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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

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

Assigned for all purposes to the Honorable Percy Anderson

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

Hearing Date: November 28, 2016
Hearing Time: 1:30 p.m.
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I. INTRODUCTION

As explained in ICANN's motion to dismiss ("Motion"),[1] Plaintiff's FAC should be dismissed because: (1) it fails to plausibly allege the elements of its five causes of action; (2) Module 6 of the Guidebook requires that alleged Bylaws violations be addressed using ICANN's accountability mechanisms; and (3) the FAC fails to name NDC, a necessary party whose joinder is feasible. Nothing in Plaintiff's Opposition changes these conclusions.

II. ARGUMENT

A. Each Of Plaintiff's Causes Of Action Fails To State A Claim.[2]

1. Plaintiff's Breach of Contract Claim Warrants Dismissal.

(a) Plaintiff Does Not Plausibly State A Claim For Contractual Breach Of ICANN's Bylaws.

Plaintiff argues that ICANN's Bylaws comprise an enforceable contract in three ways, none of them availing. First, Plaintiff confuses ICANN's internal accountability mechanisms (such as an independent review process ("IRP")) established by ICANN's own Bylaws with contractual obligations under California law. Opp. at 6. Under the Bylaws, a qualified claimant may prevail in an IRP by demonstrating that ICANN's Board violated the Bylaws. FAC, Ex. B (Bylaws, Art. IV, § 3.2).[3] But that proposition does not imply that the Bylaws comprise a contractual obligation under California law.

A party dealing with a corporation does not, without more, have a contractual

[1] Unless otherwise indicated, all named terms and abbreviations have the same meaning as in ICANN's Motion.

[2] Plaintiff devotes a substantial portion of its Opposition to arguing that ICANN urges this Court to "apply an inapplicable legal standard" because ICANN quoted this Court's TRO Order in its Motion—the Motion plainly does not rely on any factual findings made therein, and addresses the few additional facts Plaintiff added when it amended its Complaint. Plaintiff's arguments in this regard are a red herring that should not distract from the deficiencies of the pleading.

[3] ICANN's Bylaws provide for several accountability mechanisms, including the IRP, under which an aggrieved applicant can ask independent panelists to evaluate whether an action or inaction of ICANN's Board was inconsistent with ICANN's Articles of Incorporation or its Bylaws. FAC, Ex. B (Bylaws, Art. IV, § 2).

right to enforce the corporation's bylaws.[4] Here, the Bylaws create internal accountability requirements and mechanisms (including IRPs) and the Guidebook (in Module 6) is explicit that applicants can pursue Bylaws complaints only through ICANN's accountability mechanisms, and specifically not through judicial actions. Plaintiff cannot now make use of the accountability assurances mentioned in Module 6 to pursue Bylaws complaints and then ignore Module 6's requirement that only accountability mechanisms can be employed to do so.

Second, Plaintiff argues that ICANN "admitted" that the Bylaws comprise an enforceable contract in an unrelated IRP. Opposition ("Opp.") at 5. However, Plaintiff's quotation strategically omits critical language (included below in italics). The full quote shows ICANN stated that IRP panelists derived "their powers *and authority* from *the relevant applicable rules, the parties' requests, and* the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, *which establish the process of independent review*). *The authority of panelists is limited by such rules, submissions and agreements*." Pl.'s Request for Judicial Notice ("RJN"), ECF 40, Ex. C ¶ 30. The entire statement makes clear that ICANN only said the Bylaws, which exist alongside contractual provisions in empowering IRP panelists, provide the process for IRPs. *See* FAC, Ex. B (Bylaws, Art. IV, § 3). Also, Plaintiff does not cite any legal principle that would make this statement binding on ICANN.[5]

Third, Plaintiff attempts to distinguish this District's ruling that squarely held the contract between ICANN and new gTLD applicants is limited to the terms in the parties' signed contract and the documents expressly incorporated by reference. *See Image Online Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No.

[4] That is as true for not-for-profit public benefit corporations as it is for for-profit corporations. *See* Mot. at 9.

[5] Judicial estoppel, to which Plaintiff alludes, does not apply because the statement is not "clearly inconsistent with ICANN's current position, and was not made in a legal proceeding. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006).

