plaintiff, acknowledged and accepted by submitting a gTLD application. (FAC ¶
20 16 & Ex. C.) One key provision, the “Covenant Not to Sue,” requires applicants to
21 pursue claims about ICANN’s evaluation of applications using ICANN’s
22 accountability mechanisms, rather than in judicial lawsuits:

23 Applicant hereby releases ICANN and the ICANN Affiliated Parties
24 from any and all claims by applicant that arise out of, are based upon, or
25 are in any way related to, any action, or failure to act, by ICANN or any
26 ICANN Affiliated Party in connection with ICANN’s or an ICANN
27 Affiliated Party’s review of this application, investigation or verification,
28 any characterization or description of applicant or the information in this

1 application, any withdrawal of this application or the decision by ICANN
 2 to recommend, or not to recommend, the approval of applicant’s gTLD
 3 application. APPLICANT AGREES NOT TO CHALLENGE, IN
 4 COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL
 5 DECISION MADE BY ICANN WITH RESPECT TO THE
 6 APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO
 7 SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA
 8 ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN
 9 AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE
 10 APPLICATION. . . ; PROVIDED, THAT APPLICANT MAY UTILIZE
 11 ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S
 12 BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL
 13 DECISION MADE BY ICANN WITH RESPECT TO THE
 14 APPLICATION.”

15 (FAC ¶ 21, Ex. C § 6.6 (capitalization in original, underlining supplied).)

16 Among the several accountability mechanisms provided for in ICANN’s
 17 Bylaws is an independent review process (“IRP”), under which an aggrieved
 18 applicant can ask independent panelists to evaluate whether an action or inaction of
 19 ICANN’s Board was inconsistent with ICANN’s Articles and Bylaws. (FAC, Ex.
 20 B [Bylaws, Art. IV, § 2].)¹ A gTLD applicant can use the IRP to challenge whether
 21 the ICANN Board violated the Bylaws by acting on its application in a way
 22 contrary to the Guidebook.

23 Because technical, operational and financial capabilities are critical to an
 24 applicant’s suitability to run a gTLD, applicants are required to identify the entities
 25 and people who will be involved in the management of the applied-for gTLD.

26
 27 ¹ All references to ICANN’s Bylaws refer to the Bylaws which took effect on
 28 11 February 2016 and are relied upon by Plaintiff in the FAC. (FAC, Ex. B.) An
 amended set of ICANN Bylaws became effective on 1 October 2016. *See*
<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

1 (FAC, Ex. C [Guidebook § 2].) Each applicant must also be screened and submit to
2 certain background checks. (*Id.* §§ 1.2.1, 2.1.) The Guidebook also provides that
3 “[i]f at any time during the evaluation process information previously submitted by
4 an applicant becomes untrue or inaccurate, the applicant must promptly notify
5 ICANN.” (*Id.* § 1.2.7.) Section 1.2.7 imposes an ongoing duty to update
6 “applicant specific information such as changes in financial position and changes in
7 ownership or control of the applicant.” (*Id.*)

8 In June 2012, Plaintiff, non-party NDC, and several other applicants applied
9 for .WEB. NDC’s application stated that it was a Delaware limited liability
10 company, and listed three officers: Jose Ignacio Rasco III, CFO; Juan Diego Calle,
11 CEO; and Nicolai Bezsonoff, COO. (FAC ¶ 32.) It listed Mr. Rasco as its
12 “Primary Contact” and Mr. Bezsonoff as its “Secondary Contact.” (FAC ¶ 32.) As
13 the application requested, NDC identified two owners having at least 15% interests:
14 Domain Marketing Holdings, LLC and Nuco LP, LLC. (FAC ¶ 32.)

15 If more than one application for the same gTLD passes all of the prescribed
16 levels of evaluation, the applications are placed in a string “contention set.” (FAC,
17 Ex. C [Guidebook § 1.1.2.10].) The seven applicants seeking .WEB were placed
18 into a contention set by ICANN. (FAC ¶¶ 25, 30, 43.) Following the Guidebook’s
19 procedures, on April 27, 2016, ICANN scheduled the .WEB Auction to take place
20 on July 27, 2016 in order to resolve which application in the contention set would
21 be selected. (*See* FAC ¶¶ 26, 43.) The Guidebook, however, “encourage[s]
22 applicants] to resolve string contention cases among themselves prior to the string
23 contention resolution stage.” (FAC, Ex. C [Guidebook § 1.1.2.10].) In order to
24 proceed by private resolution, all applicants for the string must agree to participate.
25 (FAC ¶ 26.) Here, NDC declined to agree to private resolution of the contention
26 set. (FAC ¶ 37.)

27 Plaintiff then sought to delay the Auction by expressing concerns to ICANN
28 regarding NDC’s application for .WEB, and arguing that ICANN’s investigation of

1 those concerns was insufficient. (FAC ¶¶ 38-39.) Specifically, Plaintiff asserts that
2 it received an email from NDC’s CFO on June 7, 2016 that, according to Plaintiff,
3 “indicated a potential change in both [NDC’s] management and ownership.” (FAC
4 ¶ 39.) Plaintiff contends that this—and this alone—should have caused ICANN to
5 postpone the Auction for further investigation. (FAC ¶ 42.)

6 After completing its investigation of Plaintiff’s allegations, ICANN sent a
7 letter to the members of the contention set on July 13, 2016 stating, among other
8 things, that “in regards to potential changes of control of [NDC], we have
9 investigated the matter, and to date we have found no basis to initiate the
10 application change request process or postpone the auction.” (FAC ¶ 44.)

11 On July 17, 2016, Plaintiff invoked one of ICANN’s accountability
12 mechanisms by submitting a reconsideration request on an urgent basis
13 (“Reconsideration Request 16-9”) to ICANN’s Board, seeking postponement of the
14 Auction and requesting a more detailed investigation into Plaintiff’s claims
15 regarding NDC’s application. (FAC ¶¶ 49-52.) On July 21, 2016, ICANN’s Board
16 Governance Committee (“BGC”) denied that request. (FAC ¶ 54².) Plaintiff also
17 contacted ICANN’s Ombudsman, who did not take action on the issue. (FAC ¶ 41.)

18 The Auction took place on July 27, 2016 as scheduled, and NDC placed the
19 winning bid. (FAC ¶ 56.) Shortly afterward, non-party Verisign disclosed that it
20 had entered into an agreement with NDC, whereby VeriSign “provided funds for
21 [NDC]’s bid for the .web TLD’ in an effort to acquire the rights to the .WEB
22 gTLD.” (FAC ¶ 58 (quoting Verisign press release).)

