

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

West District, Santa Monica Courthouse, Department N

20STCV42881

**FEGISTRY, LLC., et al. vs INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS**

January 18, 2022

2:30 PM

Judge: Honorable Craig D. Karlan
Judicial Assistant: S. Hwang
Courtroom Assistant: S. Mixon

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter Re: Demurrer

The Court, having taken the matter under submission on 12/17/2021 for Hearing on Demurrer - without Motion to Strike, now rules as follows:

***** RULING *****

Defendant Internet Corporation for Assigned Names and Numbers' Demurrer is SUSTAINED, with forty-five (45) days leave to amend. In amending the complaint, Plaintiff shall include within each cause of action the facts in support of that cause of action.

Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. Ltd., and Domain Venture Partners PPC Limited may amend their complaint only as authorized by the Court's order and may not amend the complaint to add a new party or cause of action without having obtained permission to do so. (Harris v. Wachovia Mortgage, FSB (2010) 185 Cal.App.4th 1018, 1023.)

A Case Management Conference is set for April 18, 2022, at 8:30 AM.

Defendant Internet Corporation for Assigned Names and Numbers to give notice.

REASONING

Request for Judicial Notice

Defendant Internet Corporation for Assigned Names and Numbers ("Defendant" or "ICANN") and Plaintiffs Fegistry, LLC, Radix Domain Solutions PTE. Ltd., and Domain Venture Partners PPC Limited ("Plaintiffs") request judicial notice of various iterations of the ICANN Bylaws, Applicant Guidebook, Emergency Panelist Decision on Request for Interim Measures of Protection, issued on August 7, 2020, and Plaintiffs' IRP Request, all of which are linked in

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Plaintiffs' complaint. The parties' requests for judicial notice are GRANTED, pursuant to Evidence Code section 452, subdivisions (d) and (h).

Demurrer

“[A] demurrer tests the legal sufficiency of the allegations in a complaint.” (Lewis v. Safeway, Inc. (2015) 235 Cal.App.4th 385, 388.) A demurrer can be used only to challenge defects that appear on the face of the pleading under attack or from matters outside the pleading that are judicially noticeable. (See Donabedian v. Mercury Ins. Co. (2004) 116 Cal.App.4th 968, 994 [in ruling on a demurrer, a court may not consider declarations, matters not subject to judicial notice, or documents not accepted for the truth of their contents].) For purposes of ruling on a demurrer, all facts pleaded in a complaint are assumed to be true, but the reviewing court does not assume the truth of conclusions of law. (Aubry v. Tri-City Hosp. Dist. (1992) 2 Cal.4th 962, 967.)

Leave to amend must be allowed where there is a reasonable possibility of successful amendment. (See Goodman v. Kennedy (1976) 18 Cal.3d 335, 349 [court shall not “sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment”]; Kong v. City of Hawaiian Gardens Redevelopment Agency (2002) 108 Cal.App.4th 1028, 1037 [“A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment.”]; Vaccaro v. Kaiman (1998) 63 Cal.App.4th 761, 768 [“When the defect which justifies striking a complaint is capable of cure, the court should allow leave to amend.”].) The burden is on the complainant to show the Court that a pleading can be amended successfully. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Applicability of Covenant

Defendant contends that when Plaintiffs submitted their applications for .hotel, they agreed to be bound by a covenant that prohibits applicants from suing ICANN for any claims that “arise out of, are based upon, or are in any way related to” ICANN’s review of the application. (Def.’s Req. for Judicial Notice, Ex. 2, Module 6, § 6.) Defendant argues the covenant extinguishes any claim Plaintiffs bring here. (See Civ. Code, § 1541 [“An obligation is extinguished by a release therefrom given to the debtor or the released party by the creditor or releasing party, upon a new consideration, or in writing, with or without new consideration”]; Skrbina v. Fleming Companies (1996) 45 Cal.App.4th 1353, 1366 [“In general, a written release extinguishes any obligation covered by the release’s terms, provided it has not been obtained by fraud, deception, misrepresentation, duress, or undue influence”]. Indeed, the complaint makes clear that Plaintiffs’ claims relate to Defendant’s processing of Plaintiffs’ applications for the rights to exclusively operate .hotel (Compl. ¶ 12), such that the language of the covenant may apply here

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to preclude Plaintiffs' claims.

Plaintiffs contend the covenant is unenforceable as a matter of law because it seeks to exempt Defendant from intentional wrongdoing. Plaintiffs rely on Civil Code section 1668, which provides that “[a]ll 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.” (Civ. Code, § 1668, emphasis added.) However, according to Plaintiffs’ own allegations, Defendant has provided for an Independent Review Process, “an accountability mechanism prescribed by the ICANN bylaws that allows for independent third-party review of ICANN Board or staff actions (or inactions).” (Compl. ¶ 24.) The covenant, therefore, does not appear to exempt Defendant from liability, as there is an independent review process for claims of the nature raised here, such that Civil Code section 1668 would seem to be inapplicable. Plaintiffs allege the independent review process is “an unfair, sham ADR scheme” (Pls.’ Opp’n to Dem., p. 7, line 28), but Civil Code section 1668 only applies where the contract itself seeks to make a party exempt from liability; Plaintiffs’ allegations here are not that the contract makes Defendants exempt but that the review process is insufficient, and it is thus not clear how such an allegation can support an invocation of Civil Code section 1668.