CV 12-08968 DDP (JCx), 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013); Opp. at 6. Plaintiff argues that the ruling merely applied the maxim that statements made after a contract is formed do not generally become part of the contract. Opp. at 6. But in fact, Judge Pregerson ruled: "the explicit terms of the Agreement contradict the notion that ICANN had an obligation to do anything beyond considering IOD's application [for .WEB]." *Image Online Design, Inc.*, 2013 U.S. Dist. LEXIS 16896, at *10. This proposition holds true here, defeating Plaintiff's claim for breach of ICANN's Bylaws.

In addition to the fact that Plaintiff's claim fails because the Bylaws do not constitute a contractual obligation, the FAC also does not plausibly allege that ICANN breached its Bylaws. This failure is starkly demonstrated by Plaintiff's reliance on only one case (*Flores v. Am. Seafoods Co*., 335 F.3d 904 (9th Cir. 2003); Opp. at 7-9) in defense of its Bylaws-breach theory. That case, however, simply indicates that an otherwise illusory promise to give discretionary employee bonuses should be construed to require the employer to exercise the discretion. *Id*. at 913. The fact that ICANN has the discretion to investigate applicants does not plausibly constitute a promise that ICANN will always exercise its discretion to investigate in the manner Plaintiff desires.

Having failed to provide any cases suggesting that the FAC plausibly alleges ICANN breached its Bylaws, Plaintiff proceeds to simply reiterate the allegations themselves. Opp. at 7-9. But those allegations comprise a wish list of actions Plaintiff wanted ICANN to undertake against a rival applicant for .WEB, not the "express terms" of any contract between ICANN and Plaintiff, which is required in order to maintain such a cause of action. *See Image Online Design, Inc.*, 2013 U.S. Dist. LEXIS 16896, at *10. For example, ICANN's Bylaws obligate it to act with a speed "responsive to the needs of the Internet" and "obtaining informed input from the entities most affected." Opp. at 8. The FAC does not allege that the Bylaws provide what speed would be sufficiently responsive or define "informed input" or

"entities most affected," because the Bylaws do not. Similarly, Plaintiff complains that ICANN did not utilize certain of its investigatory powers, but does not identify any Bylaws provision requiring ICANN to do so in the circumstances alleged. Opp. at 8. Likewise, Plaintiff asserts that ICANN applied standards inequitably without identifying those standards or how Plaintiff was treated disparately as compared to any other applicant. Opp. at 9.

In sum, the FAC does not plausibly allege that the Bylaws comprise an enforceable contract between ICANN and Plaintiff, or that ICANN in any way breached the Bylaws.[6]

(b) Plaintiff Does Not Plausibly Allege Any Breach Of ICANN's Auction Rules.

The FAC alleges only one fact related to the alleged Auction Rules breach: "ICANN . . . promised that a contention set would only ***proceed to auction*** where all active applications . . . have 'no pending ICANN Accountability Mechanisms'." FAC ¶ 70 (emphasis added). Yet the Auction Rules—which Plaintiff submitted with its TRO application[7]—require only that accountability mechanisms must be resolved "prior to the ***scheduling*** of an Auction." ECF 7-10 ¶ 8 (emphasis added).[8]

In its Opposition, Plaintiff tries to avoid the clarity of the Auction Rules'

[6] Plaintiff argues in a brief footnote that this Court should accept as true statements made by Senator Ted Cruz and two other Senators in connection with his request that the Department of Justice oversee an aspect of the relationship between ICANN and Verisign that is wholly unrelated to the instant dispute (which Plaintiff acknowledges). Opp. at 8 n.3 (citing RJN, Ex. A). However, while judicial notice may be taken of the existence of a document, it does not apply to the truth of the matters asserted therein. The Court should therefore disregard the letter (which is irrelevant in any event). *See Ramirez v. Medtronic Inc.*, 961 F. Supp. 2d 977, 983–84 (D. Ariz. 2013) (declining to take judicial notice of "the validity of the allegations or claims made" in letters from four U.S. Senators).