23 **III. PROCEDURAL HISTORY**

24 Plaintiff filed its Complaint on July 22, 2016. (ECF No. 1.) At the same
25 time, it applied for a temporary restraining order, seeking to enjoin ICANN from
26 conducting the Auction at the scheduled time. (ECF 6, “TRO Application.”) On

27 ² See also BGC’s Determination on Reconsideration Request 16-9, available
28 at <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf>.

1 July 26, 2016, this Court denied the TRO Application. (ECF No. 21, “TRO
2 Order.”) Plaintiff filed the FAC on August 8, 2016. (ECF No. 23.)³

3 **IV. LEGAL STANDARDS**

4 **A. Fed. R. Civ. P. 12(b)(6).**

5 Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”) requires dismissal
6 when a plaintiff fails to plead a set of facts which, if true, would entitle the plaintiff
7 to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The pleadings must raise
8 the right to relief beyond the speculative level, and a plaintiff must provide “more
9 than labels and conclusions.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
10 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
11 possibility of misconduct,” dismissal is warranted. *Iqbal*, 556 U.S. at 679. To
12 satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b)
13 (“Rule 9(b)”), which applies to fraud-based claims under Cal. Bus. & Prof. Code §
14 17200 (“Section 17200”), Plaintiff must allege the who, what, when, where, and
15 how of the alleged fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th
16 Cir. 2003).

17 **B. Fed. R. Civ. P. 12(b)(7).**

18 Federal Rule of Civil Procedure 12(b)(7) (“Rule 12(b)(7)”) requires dismissal
19 where a plaintiff failed to include a party that is “necessary” to the action under
20 Fed. R. Civ. P. 19 (“Rule 19”). If a non-party is necessary and joinder is feasible,
21 the complaint must be dismissed and the plaintiff ordered to join the necessary
22 party. *NRDC v. Kempthorne*, 539 F. Supp. 2d 1155, 1183, 1191 (E.D. Cal. 2008).

23 **V. ARGUMENT**

24 The FAC attempts to plead five causes of action: (1) breach of contract; (2)
25 breach of the implied covenant of good faith and fair dealing; (3) negligence; (4)

26 ³ In the TRO Order, the Court noted that the original Complaint failed to
27 allege sufficient facts regarding the parties’ citizenship to demonstrate whether the
28 Court could exert subject matter jurisdiction over the matter by virtue of diversity
of citizenship, and ordered Plaintiff to file an Amended Complaint setting forth the
 requisite jurisdictional allegations. (TRO Order at 4-5.)

1 violation of Section 17200; and (5) declaratory relief. The allegations do not set
 2 forth a plausible ground for relief with respect to any of these claims, and each is
 3 barred by Plaintiff's agreement to pursue its claims in ICANN's accountability
 4 mechanisms in the Covenant Not to Sue. Moreover, Plaintiff failed to join NDC, a
 5 necessary party, which serves as an independent basis for dismissal of the FAC.

6 **A. Each Of Plaintiff's Causes Of Action Fail To State A Claim.**

7 **1. Plaintiff's Breach of Contract Claim Fails As A Matter of**
 8 **Law.**

9 "The standard elements of a claim for breach of contract are: '(1) the
 10 contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's
 11 breach, and (4) damage" *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal.
 12 App. 4th 1171, 1178 (2008) (citation omitted). Plaintiff's claim that ICANN
 13 breached both the Auction Rules⁴ and ICANN's Bylaws⁵ fails because the FAC
 14 does not plausibly allege a breach of either, and ICANN's Bylaws do not comprise
 15 a contract between ICANN and Plaintiff.

16 **(a) Plaintiff Does Not Plausibly Allege Any Breach Of**
 17 **ICANN's Auction Rules.**

18 Plaintiff alleges only one fact related to the alleged Auction Rules breach:
 19 "ICANN . . . promised that a contention set would only *proceed to auction* where
 20 all active applications . . . have 'no pending ICANN Accountability Mechanisms'."
 21 (FAC ¶ 70 (emphasis added).) That allegation, however, misstates the contents of
 22 the Auction Rules, which in fact state that all "pending ICANN Accountability

23 ⁴ The Court may consider the Auction Rules even though they are not
 24 attached to the FAC because: (1) the FAC refers to them; (2) they are central to
 25 Plaintiff's breach of contract claim; and (3) Plaintiff could not challenge their
 26 authenticity given that it filed the Auction Rules as an exhibit in support of its
 27 unsuccessful TRO Application (ECF 7-10, Zecchini Decl., Ex. J). *See United*
 28 *States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011) (in ruling
 on motion to dismiss, court may consider a document that is not attached to the
 complaint "if: (1) the complaint refers to the document; (2) the document is central
 to the plaintiff's claim; and (3) no party questions the authenticity of the
 document").

⁵ The Bylaws are included as Exhibit B to the FAC.

1 Mechanisms” must be resolved “prior to the *scheduling* of an Auction.” (ECF No.
2 7-10 ¶ 8 (emphasis added).) Unsurprisingly, Plaintiff does not allege that any
3 accountability mechanisms were pending when the Auction was *scheduled* (which
4 was April 27, 2016—*before* Plaintiff invoked any accountability mechanisms).
5 Plaintiff, therefore, has pled no facts to support the claim that ICANN breached the
6 requirement that no auction may be scheduled while an accountability mechanism
7 is pending. Had the FAC included the critical and undisputed fact that the Auction
8 was scheduled on April 27, 2016, the claim would be deficient on its face: Plaintiff
9 did not lodge a complaint with ICANN’s Ombudsman until late June 2016 (FAC ¶
10 41); Plaintiff did not submit Reconsideration Request 16-9 until July 17, 2016
11 (FAC ¶ 50); and Plaintiff did not attempt to initiate a Request for Independent
12 Review until July 22, 2016 (FAC ¶ 55). Thus, no ICANN accountability
13 mechanisms were pending on April 27, 2016, when the Auction was scheduled.

14 **(b) ICANN’s Bylaws Do Not Constitute An Enforceable**
15 **Contract Between Plaintiff And ICANN, And Plaintiff**
16 **Does Not Plausibly Allege Any Bylaws Breach In Any**
17 **Event.**

18 Plaintiff’s claim for breach of the Bylaws fails for two reasons. First,
19 ICANN’s Bylaws cannot comprise a contract between ICANN and Plaintiff.
20 Second, in any event, ICANN did not breach its Bylaws in its dealings with
21 Plaintiff.