Insofar as Plaintiffs contend the covenant cannot apply to claims which were unknown at the time of contracting, such as fraud claims, or the covenant is inapplicable under the facts alleged, the Court is not so convinced. The covenant prohibited actions for any claims that “arise out of, are based upon, or are in any way related to” ICANN’s review of the application. (Def.’s Req. for Judicial Notice, Ex. 2, Module 6, § 6.) Here, there is no other way to read the pleading except to conclude that the purported fraud arose out of Plaintiffs’ application(s) with ICANN, and “a general release,” such as the one at issue here, “can be completely enforceable and act as a complete bar to all claims (known or unknown at the time of the release) despite protestations by one of the parties that he did not intend to release certain types of claims.” (San Diego Hospice v. County of San Diego (1995) 31 Cal.App.4th 1048, 1053.) Plaintiffs’ contention that their claims relate to the public interest is also not persuasive; Plaintiffs’ claims are variations on breach of contract claims, and there is no basis to conclude that these breach of contract claims or unfair business practices claims concern the public interest.

Further, Plaintiffs argue the covenant is unenforceable as it was procured by fraud. Notably, these arguments are based on the purported fraud that occurred after Plaintiffs signed the subject contracts; there are no facts in the complaint indicating that ICANN misrepresented facts that induced Plaintiffs to submit their applications. “[F]raudulent inducement occurs before a contract

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is signed” (SI 59 LLC v. Variel Warner Ventures, LLC (2018) 29 Cal.App.5th 146, 152), and there are no facts that specifically demonstrate fraud as it relates to the subject covenant.

Accordingly, Defendant Internet Corporation for Assigned Names and Numbers’ Demurrer is SUSTAINED, with forty-five (45) days leave to amend, as to all claims based on the existence of a covenant which appears to bar Plaintiffs’ claims. Upon amending the complaint, Plaintiffs shall provide facts which support the conclusion that the subject covenant does not apply. While it is unclear what amendments can be made to cure the aforementioned deficiencies, the Court notes that this is the first demurrer in this action, such that the Court will allow Plaintiffs the opportunity to cure this deficiency, if possible. The Court also opts to consider Defendant’s contentions as to each individual claim so Plaintiffs may cure any other deficiencies.

First Cause of Action: Breach of Contract – Violation of Bylaws

To state a cause of action for breach of contract, Plaintiff must be able to establish “(1) the existence of the contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the plaintiff.” (Oasis West Realty, LLC v. Goldman (2011) 51 Cal.4th 811, 821.)

Plaintiffs’ breach of contract claim is based on ICANN’s bylaws; Plaintiffs allege that ICANN breached the bylaws that are incorporated into the contractual terms with each Plaintiff. (Compl. ¶ 84.) Plaintiffs, though, set forth no contractual term that incorporates the bylaws, nor do they provide a copy of either the contract or the bylaws. If a breach of contract claim “is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference.” (Harris v. Rudin, Richman & Appel (1999) 74 Cal.App.4th 299, 307.) Plaintiffs also fail to indicate which bylaws were incorporated at the time they entered into their contracts, and Plaintiffs provide no legal authority to support their argument that amendment to the bylaws creates a new contract, although this may be the case. As such, Defendant’s demurrer to the first cause of action is SUSTAINED, with forty-five (45) days leave to amend.

Second Cause of Action: Fraud in the Inducement – Deceit; Third Cause of Action: Deceit;

Fourth Cause of Action: Grossly Negligent Misrepresentation

“The elements of fraud,” including a cause of action for fraudulent inducement, “are (a) a misrepresentation (false representation, concealment, or nondisclosure); (b) scienter or knowledge of its falsity; (c) intent to induce reliance; (d) justifiable reliance; and (e) resulting damage.” (Hinesley v. Oakshade Town Ctr. (2005) 135 Cal.App.4th 289, 294.)

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The elements of a cause of action for negligent misrepresentation include “[m]isrepresentation of a past or existing material fact, without reasonable ground for believing it to be true, and with intent to induce another’s reliance on the fact misrepresented; ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was directed; and resulting damage.” (Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc. (2004) 115 Cal.App.4th 1145, 1154, quotation marks omitted.)

The facts constituting the alleged fraud must be alleged factually and specifically as to every element of fraud, as the policy of “liberal construction” of the pleadings will not ordinarily be invoked. (Lazar v. Superior Court (1996) 12 Cal.4th 631, 645.) To properly allege fraud against a corporation, the plaintiffs must plead the names of the persons allegedly making the false representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal.App.4th 153, 157.)