[7] ECF 7 ¶ 11 (Plaintiff's counsel declaring: "Attached hereto as Exhibit J is a true and correct copy of the ICANN Auction Rules"); ECF 7-10 (Exhibit J, titled "AUCTION RULES FOR NEWGTLDs: INDIRECT CONTENTIONS EDITION VERSION 2015-02-24 PREPARED FOR ICANN BY POWER AUCTIONS LLC"); ECF 6 at 28.

[8] Plaintiff cannot allege that any accountability mechanisms were pending when the Auction was scheduled (April 27, 2016). Plaintiff did not lodge a complaint with ICANN's Ombudsman until late June 2016 (FAC ¶ 41); Plaintiff did not submit Reconsideration Request 16-9 until July 17, 2016 (FAC ¶ 50); and Plaintiff did not attempt to initiate a Request for Independent Review until July 22, 2016 (FAC ¶ 55).

requirement that accountability mechanisms must not be pending at the time an auction is scheduled by now relying on a different document—a webpage[9] ***summarizing*** the Auction Rules—to argue that the Auction Rules require no pending accountability mechanisms when "enter[ing] into a New gTLD Program Auction." But the actual Auction Rules, not the webpage summary of them, are what Plaintiff agreed to follow. They are authoritative.

This kind of gamesmanship should be rejected for two additional reasons. First, a breach of contract claim must be dismissed where, as here, the plaintiff fails to "allege the substance of [the contract's] relevant terms[.]" *Frontier Contracting, Inc. v. Allen Eng'g Contractor, Inc.*, No. CV F 11-1590 LJO DLB, 2012 U.S. Dist. LEXIS 64037, at *11, 13 (E.D. Cal. May 7, 2012) (quoting *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1489 (2006)). Second, Plaintiff is judicially estopped from arguing that a different document comprises the Auction Rules because: (1) Plaintiff's current position is "clearly inconsistent" with its position in the TRO Application; (2) the Court accepted Plaintiff's prior representation (*see* ECF 21 at 3); and (3) ICANN would suffer an unfair detriment if Plaintiff's claim for breach of the Auction Rules proceeds without alleging which document comprises the contract. *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (2001) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).

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

ICANN argued in its Motion that the implied covenant claim failed because it was not "directly tied to the contract's purpose." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373 (1992) (citation omitted); Mot. at 12. In its Opposition, Plaintiff misconstrues ICANN's position by claiming that

[9] RJN, Ex. D. Plaintiff inexplicably titles this summary webpage "ICANN's 'New gTLD Program Auctions guidelines'" even though the word "guidelines" does not appear in the document. *See* RJN, Ex D. The printout is from a portion of ICANN's website entitled "Understanding Auction – Overview[.]" *Id.*

ICANN only argued that the claim failed because it was not tethered to an express contract term. Opp. at 11. Yet the case Plaintiff cites illustrates why its implied covenant claim must fail, for the exact reason ICANN previously asserted. In *Marsu, B.V. v. Walt Disney Co*., 185 F.3d 932 (9th Cir. 1999), the Ninth Circuit affirmed a ruling that defendant Disney violated the implied covenant in connection with a contractual "obligation to merchandise Marsupilami," "a cartoon character owned by" the plaintiff, "by employing junior and inexperienced executives to merchandise Marsupilami products, by mistiming the launch of the Marsupilami merchandise campaign, and by waiving guarantees under merchandising licensing agreements." *Id*. at 935, 937. The FAC alleges no explicit purpose like Disney's agreement to merchandise the character, and no ICANN conduct analogous to Disney's purposeful failure to devote the "time" and "resources" necessary to merchandise the character in favor of other priorities "more important" to Disney. *Id*. at 937.

3. Plaintiff's Negligence Claim Fails As A Matter Of Law.

Plaintiff's negligence claim is barred by the economic loss rule, which precludes recovery for "purely economic loss due to disappointed expectations," unless the plaintiff "can demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co. v. Dana Corp*., 34 Cal. 4th 979, 988 (2004). Plaintiff alleges only economic harm (*see* Opp. at 13), and Plaintiff's arguments that the economic loss rule does not apply are meritless.