22 To start, the Bylaws do not constitute a contract between ICANN and new
23 gTLD applicants. Indeed, this Court has considered this precise issue and held that
24 ICANN is only contractually bound by the obligations to which it agreed in the
25 application documents, not other extraneous materials. *See Image Online Design,*
26 *Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP (JCx),
27 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013). Plaintiff does not
28 allege any facts that suggest the terms of ICANN’s Bylaws are incorporated into
any contract that might exist in connection with Plaintiff’s application for .WEB,

1 rendering the claim fatally defective. *See Frontier Contracting, Inc. v. Allen Eng'g*
2 *Contractor, Inc.*, No. CV F 11-1590 LJO DLB, 2012 U.S. Dist. LEXIS 64037, at
3 *11, 13 (E.D. Cal. May 7, 2012) (granting motion to dismiss breach of contract
4 claim for failure to “allege the substance of [the contract’s] relevant terms” (quoting
5 *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006))).

6 Indeed, the Bylaws **could not** comprise an enforceable contract between
7 ICANN and Plaintiff, because Plaintiff lacks standing to claim that ICANN has
8 breached the Bylaws. ICANN is a not-for-profit public benefit corporation, and
9 only officers, directors, the corporation or a member thereof, the attorney general or
10 a person with an interest in an asset the corporation holds in charitable trust have
11 standing to sue for breach of the corporation’s foundational documents. Cal. Corp.
12 Code § 5142; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (1987).⁶

13 The breach of contract claim also fails for the separate and independent
14 reason that the FAC shows that ICANN fully complied with its Bylaws. The FAC
15 alleges four Bylaws breaches, yet pleads no facts indicating that any breach actually
16 occurred. First, the FAC alleges that ICANN “fail[ed] to engage in a thorough,
17 open, and transparent investigation” of NDC’s potential change in ownership and
18 agreement with Verisign, and therefore purportedly breached ICANN’s Bylaws
19 requiring it to operate “neutrally and objectively” and to “operate to the maximum
20 extent feasible in an open and transparent manner[.]” (FAC ¶ 60(a).) Yet Plaintiff
21 does not allege any facts suggesting that ICANN did not act “neutrally and
22 objectively” (for instance, by investigating other applicants in a different way), and
23 the Bylaws require transparency only to the extent “feasible.”

24 Second, the FAC alleges that ICANN undertook only a “cursory

25
26 ⁶ For this reason, to the extent the breach of contract claim arises out of the
27 Bylaws, Plaintiff’s claim cannot be cured by amendment and should be dismissed
28 with prejudice. *See Villalvazo v. Am.’s Servicing Co.*, No. CV 11-4868 CAS
(MANx), 2012 U.S. Dist. LEXIS 103075, at *12, 19–20 (C.D. Cal. July 23, 2012)
(finding further amendment to contract claim would be futile and dismissing first
amended complaint with prejudice).

1 examination” of NDC’s ownership, and did not discover NDC’s agreement with
2 Verisign, thereby purportedly violating the Bylaws’ requirement that ICANN “[act]
3 with a speed that is responsive to the needs of the Internet while . . . obtaining
4 informed input from those entities most affected[.]” (FAC ¶ 69(b).) But the FAC
5 admits that ICANN had a legitimate “interest in a swift resolution of [Plaintiff’s]
6 concerns” (FAC ¶ 69(b)), does not cite any Bylaws provision requiring
7 “interviews” with “*all . . . individuals*” mentioned in NDC’s application (FAC ¶
8 69(b) (emphasis added)), and fails to allege any facts suggesting that ICANN was
9 or should have been aware of the allegedly private agreement between NDC and
10 Verisign prior to the Auction.

11 Third, the FAC alleges that ICANN breached the Bylaws provision requiring
12 ICANN to remain “accountable to the Internet community” because ICANN did not
13 “make use of the processes established in Sections 6.8 and 6.11 to the Applicant
14 Guidebook” in its investigation of NDC. (FAC ¶ 69(c).) Those Guidebook
15 provisions *allow* ICANN to conduct background checks and seek information from
16 applicants regarding their applications. (FAC, Ex. C.) No Bylaws provision,
17 however, *requires* ICANN to utilize those procedures in any specific circumstances,
18 let alone those presented here.

19 Fourth, the FAC alleges that ICANN breached the Bylaws provision
20 prohibiting ICANN from “singl[ing] out any particular party for disparate treatment
21 unless justified by substantial and reasonable cause,” alleging that ICANN favored
22 NDC because “ICANN provided only a conclusory statement” regarding Plaintiff’s
23 pre-Auction claim that NDC changed ownership and post-Auction claim that NDC
24 transferred rights to Verisign. Yet, the FAC admits that ICANN provided more
25 than a “conclusory statement” insofar as the BGC prepared a detailed response to
26 Plaintiff’s Reconsideration Request 16-9. (FAC ¶¶ 52-54.) The FAC also fails to
27 allege any “disparate treatment” because it does not explain why ICANN’s
28 investigation of NDC singled out any applicant for disparate treatment; in fact,

1 Plaintiff fails to cite any Bylaws provision requiring ICANN to investigate claims
2 made by one applicant against another.

3 Moreover, ICANN complied with both its Bylaws and Auction Rules in all
4 relevant respects. Indeed, when considering the original Complaint (ECF No. 1),
5 this Court remarked upon “the weakness of Plaintiff’s efforts to enforce vague
6 terms contained in the ICANN bylaws and Applicant Guidebook” (TRO Order at
7 4), and Plaintiff’s FAC does not place it on any firmer footing. In fact, in denying
8 Plaintiff’s TRO Application, this Court ruled that the evidence demonstrated that
9 ICANN did conduct a thorough investigation of Plaintiff’s claims regarding NDC’s
10 alleged change in ownership or control, and found that the claims were erroneous:

11 ICANN has provided evidence that it has conducted investigations into
12 Plaintiff’s allegations concerning potential changes in NDC’s
13 management and ownership structure at each level of Plaintiff’s appeals
14 to ICANN for an investigation and postponement of the auction. During
15 those investigations, NDC provided evidence to ICANN that it had made
16 no material changes to its management and ownership structure. . . .
17 [which] is supported by the Declarations of Nicolai Bezsonoff and Jose
18 Ignacio Rasco, who declare under penalty of perjury that there have been
19 no changes to NDC’s management, membership, or ownership since
20 NDC first filed its application with ICANN.