Here, Plaintiffs’ fraud claims fail to meet the heightened standard for specificity required of such claims. Plaintiffs allege “continuing false representations over time to its community” or “several false representations” and representations that ICANN “would implement all of the” bylaw provisions “covering the Accountability Mechanisms” (Compl. ¶¶ 90, 96, 102), but Plaintiffs do not set forth any specific representations that were made to them, who made the alleged misrepresentations and when they were made, the means by which the misrepresentations were allegedly made, those individuals’ authority to speak for ICANN, or any other specific facts aside from conclusory references to false representations. There are also no facts indicating that ICANN knew any representations were false or should have known they were false; conclusory statements to this effect are insufficient. Accordingly, Defendant’s demurrer to the second, third and fourth cause of action is SUSTAINED, with forty-five (45) days leave to amend.

Fifth Cause of Action: Gross Negligence

“Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for gross negligence the plaintiff must also allege conduct by the defendant involving either want of even scant care or an extreme departure from the ordinary standard of conduct. Gross negligence connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results.” (Chavez v. 24 Hour Fitness USA, Inc. (2015) 238 Cal.App.4th 632, 640, citations, quotation marks, and ellipsis omitted.) There is no distinct cause of action for gross negligence apart from negligence. (Continental Insurance Co. v. American Protection Industries (1987) 197 Cal.App.3d 322, 328-330.)

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Plaintiffs allege “ICANN was grossly negligent in the performance of its promises made to Plaintiffs in their contracts.” (Compl. ¶ 108.) Put simply, Plaintiffs’ claim appears to be a breach of contract claim labeled as a negligence claim, as Plaintiffs’ claim is based on a contention that “ICANN failed to comply with the most basic of its obligations,” which were based in contract. (See *ibid.*) Plaintiffs cannot simply allege negligence in conclusory terms; they must allege the elements of a negligence claim, which Plaintiffs fail to do here. As such, Defendant’s demurrer to the fifth cause of action is SUSTAINED, with forty-five (45) days leave to amend.

Sixth Cause of Action: Public Benefit Corporation Bylaw Enforcement

Plaintiffs bring this claim to require ICANN to comply with its bylaws pursuant to Corporations Code section 14623 because they are “claimants” under the bylaws. (Compl. ¶ 115.) Corporations Code section 14623 provides that “[a] benefit enforcement proceeding may be commenced or maintained only” by (1) the benefit corporation; (2) a shareholder or directors; (3) a person that owns 5% or more of equity interests in “an entity of which the benefit corporation is a subsidiary,” or (4) “[o]ther persons as have been specified in the articles or bylaws of the benefit corporation.” Plaintiffs cite to a provision of the bylaws that purports to allow them to bring a claim for independent third-party review (Compl. ¶ 115); that provision, though, does not state that a “claimant” under the bylaws can bring an action under Corporations Code section 14623. Thus, under the facts alleged in the complaint, there is no basis for the Court to conclude that Plaintiffs have standing to bring this claim. Accordingly, Defendant’s demurrer to the sixth cause of action is SUSTAINED, with forty-five (45) days leave to amend.

Seventh Cause of Action: False Advertising Law and Eighth Cause of Action: Unfair Competition

Business and Professions Code section 17500 makes it unlawful for a party to disseminate any advertising or marketing material “which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”

To set forth a claim for a violation of Business and Professions Code section 17200, Plaintiffs must establish Defendant was engaged in an “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising” and certain specific acts. (Bus. & Prof. Code, § 17200.) A cause of action for unfair competition “is not an all-purpose substitute for a tort or contract action.” (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.)

Insofar as these claims are based on purported misrepresentations, Plaintiffs fail to set forth those

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misrepresentations, as discussed above, and a party only has standing to bring these claims where the party can establish it “has suffered economic injury or damage, and [] this injury or damage was the result of, i.e., caused by, the unfair business practice” or “false advertising . . . that is the gravamen of [its] claim.” (Shaeffer v. Califia Farms, LLC (2020) 44 Cal.App.5th 1125, 1137, quotation marks omitted.) There are no facts showing Plaintiffs suffered economic injury the result of ICANN’s alleged conduct in insufficiently reviewing their claims, and there are no facts showing the injury occurred as a result of the purportedly false representations made to Plaintiffs. That is, it appears from the pleading that Plaintiffs sustained damages because their applications were rejected, not as a direct result of the review process; if the review process had been sufficient, Plaintiffs’ applications may still have been rejected, such that it is not clear how the purported sham review process itself resulted in harm to Plaintiffs. Accordingly, Defendant’s demurrer to the seventh and eighth cause of action is SUSTAINED, with forty-five (45) days leave to amend.

*** END OF RULING ***

The Demurrer - without Motion to Strike filed by Internet Corporation For Assigned Names And Numbers on 01/22/2021 is Sustained with Leave to Amend.

Case Management Conference is scheduled for 04/18/2022 at 08:30 AM in Department N at Santa Monica Courthouse.

Clerk to give notice to Defendant Internet Corporation for Assigned Names and Numbers who shall give notice to all other relevant parties.

Certificate of Mailing is attached.