First, Plaintiff argues that the rule "does not apply" because its negligence claim "does not stem from the purchase of a defective product." Opp. at 13-14. However, the economic loss rule is not limited to claims for products liability. *See, e.g., Multifamily Captive Grp., LLC v. Assurance Risk Managers, Inc*., 629 F. Supp. 2d 1135, 1145–48 (E.D. Cal. 2009) (economic loss rule barred tort claims arising out of breach of oral contract for insurance broker services); *United Guar. Mortg. Indem. Co v. Countrywide Fin. Corp.*, 660 F. Supp. 2d 1163, 1180, 1184 (C.D. Cal.

2009) (dismissing negligence claims arising out of alleged fraudulent representations regarding mortgage insurance based on economic loss rule); *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 117 F. Supp. 3d 1092, 1105–06 (C.D. Cal. 2015) (economic loss rule bars claims arising out of copyright infringement).[10]

Second, Plaintiff argues that any allegation of fraudulent inducement renders the claim beyond the scope of the economic loss rule, and seeks leave to plead around the economic loss rule on that basis. Opp. at 14. Again, Plaintiff misstates the law, as the economic loss rule warrants dismissal regardless of whether the complaint alleges fraudulent inducement, especially where, as here, the plaintiff is a sophisticated entity. *United Guar. Mortg. Indem. Co.*, 660 F. Supp. 2d at 1188 ("[S]ophisticated business entities agreed to contractually handle claims fraud by the insured. These contract terms therefore subsume any tort remedy . . . .").

In short, the economic loss rule bars the negligence claim. Moreover, the claim should be dismissed for the separate and independent reason that the FAC fails to plausibly allege any of the required elements for a viable negligence claim, as set forth in ICANN's Motion. Mot. at 12-14.[11]

4. Plaintiff's Section 17200 Claim Fails As A Matter Of Law.

Plaintiff lacks standing to assert a Section 17200 claim because it has not "lost money or property" as a result of ICANN's alleged violations. *See* Cal. Bus. & Prof. Code § 17204. Plaintiff argues that its attorneys' fees qualify as "lost

[10] Plaintiff seeks to rely on *Corelogic, Inc. v. Zurich Am. Ins. Co.*, No. 15-CV-03081-RS, 2016 U.S. Dist. LEXIS 121633, at *14–15 (N.D. Cal. Sept. 8, 2016), *see* Opp. at 14. However, this non-binding district court cases lacks persuasive force because the California Court of Appeal case on which *Corelogic* relied, *N. Am. Chem. Co. v. Superior Court*, 59 Cal. App. 4th 764, 777 (1997), was implicitly overruled by the holding in *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999) that "conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law." *See also Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Grp.*, 143 Cal. App. 4th 1036, 1043–44 (2006) (discussing the tension between the California Supreme Court's ruling in *Erlich* and the Court of Appeal's holding in *North American Chemical Company*).

[11] For instance, Plaintiff argues that ICANN owed it a duty of care because of its contractual relationship with ICANN but again, to avoid the economic loss rule, the plaintiff must "demonstrate harm above and beyond a broken contractual promise." *Robinson Helicopter Co.*, 34 Cal. 4th at 988.

money," citing only two cases holding that money expended in the ***party's investigation*** of a claim met the standing requirement. Opp. at 15. The FAC does not allege Plaintiff expended money ***investigating*** any of the claims, but only "legal fees" related to "preparation and submission" of legal briefs both in this Court and in connection with its reconsideration request. FAC ¶ 85. Thus, Plaintiff's legal fees cannot confer Section 17200 standing. *See Cordon v. Wachovia Mortg.*, 776 F. Supp. 2d 1029, 1039 (N.D. Cal. 2011). Nor does Plaintiff substantively respond to ICANN's argument that the "loss" of the application fee (in the sense that the Application did not prevail) was not caused by ICANN, but instead NDC declining to agree to private resolution of the contention set. Plaintiff even admits that the loss of that sum involved ***Verisign's*** conduct, not ICANN's. Opp. at 15.

Moreover, Plaintiff fails to demonstrate why its Section 17200 claim should survive dismissal as a substantive matter. On its "unlawful" claim, Plaintiff wholly abandons the FAC's allegation that ICANN violated California Civil Code section 1770(a)(19), but continues to contend that ICANN's "inclusion" of the Covenant Not to Sue in the Guidebook was "unlawful." What Plaintiff does not explain is how it has been injured by the existence of the Covenant Not to Sue. Moreover, "an 'unlawful' business practices claim usually cannot be premised on a common law violation such as breach of contract." *Berkeley v. Wells Fargo Bank*, No. 15-cv-00749-JSC, 2015 U.S. Dist. LEXIS 141947, at *44 (N.D. Cal. Oct. 19, 2015) (citation omitted).