21 (TRO Order at 4.) Conclusory allegations that ICANN did not conduct a thorough
22 investigation, *when this Court has already found that it did*, cannot state a viable
23 breach of contract claim.⁷ See *Iqbal*, 556 U.S. at 679 (“[d]etermining whether a
24 complaint states a plausible claim for relief will . . . be a context-specific task that

25 _____
26 ⁷ Notably, the FAC’s allegations admit that ICANN investigated Plaintiff’s
27 inaccurate claims about NDC’s ownership or management: Plaintiff admits that
28 ICANN staff looked into the matter (FAC ¶ 44), ICANN’s Ombudsman did not
provide any support for Plaintiff’s claims (FAC ¶¶ 41-42), and ICANN’s BGC
independently evaluated Plaintiff’s assertions and concluded that there was no
evidence that a postponement of the Auction was necessary (FAC ¶¶ 49-54).

1 requires the reviewing court to draw on its *judicial experience* and common sense”)
 2 (emphasis added); *Morrison v. Wachovia Mortg. Corp.*, No. CV 11-7948 CAS
 3 (FMOx), 2012 U.S. Dist. LEXIS 39273, at *11 (C.D. Cal. Mar. 12, 2012)
 4 (dismissing claims with prejudice for reasons expressed in court’s prior rulings).

5 **2. Plaintiff’s Claim For Breach Of The Implied Covenant Of**
 6 **Good Faith And Fair Dealing Fails As A Matter Of Law.**

7 Plaintiff alleges ICANN breached the implied covenant of good faith and fair
 8 dealing claim because it purportedly: (a) failed to sufficiently investigate whether
 9 NDC had changed its membership or ownership; (b) refused to postpone the
 10 Auction pending the resolution of Plaintiff’s claims; and (c) failed to investigate
 11 whether NDC had improperly transferred “its rights in the .WEB application to
 12 VeriSign.” (FAC ¶ 76.)

13 This claim arises out of what Plaintiff dubs the “contractual relationship
 14 entered into as part of the .WEB gTLD application process . . . as set forth in the
 15 Applicant Guidebook.” (FAC ¶ 74.) Yet Plaintiff does not tie its factual
 16 allegations to any enforceable contractual obligation, as discussed above. The
 17 claim is therefore fatally deficient, because “[i]t is universally recognized [that] the
 18 scope of conduct prohibited by the covenant of good faith is circumscribed by the
 19 purposes and *express terms of the contract*. . . . ‘not to protect some general public
 20 policy interest not directly tied to the contract’s purpose.’” *Carma Developers*
 21 *(Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992) (emphasis
 22 added) (citation omitted). Because Plaintiff seeks to rely on the same implausible
 23 factual allegations asserted in the breach of contract claim (*see* FAC ¶¶ 75-76), the
 24 implied covenant claim suffers the same deficiencies, warranting dismissal.

25 **3. Plaintiff’s Negligence Claim Fails As A Matter Of Law.**

26 Plaintiff bases its negligence claim on allegations *identical* to those pled in
 27 support of its deficient claim for breach of the implied covenant, namely that
 28 ICANN: (a) failed to investigate whether NDC had changed its membership or

1 ownership; (b) refused to postpone the Auction as Plaintiff had sought; and (c)
2 failed to conduct an inquiry into whether NDC had improperly resold, transferred or
3 assigned “its rights or obligations in connection with the [.WEB] application to
4 VeriSign.” (FAC ¶ 81.) The negligence claim fails for two reasons. First, the
5 claim is barred by the economic loss rule. Second, the allegations of the FAC do
6 not prove any of the three elements of a viable negligence claim.

7 As an initial (and dispositive) matter, the economic loss rule bars Plaintiff’s
8 negligence claim. “[P]urely economic damages to a plaintiff which stem from
9 disappointed expectations from a commercial transaction must be addressed
10 through contract law; negligence is not a viable cause of action for such claims.” *In*
11 *re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012).⁸

12 Accordingly, as the FAC asserts only monetary harm arising out of a commercial
13 transaction between sophisticated entities, the negligence claim must be dismissed.

14 The claim also fails as a matter of law because the allegations of the FAC do
15 not support *any* of the three elements of negligence: “(a) a legal duty to use due
16 care; (b) a breach of such legal duty; (c) the breach as the proximate or legal cause
17 of the resulting injury.” *Jackson v. AEG Live, Inc.*, 233 Cal. App. 4th 1156, 1173
18 (2015) (citation omitted). First, Plaintiff has not alleged any facts that might
19 suggest ICANN owes Plaintiff a duty of care. At most, Plaintiff alleges that the
20 parties have a contractual relationship, but a contractual relationship does not give
21 rise to a duty of care. *See Walters v. Fid. Mortg. of Cal., Inc.*, 730 F. Supp. 2d
22 1185, 1206 (E.D. Cal. 2010). Second, even if there was a duty (which there is not),
23 Plaintiff has not alleged any breach of such a duty, because ICANN fully complied
24 with the Bylaws and Auction Rules, as established above. Third, the only damages
25 Plaintiff seeks in connection with the negligence claim are: “losses of revenue from

26 ⁸ Because no amendment could cure this fundamental defect, the negligence
27 claim should be dismissed *with prejudice*. *See In re Sony Gaming Networks &*
28 *Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014)
(granting motion to dismiss negligence claim *with prejudice* based on economic
loss rule).

1 third parties, profits, consequential costs and expenses, market share, reputation,
 2 and good will.” (FAC ¶ 82.) However, those damages stem from Plaintiff’s failure
 3 to *win the Auction* (or secure NDC’s agreement to proceed by private resolution),
 4 not any ICANN conduct.⁹

5 **4. Plaintiff’s Section 17200 Claim Fails As A Matter Of Law.**

6 Plaintiff makes allegations under all three prongs of Section 17200. First,
 7 Plaintiff claims that ICANN acted in an “unlawful” manner by including the
 8 Covenant Not to Sue in the Guidebook. (FAC ¶ 86.) Second, Plaintiff alleges that
 9 ICANN acted “unfairly” when it conducted what Plaintiff vaguely calls a “cursory
 10 investigation” into Plaintiff’s claims about NDC. (FAC ¶ 87.) Third, Plaintiff
 11 claims that ICANN acted in a “fraudulent” manner when it represented that it
 12 would adhere to its Bylaws and the Auction Rules. (FAC ¶ 88.) Plaintiff fails to
 13 state a viable claim under any of Section 17200’s three subparts, for two reasons.