As to Plaintiff's "unfair" claim, it argues "there is no need for the Court to create a 'standard' for a fair investigation, as ICANN fell blatantly short of any reasonable measurement." Opp. at 16. Plaintiff cites no cases to support its position that Plaintiff's own definition of a "reasonable" investigation must be adopted by this Court. Nor does Plaintiff attempt to distinguish the directly on point authority ICANN cited in its Motion in this regard, including dismissal of a Section 17200 claim arising out of allegations that defendant was "[m]isleading

policyholders ***as to conducting reasonable investigations*** into claims" because "[t]hese allegations fail to identify any 'specific constitutional, statutory or regulatory provisions' that may serve as a predicate for Plaintiff's 'unfair' UCL claim." *Am. W. Door & Trim v. Arch Specialty Ins. Co.*, No. CV 15-00153 BRO (SPx), 2015 U.S. Dist. LEXIS 34589, at *17–18 (C.D. Cal. Mar. 18, 2015) (emphasis added and citations omitted); Mot. at 16-17.

On its "fraudulent" claim, Plaintiff cites a ***California*** case providing that a fraud-based Section 17200 claim need not meet any heightened pleading standard. However, in ***federal*** court, Section 17200 claims grounded in fraud must satisfy Federal Rule of Civil Procedure 9(b), which Plaintiff's does not. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003); Mot. at 17.

5. Plaintiff's Declaratory Relief Claim Fails As A Matter Of Law.

Plaintiff's claim for a judicial declaration concerning "the legality and effect" of the Covenant Not to Sue (FAC, Ex. C § 6.6) fails as a matter of law because the Covenant Not to Sue is enforceable and bars Plaintiff's claims, as discussed below.

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

Plaintiff argues its suit may proceed notwithstanding its agreement to the Covenant Not to Sue for two reasons, neither of which are availing.

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

Plaintiff argues that California Civil Code section 1668 ("Section 1668") renders the Covenant Not to Sue unenforceable. However, the statute does not apply.

First, Plaintiff asks this Court to rely upon a District Court ruling that has been rendered null and void, namely the preliminary injunction order in *DotConnectAfrica Tr. v. Internet Corp. for Assigned Names & Nos,. et al.*, Case No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016) ("*DCA*"). Opp. at 18. Plaintiff accuses ICANN of improperly "fail[ing] to even inform the Court of this precedent"

(Opp. at 18), but ICANN already explained why *DCA* is substantively irrelevant to this Court, when ICANN successfully opposed Plaintiff's TRO Application. ECF 18 at 24. Moreover, the ruling is null and void because *DCA* was remanded for lack of subject matter jurisdiction. *DotConnectAfrica Tr. v. Internet Corp. for Assigned Names & Nos.*, No. CV-16-00862-RGK (JCx), 2016 U.S. Dist. LEXIS 155613, at *11; *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) ("It is well settled that a judgment is void 'if the court that considered it lacked jurisdiction of the subject matter . . . .'") (emphasis and citations omitted).[12]

Second, Plaintiff attempts to distinguish *Commercial Connect v. Internet Corp. for Assigned Names & Nos.*, No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016), which enforced the Covenant Not to Sue, but Plaintiff does not explain why this Court should reach a different result. Instead, Plaintiff argues merely that in *Commercial Connect*, "the plaintiff did not challenge the language of the release, and did not even have counsel." Opp. at 18. But rulings issued in cases where a party is pro se have no less persuasive force. Moreover, the Court offered a detailed, reasoned analysis of why the Covenant Not to Sue barred all the claims. *Commercial Connect*, 2016 U.S. Dist. LEXIS 8550, at *6–11.[13]

2. <u>The Covenant Not to Sue Is Not Unconscionable.</u>

Plaintiff misstates the law as to unconscionability. First, Plaintiff argues that the Covenant Not to Sue is procedurally unconscionable ***only*** because it is purportedly a contract of adhesion. Opp. at 19-20. However, "showing a contract is one of adhesion does not always establish procedural unconscionability." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1348

[12] *See also In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 726–27 (9th Cir. 1989).