14 First, Plaintiff lacks standing to assert a Section 17200 claim because it has
 15 not “lost money or property” as a result of ICANN’s alleged violations of the
 16 statute. *See* Cal. Bus. & Prof. Code § 17204. Plaintiff alleges only that it lost its
 17 legal fees and the application fee required of all New gTLD Program applicants.
 18 (FAC ¶ 85.)¹⁰ However, attorneys’ fees cannot qualify as “lost money or property”
 19 sufficient to support standing under Section 17200. *Cordon v. Wachovia Mortg.*,
 20 776 F. Supp. 2d 1029, 1039 (N.D. Cal. 2011) (“Plaintiff fails to cite any authority
 21 establishing that attorney’s fees incurred in bringing a UCL claim are sufficient to

22 ⁹ Indeed, Plaintiff seeks \$22.5 million in damages (FAC ¶ 72)—the precise
 23 amount Plaintiff would have garnered had the Auction not taken place and had the
 24 rights to operate the .WEB string instead been determined by private resolution (as
 25 the facts elicited in discovery will show). The need for an auction to determine
 which applicant would prevail in being awarded the right to operate .WEB was not
 a result of any ICANN conduct, but instead Plaintiff’s failure to convince other
 applicants, including NDC, that private resolution was preferable.

26 ¹⁰ Plaintiff appears to assume that Section 17200 permits a refund of any
 27 monies that have flowed from Plaintiff to ICANN, but case law squarely forecloses
 28 that reasoning. *See Henry v. Lehman Commercial Paper, Inc. (In re First All.*
Mortg. Co.), 471 F.3d 977, 997 (9th Cir. 2006) (“[t]here is no reason to believe, nor
 do the [plaintiffs] argue, that *all* of the money that went to [defendant] was
 improper. . . .”) (emphasis in original).

1 confer standing under § 17204. Under Plaintiff’s reasoning, a private plaintiff
2 bringing a UCL claim automatically would have standing merely by filing suit.”);
3 *Hernandez v. Specialized Loan Servicing, LLC*, No. CV 14-9404-GW(JEMx), 2015
4 U.S. Dist. LEXIS 8695, at *24–25 (C.D. Cal. Jan. 22, 2015) (same); *Selby v. Bank*
5 *of Am., Inc.*, No. 09cv2079 BTM(JMA), 2010 U.S. Dist. LEXIS 139966, at *24
6 (S.D. Cal. Oct. 27, 2010) (same).

7 Nor can the application fee serve as a basis for standing under Section 17200
8 because these amounts were not “lost . . . **as a result** of the [alleged] unfair
9 competition.” Cal. Bus. & Prof. Code § 17204 (emphasis added). Plaintiff’s
10 payment of the Application fee was not a “result” of any conduct challenged in this
11 lawsuit. The “loss” of the application fee (in the sense that the Application did not
12 prevail) was caused by NDC declining to agree to private resolution of the
13 contention set, and then submitting the winning bid in the Auction, not because of
14 any ICANN conduct. As such, Plaintiff lacks standing to assert a Section 17200
15 claim against ICANN. *See Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788,
16 808 (9th Cir. 2007) (affirming dismissal of UCL claim because challenged conduct
17 was not undertaken by defendant); *see also Easter v. Am. W. Fin.*, 381 F.3d 948,
18 961–62 (9th Cir. 2004) (plaintiff must trace alleged injury-in-fact to particular
19 defendants); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 944–46 (S.D.
20 Cal. 2007).

21 Second, Plaintiff’s Section 17200 claim must be dismissed because the FAC
22 does not plausibly suggest that ICANN engaged in an unlawful, unfair or fraudulent
23 business practice, as required by the statute.

24 Plaintiff claims that ICANN acted in an “unlawful” manner for only one
25 reason: ICANN included the Covenant Not to Sue in the Guidebook. (FAC ¶ 86.)
26 Plaintiff contends that the inclusion was unlawful because the requirement is
27 unenforceable under California Civil Code section 1668, and also is unconscionable
28 and therefore unlawful under California Civil Code section 1770(a)(19),

1 California’s Consumer Legal Remedies Act. (FAC ¶ 86.) As discussed below,
2 Section 1668 does not render the Covenant Not to Sue unenforceable, much less
3 “unlawful.” *See also Berkeley v. Wells Fargo Bank*, No. 15-cv-00749-JSC, 2015
4 U.S. Dist. LEXIS 141947, at *44 (N.D. Cal. Oct. 19, 2015) (“an ‘unlawful’
5 business practices claim usually cannot be premised on a common law violation
6 such as breach of contract”). And California Civil Code section 1770(a)(19) is
7 inapplicable on its face, as it makes certain practices unlawful only “in a . . . sale or
8 lease of goods or services to any consumer.” (emphasis added). In addition, there is
9 no allegation that inclusion of the Covenant *caused* Plaintiff any actual injury or
10 resulted in lost money or property. Indeed, Plaintiff filed this lawsuit despite, and
11 in violation of, its promise to pursue other remedies.

12 Plaintiff then claims that ICANN acted unfairly when it conducted what
13 Plaintiff views as a “cursory investigation” into Plaintiff’s claims about NDC and
14 decided, based on that investigation, not to postpone the Auction. (FAC ¶ 87.) Yet
15 Plaintiff does not allege any law or rule that requires a particular level of
16 investigation into these circumstances. In other words, Plaintiff asks this Court to
17 simply adopt Plaintiff’s definition of what level of investigation is “fair.” Such
18 allegations fail to state a claim according to well-established California Supreme
19 Court precedent: “[W]e must require that any finding of unfairness to competitors
20 under section 17200 be tethered to some *legislatively declared policy or proof of*
21 *some actual or threatened impact on competition.*” *Cel-Tech Commc’ns, Inc. v.*
22 *L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 186–87 (1999) (emphasis added). Indeed,
23 Plaintiff improperly asks the Court to invent a standard for a “fair” investigation in
24 this particular instance. *Id.* at 182, 184 (“Courts may not simply impose their own
25 notions of the day as to what is fair or unfair.”); *Am. W. Door & Trim v. Arch*
26 *Specialty Ins. Co.*, No. CV 15-00153 BRO (SPx), 2015 U.S. Dist. LEXIS 34589, at
27 *17–18 (C.D. Cal. Mar. 18, 2015) (dismissing Section 17200 claim arising out of
28 allegations that defendant was “[m]isleading policyholders as to conducting

1 *reasonable investigations* into claims” because “[t]hese allegations fail to identify
2 any ‘specific constitutional, statutory or regulatory provisions’ that may serve as a
3 predicate for Plaintiff’s ‘unfair’ UCL claim”) (citation omitted and emphasis
4 added).

5 Finally, Plaintiff attempts to plead a claim under the “fraudulent” prong of
6 Section 17200 by alleging that ICANN represented that it would adhere to the
7 terms of its Auction Rules and its Bylaws, but failed to do so. (FAC ¶ 88.) Under
8 California law, fraud is “an *intentional* misrepresentation, deceit, or concealment of
9 a material fact known to the defendant with the intention on the part of the
10 defendant of thereby depriving a person of property or legal rights or otherwise
11 causing injury.” Cal. Civ. Code § 3294(c)(3) (emphasis added). In federal court,
12 Section 17200 claims grounded in fraud must satisfy the particularity requirements
13 of Rule 9(b), and Plaintiff’s allegations do not come close to asserting the requisite
14 “‘who, what, when, where [or] how of the misconduct charged.’” *Vess*, 317 F.3d at
15 1103, 1106 (citation omitted); *Clark v. Countrywide Home Loans, Inc.*, 732 F.
16 Supp. 2d 1038, 1050 (E.D. Cal. 2010). Plaintiff fails to allege that: (a) ICANN
17 made any knowingly false statements as to its intentions regarding the Auction
18 Rules or Guidebook; (b) Plaintiff relied on those allegedly-false statements; (c)
19 those allegedly-false statements were made prior to Plaintiff’s decision to apply for
20 .WEB; or (d) ICANN had any duty to do any more than it did in its investigation
21 into NDC’s ownership and membership. *See also Hill v. State Farm Mut. Auto.*
22 *Ins. Co.*, 166 Cal. App. 4th 1438, 1468 (2008) (holding it is not fraudulent or
23 “dishonest” for a corporation to omit detailed explanations of its practices from its
24 contracts and bylaws, “particularly where the board expressly retains discretion in
25 the matter”).

26 **5. Plaintiff’s Declaratory Relief Claim Fails As A Matter Of**
27 **Law.**

28 Plaintiff seeks a judicial declaration concerning “the legality and effect” of

1 the Covenant Not to Sue to which Plaintiff agreed. (FAC, Ex. C § 6.6.) This claim
 2 must be dismissed because the Covenant Not to Sue is enforceable as a matter of
 3 law and bars all of Plaintiff's claims for the reasons set forth below.

4 **B. The Covenant Not To Sue Bars Plaintiff's Claims.**

5 A written release generally extinguishes any claim covered by its terms.
 6 *Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1366–67 (1996). The Covenant
 7 Not to Sue, which Plaintiff acknowledged and accepted, covers all of the claims set
 8 forth in the FAC because they “arise out of, are based upon, or are in any way
 9 related to, any action, or failure to act, by ICANN . . . in connection with ICANN's
 10 . . . review of” Plaintiff's Application. (FAC, Ex. C § 6.6.) This provision was
 11 well-known to, and accepted by, Plaintiff, which is part of a corporate family that
 12 applied for 307 new gTLDs in 2012. (See FAC ¶ 5.) Indeed, as the Western
 13 District of Kentucky recently held under nearly identical circumstances, the
 14 Covenant Not to Sue is enforceable, “clear and comprehensive.” *Commercial*
 15 *Connect v. Internet Corp. for Assigned Names & Nos.*, No. 3:16CV-00012-JHM,
 16 2016 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016). Interpreted
 17 generously, the FAC alleges that the Covenant Not to Sue is unenforceable for two
 18 reasons. One, Plaintiff argues that California Civil Code § 1668 (“Section 1668”)
 19 bars the Covenant Not to Sue's requirement that Plaintiff pursue the accountability
 20 mechanisms. Two, the FAC makes vague assertions that the Covenant Not to Sue
 21 is unconscionable in some unidentified way. Neither argument withstands scrutiny.

22 **1. Section 1668 Does Not Invalidate The Covenant Not To Sue.**

23 Section 1668 only invalidates contractual provisions that “exempt anyone
 24 from responsibility for his own fraud, or willful injury to the person or property of
 25 another.” Cal. Civ. Code § 1668. The statute has no effect upon the enforceability
 26 of requiring applicants to follow ICANN's accountability measures.

27 First, Section 1668 is relevant only to contractual provisions “which have for
 28 their object, directly or indirectly, to *exempt* any one from responsibility” for fraud

1 or willful injuries. Cal. Civ. Code § 1668 (emphasis added); *Monterey Bay Military*
2 *Hous., LLC v. Pinnacle Monterey LLC*, 116 F. Supp. 3d 1010, 1051 (N.D. Cal.
3 2015) (Section 1668 does not bar enforcement of clause that “merely exempts
4 employees and officers from personal liability” and still permitted plaintiff to
5 proceed against defendants in corporate capacity). The California Supreme Court
6 has invalidated provisions waiving judicial remedies under Section 1668 only upon
7 concluding that “the waiver becomes in practice the exemption of the party ‘from
8 responsibility for [its] own fraud, or willful injury to the person or property of
9 another.’” *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 163 (2005) (quoting
10 Section 1668), *overruled on other grounds in AT&T Mobility LLC v. Concepcion*,
11 563 U.S. 333 (2011).

12 Recognizing that language places the Covenant Not to Sue outside of Section
13 1668’s purview, the FAC omits the portions of the clause that make clear that it
14 does not exempt ICANN from responsibility for any kind of claim whatsoever. The
15 portion Plaintiff strategically opted not to quote provides: “APPLICANT MAY
16 UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S
17 BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION
18 MADE BY ICANN WITH RESPECT TO THE APPLICATION.” (FAC, Ex. C, §
19 6.6.) In other words, the Covenant Not to Sue does not *exempt* ICANN from
20 responsibility; any applicant may invoke the various accountability mechanisms
21 provided for in ICANN’s Bylaws. (*See* FAC, Ex. B, Art. IV.)