[13] The Court should disregard Plaintiff's bombastic claim that ICANN "violates its duty of candor" (Opp. at 18) by arguing, as ICANN reiterates here with good reason, that *Commercial Connect* presents "nearly identical circumstances" as are at issue; the case applied the exact same contract provision to bar identical claims.

n.9 (2015); *In re Detwiler,* 305 F. App'x 353, 356 (9th Cir. 2008). Indeed, the argument lacks merit where, as here, both parties are sophisticated. *See Gatton v. T-Mobile USA, Inc*., 152 Cal. App. 4th 571, 597 (2007).

Second, Plaintiff argues that the Covenant Not to Sue is substantively unconscionable ***only*** because it is one-sided (Opp. at 20), but "unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." *Walnut Producers of Cal. v. Diamond Foods, Inc*., 187 Cal. App. 4th 634, 647 (2010) (citations omitted). Plaintiff offers two responses to the Covenant Not to Sue's business justification of preventing a flood of litigation. First, Plaintiff mistakenly claims ICANN cannot justify a one-sided release on a motion to dismiss. *See, e.g. Leong v. Square Enix of Am. Holdings, Inc.*, No. CV 09-4484 PSG (VBKx), 2010 U.S. Dist. LEXIS 47296, at *31 (C.D. Cal. Apr. 20, 2010) (deciding on motion to dismiss clause was not substantively unconscionable because defendant asserted it would "face class action suits" were it not enforced). Second, in noting that the Covenant Not to Sue does not bar ICANN from suing new gTLD applicants in court, Plaintiff does not indicate why ICANN would ever sue applicants. Meanwhile, this lawsuit demonstrates the risk of lawsuits brought against ICANN, disrupting the New gTLD Program to the detriment of the entire Internet community, in addition to possibly resulting in inconsistent judicial rulings.

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

Plaintiff offers an anemic response to ICANN's Federal Rule of Civil Procedure 12(b)(7) motion to dismiss for failure to join a necessary party—namely, NDC. Moreover, Plaintiff's arguments that NDC's "interest . . . in operating the .WEB gTLD . . . is not at issue" in the FAC are in tension with its motion for expedited discovery from NDC. *See* ECF 32.[14] First, Plaintiff argues that NDC is

[14] Plaintiff argues therein that it is "critical to determine" issues related to NDC such as "the details surrounding VeriSign's payment of money to, and apparent control of, NDC in relation to the .WEB auction," and "whether the agreements between VeriSign and NDC are such that they undermined NDC's eligibility to participate in the .WEB auction

not necessary because NDC merely has a financial interest in the action. Second, Plaintiff's case citations offer no analysis as to what constitutes a legally cognizable, as opposed to merely financial, interest in the litigation. Third, those cases deemed the non-party not to be necessary to the litigation for completely unrelated reasons. Opp. at 22 (citing *Barkhordar v. Century Park Place Condo. Ass'n*, No. 2:16-cv-03071-CAS(Ex), 2016 U.S. Dist. LEXIS 107165, at *4 (C.D. Cal. Aug. 11, 2016) and *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990)). If anything, those cases stand for the proposition that a potential right in the subject of the litigation constitutes a legally protectable interest. *See Makah*, 910 F.2d at 559 ("to the extent the Makah seek a reallocation of the 1987 harvest or challenge the Secretary's inter-tribal allocation decisions, the absent tribes may have an interest in the suit"). Similarly, here, NDC has acquired the potential right to operate .WEB by winning the Auction.

III. CONCLUSION

The FAC should be dismissed in its entirety, with prejudice.[15]

Dated: November 14, 2016

JONES DAY

By: */s/ Eric P. Enson*
Eric P. Enson

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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

(continued…)

to acquire the .WEB gTLD for VeriSign" and "whether NDC was qualified to bid on the .WEB contention set." ECF 32 at 6-7.

[15] Plaintiff cites a case stating that after a complaint has been "held insufficient" the court must permit one chance to amend (Opp. at 23); here, Plaintiff already amended the complaint after it was held deficient. ECF 21 at 5; ECF 23.