22 Second, Courts have interpreted Section 1668’s phrase “willful injury to the
23 person or property of another” to mean more than merely intentional conduct (such
24 as acts in breach of contract), but only “*intentional wrongs.*” *Frittelli, Inc. v. 350*
25 *N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) (emphasis added); *id.*
26 (“Ordinarily, the statute invalidates contracts that purport to exempt an individual
27 or entity from liability for future intentional wrongs and gross negligence.” (citation
28 omitted)); *see also Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 729 (1998)

1 (“While the word ‘willful’ implies an intent, the intention must relate to the
 2 misconduct and not merely to the fact that some act was intentionally done.”
 3 (citations omitted)).¹¹ The most Plaintiff alleges is that ICANN failed to thoroughly
 4 investigate NDC’s ownership and management, and that ICANN should somehow
 5 have discovered that non-party NDC entered into an agreement with Verisign.¹²
 6 But such accusations do not comprise the kind of intentional wrongs covered by
 7 Section 1668. Indeed, *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209
 8 Cal. App. 4th 1118 (2012), is instructive. There, a food-disinfectant equipment
 9 manufacturer alleged that a food-safety equipment tester failed to test the
 10 equipment using agreed-upon standards, in bad faith, and employed “slovenly
 11 procedures which seemed to be *slanted towards a preconceived conclusion.*” *Id.* at
 12 1125 (emphasis added and citation omitted). The court held that a limitation of
 13 liability clause in the parties’ contract—much like the requirement here to pursue
 14 accountability mechanisms—was enforceable to bar not only the plaintiff’s breach
 15 of contract claim but also “bad faith” and negligence claims. *Id.* at 1125–27; *see*
 16 *also Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 340–42 (1985)
 17 (release that covered “all actions, claims or demands . . . for injury or damage”
 18 barred negligence claim).

19 Third, interpreting Section 1668 to invalidate the Covenant Not to Sue runs
 20 contrary to the public interest. The Guidebook was adopted through an extensive
 21 public comment process to govern the nearly 2,000 applications that ICANN

22 _____
 23 ¹¹ *Calvillo-Silva* was disapproved on other grounds by *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826 (2001).

24 ¹² In addition, Plaintiff’s assertion that ICANN had a financial interest in the
 25 Auction is baseless. (FAC ¶ 77.) As a not-for-profit organization, ICANN has no
 26 interest in financial gain for its own sake. In fact, the Guidebook limits ICANN’s
 27 permissible uses of auction funds: “Any proceeds from auctions will be reserved
 28 and earmarked until the uses of funds are determined. Funds must be used in a
 manner that supports directly ICANN’s Mission and Core Values and also allows
 ICANN to maintain its not for profit status. . . . Possible uses of auction funds
 include formation of a foundation with a clear mission and a transparent way to
 allocate funds to projects that are of interest to the greater Internet community”
 (FAC, Ex. C Guidebook § 4.3 n.1.)

1 received and was tasked with evaluating—including competing applications for the
2 same gTLD such as those of Plaintiff and NDC. The requirement to pursue
3 accountability mechanisms ensures that the processing of these applications does
4 not get ensnared in endless litigation by disappointed applicants. If Plaintiff’s
5 argument is accepted, the Covenant Not to Sue could become dead letter—and the
6 important purposes it serves frustrated. Indeed, Section 1668 is limited to fraud and
7 willful injury, because the law recognizes that limiting lawsuits and achieving
8 finality are not only permissible goals, but serve valuable and important public-
9 interest purposes.

10 **2. The Covenant Not to Sue Is Not Unconscionable.**

11 The FAC vaguely alludes to the notion that the Covenant Not to Sue is
12 unconscionable. (*See, e.g.*, FAC ¶¶ 86, 99.) However, it is neither procedurally nor
13 substantively unconscionable. *See McCaffrey Grp., Inc. v. Superior Court*, 224 Cal.
14 App. 4th 1330, 1348–49 (2014) (party seeking to avoid written release must show
15 both).

16 The procedural unconscionability analysis “focus[es] on oppression and
17 surprise due to unequal bargaining power.” *Grand Prospect Partners, L.P. v. Ross*
18 *Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347 (2015). No “oppression” took
19 place here because Plaintiff is a sophisticated business entity, which is part of an
20 organization that willingly submitted hundreds of new gTLD applications (*see* FAC
21 ¶¶ 5, 72). *See Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d
22 1, 26–27 (1989); *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng’g,*
23 *Inc.*, 89 Cal. App. 4th 1042, 1056 (2001); *Grand Prospect Partners*, 232 Cal. App.
24 4th at 1352. Nor can Plaintiff claim to have been “surprised” by the Covenant Not
25 to Sue, a conspicuous and well-publicized provision of the Guidebook. *See*
26 *Performance Team Freight Sys., Inc. v. Aleman*, 241 Cal. App. 4th 1233, 1247
27 (2015).

28 To be substantively unconscionable, a provision must “shock the conscience.”

1 *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1323 (2005) (citation
 2 omitted). The FAC does not and cannot allege that is the case; the mere allegation
 3 that a release is one-sided cannot show substantive unconscionability, because
 4 “[u]nconscionability turns not only on a ‘one-sided’ result, but also on an absence
 5 of ‘justification’ for it” *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187
 6 Cal. App. 4th 634, 647 (2010) (citations omitted). The Covenant Not to Sue has a
 7 well-founded business justification, namely to prevent a dispersed flood of court
 8 litigation that would threaten to disrupt the orderly operation of the entire New
 9 gTLD Program. *See, e.g., Ambler v. BT Ams. Inc.*, 964 F. Supp. 2d 1169, 1177
 10 (N.D. Cal. 2013) (one-sided contract clause not unconscionable because it had “a
 11 legitimate business justification”); *Correa v. Firestone Complete Auto Care*, No. C
 12 13-03123 CW, 2013 U.S. Dist. LEXIS 169012, at *10 (N.D. Cal. Nov. 25, 2013).

13 **C. The FAC Should Be Dismissed Because It Fails To Join NDC, A**
 14 **Necessary Party.**

15 There is another flaw in the claims Plaintiff has brought to this Court:
 16 Plaintiff failed to join NDC, a necessary party, as required under Fed. R. Civ. P. 19.
 17 *See* Fed. R. Civ. P. 12(b)(7).¹³ NDC is necessary to the action because: (1) NDC
 18 maintains an interest in operating .WEB, the subject of the litigation, and (2)
 19 NDC’s absence would impair that interest and leave ICANN subject to multiple and
 20 inconsistent obligations related to this gTLD. Moreover, joining NDC is not
 21 infeasible.¹⁴

22 **1. NDC Is A Necessary Party.**

23 NDC is a necessary party because: (1) NDC “claims an interest relating to
 24 the subject of the action”; and (2) resolving the action in NDC’s absence would

25 ¹³ While both Rule 12(b)(7) and Rule 19 speak of a “required” (not
 26 “necessary”) party, the Ninth Circuit has explained that the inquiry under Rule
 27 12(b)(7) is whether “the absent party is *necessary* (i.e., *required* to be joined if
 28 feasible) under Rule 19(a)[.]” *Salt River Project Agric. Improvement & Power Dist.*
v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012) (emphasis added).

¹⁴ On information and belief, joining NDC would not destroy diversity.

1 “impair or impede [its] ability to protect the interest” and leave ICANN “subject to
2 a substantial risk of incurring double, multiple, or otherwise inconsistent
3 obligations because of the interest.” Fed. R. Civ. P. 19(a)(1)(B).

4 **(a) NDC Claims An Interest In The Subject Of The**
5 **Action.**

6 To start, NDC holds a legally-protectable interest in the subject matter of this
7 litigation. NDC prevailed in the auction and paid \$135 million. It therefore is
8 poised to enter into a Registry Agreement with ICANN to operate the .WEB gTLD.
9 This gives it a cognizable interest in the subject matter of this litigation. *See, e.g.,*
10 *Mayes v. Fujimoto*, 181 F.R.D. 453, 457 (D. Haw. 1998) (party necessary where it
11 had twenty percent beneficiary interest in the subject matter of the litigation); *see*
12 *also Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993), *abrogated on other*
13 *grounds in Wilderness Soc’y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011)
14 (legally protectable interest requirement met where “there is a relationship between
15 the legally protected interest and the claims at issue”). In fact, Plaintiff has filed a
16 motion to seek expedited discovery from NDC, stating that NDC’s “eligibility to
17 participate in the .WEB Auction” is “critical to determine” and could lead Plaintiff
18 to “amend its pleadings[.]” (ECF 28 at 6.)

19 Plaintiff may nonetheless argue that NDC’s interest is merely a speculative,
20 financial interest in the outcome of the litigation. Not so. Claims of rights to the
21 subject matter of the litigation comprise legally protectable interests for purposes of
22 the Rule 19 analysis. *White v. Univ. of Cal.*, No. C 12-01978 RS, 2012 U.S. Dist.
23 LEXIS 191061, at *30–31 (N.D. Cal. Oct. 9, 2012). A legally protected interest
24 “such as a claim under a contract, or ‘an interest in a fixed fund or limited resource
25 that the Court is asked to allocate may also be protected,’” and “the interest need
26 not rise to the level of” property under the Due Process Clause or a vested property
27 interest. *Id.* at *30 (citation omitted). Therefore, NDC’s interest in operating the
28 .WEB gTLD constitutes a legally protectable interest under Rule 19, because it

1 claims a legally protectable interest in the right to operate .WEB. *See id.* at *30–31;
 2 *Biagro W. Sales Inc. v. Helena Chem.Co.*, 160 F. Supp. 2d 1136, 1149 (E.D. Cal.
 3 2001). In sum, NDC “claims an interest relating to the subject of the action” under
 4 Rule 19(a)(1)(B).

5 **(b) NDC’s Absence Would Impair Or Impede Its Interest**
 6 **In The Subject Of The Action And Subject ICANN To**
 7 **Multiple And Inconsistent Obligations.**

8 NDC also meets both prongs of the disjunctive test Rule 19(a)(1)(B) requires
 9 a necessary party to meet. First, disposition of this action would necessarily impair
 10 and impede NDC’s interests. *See Fed. R. Civ. P. 19(a)(1)(B)(i)*. Plaintiff seeks an
 11 injunction “requiring ICANN to refrain from entering into a Registry Agreement
 12 with any party for the .WEB gTLD” and “refrain from assigning the rights to the
 13 .WEB gTLD to any party pending a final decision on the merits of this matter.”
 14 (FAC at Prayer.) The “any party” to which Plaintiff refers plainly is NDC, the
 15 winning bidder at the Auction. If Plaintiff obtains the injunctive relief it seeks,
 16 NDC’s interest in operating .WEB would be eliminated. NDC cannot defend this
 17 interest without becoming a party to the action. Second, disposing of the action in
 18 NDC’s absence would leave ICANN “subject to a substantial risk of incurring
 19 double, multiple, or otherwise inconsistent obligations[.]” *See Fed. R. Civ. P.*
 20 *19(a)(1)(B)(ii)*; *see Camacho v. Major League Baseball*, 297 F.R.D. 457, 462 (S.D.
 21 Cal. 2013) (“Inconsistent obligations occur when a party is unable to comply with
 22 one court’s order without breaching another court’s order concerning the same
 23 incident.” (citation omitted)). Specifically, if this court were to enjoin ICANN from
 24 entering into a Registry Agreement with NDC, NDC could file suit seeking an
 25 order requiring ICANN to execute the Registry Agreement.

26 **2. Plaintiff Should Be Ordered To Join NDC If The Lawsuit**
 27 **Continues.**

28 The FAC is inadequate and Plaintiff’s Covenant Not to Sue means that this
 action should be dismissed. But if a lawsuit continues, Plaintiff must be ordered to

1 join NDC, as nothing in the FAC suggests doing so would be infeasible. *See Trinh*
2 *v. Citibank, NA*, No. 5:12-cv-03902 EJD, 2012 U.S. Dist. LEXIS 178395, at *7
3 (N.D. Cal. Dec. 17, 2012) (“Neither Plaintiff nor Defendants argue that Canton’s
4 joinder is not feasible . . . since all of Plaintiff’s claims will be dismissed, some
5 with leave to amend, Plaintiff will have the opportunity to join Canton as a party in
6 an amended complaint”); *NRDC*, 539 F. Supp. 2d at 1191.

7 **VI. CONCLUSION**

8 For the foregoing reasons, ICANN respectfully requests that the Court
9 dismiss the FAC in its entirety, and with prejudice.

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Dated: October 26, 2016

JONES DAY

By: /s/ Eric P. Enson
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Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS