

1 Paula L. Zecchini (SBN 238731)
 2 Aaron M. McKown (SBN 208781)
 3 COZEN O’CONNOR
 4 999 Third Avenue, Suite 1900
 5 Seattle, WA 98104
 6 Telephone: 206.340.1000
 7 Toll Free Phone: 1.800.423.1950
 8 Facsimile: 206.621.8783
 9 E-Mail: pzecchini@cozen.com
 10 amckown@cozen.com

11 Attorneys for Plaintiff
 12 RUBY GLEN, LLC

13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 RUBY GLEN, LLC

16 Plaintiff,

17 vs.

18 INTERNET CORPORATION FOR
 19 ASSIGNED NAMES AND NUMBERS
 20 AND DOES 1-10

21 Defendant.

Case No.: 2:16-cv-05505-PA-AS

**PLAINTIFF’S AMENDED
 COMPLAINT FOR:**

- 1) **BREACH OF CONTRACT**
- 2) **BREACH OF IMPLIED
 COVENANT OF GOOD FAITH
 AND FAIR DEALING**
- 3) **NEGLIGENCE**
- 4) **UNFAIR COMPETITION
 (VIOLATION OF CALIFORNIA
 BUSINESS & PROFESSIONS
 CODE § 17200)**
- 5) **DECLARATORY RELIEF**

1 Plaintiff RUBY GLEN, LLC (hereinafter, “Plaintiff”) alleges as follows:

2 **INTRODUCTION**

3 1. Plaintiff was formed for the purpose of applying to the Internet
4 Corporation for Assigned Names and Numbers (“ICANN”) for the right to operate the
5 .WEB generic top-level domain (“gTLD”). In reliance on ICANN’s agreement to
6 administer the bid process in accordance with the rules and guidelines contained in its
7 gTLD Applicant Guidebook (“Applicant Guidebook”), Plaintiff paid ICANN a
8 mandatory \$185,000 application fee for the opportunity to secure the rights to the .WEB
9 gTLD.

10 2. Throughout every stage of the four years it has taken to bring the .WEB
11 gTLD to market, Plaintiff worked diligently to follow the rules and procedures
12 promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead
13 of functioning as a disinterested regulator of a fair and transparent gTLD bid process,
14 ICANN used its authority and oversight to unfairly benefit an applicant who is in
15 admitted violation of a number of provisions of the Applicant Guidebook. ICANN’s
16 conduct, tainted by an inherent conflict of interest, ensured that it would be the sole
17 beneficiary of the \$135 million proceeds from the .WEB auction—a result that
18 ICANN’s own guidelines identify as a “last resort” outcome. Even more problematic,
19 ICANN allowed a third party to make an eleventh-hour end run around the application
20 process to the detriment of Plaintiff, the other legitimate applicants for the .WEB gTLD
21 and the Internet community at large.

22 3. ICANN’s failure to administer the gTLD application process in a fair,
23 proper, and transparent manner is not unique to the .WEB gTLD applicants. To the
24 contrary, in the days following the filing of this action, ICANN was publicly rebuked
25 by an independent review panel for its “cavalier” and seemingly routine dismissal of
26 concerns raised by gTLD applicants without “mak[ing] any reasonable investigation”
27 into the facts underlying those concerns as required by ICANN’s Bylaws, Articles of
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1 Incorporation and the Applicant Guidebook. The independent review panel also
2 highlighted what it deemed to be improper influence by ICANN staff on purportedly
3 independent ICANN accountability mechanisms established to handle concerns raised
4 by gTLD applicants.

5 4. As set forth more fully herein, ICANN deprived Plaintiff and the other
6 applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in
7 accordance with established ICANN policy and guidelines. Court intervention is
8 necessary to ensure ICANN's compliance with its own accountability and transparency
9 mechanisms in the ongoing .WEB bid process and to prevent the assignment of the
10 .WEB gTLD to an entity that is in admitted violation of ICANN's own policies.

11 **PARTIES**

12 5. Plaintiff Ruby Glen, LLC is a limited liability company, duly organized
13 and existing under the laws of the State of Delaware and operated by Donuts Inc., an
14 affiliate located in Bellevue, Washington. The sole member of Ruby Glen, LLC is
15 Covered TLD, LLC ("Covered TLD"). Covered TLD is a limited liability company,
16 duly organized and existing under the laws of the State of Delaware. Covered TLD has
17 a sole member, Donuts Inc. ("Donuts"). Donuts is a for-profit corporation, duly
18 organized and existing under the laws of the State of Delaware, with its principal place
19 of business in Bellevue, Washington.

20 6. Defendant Internet Corporation for Assigned Names and Numbers
21 ("ICANN") is a nonprofit corporation, organized and existing under the laws of the
22 State of California, with its principal place of business in Los Angeles, California.

23 7. Defendants Does 1-10 are persons who instigated, encouraged, facilitated,
24 acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible
25 in some manner or degree for the breaches and wrongful conduct averred herein.
26 Plaintiff is presently ignorant of the true names and capacities, whether individual,
27 corporate, associate, or otherwise, of DOES 1 through 10, and will amend this
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1 Complaint to allege their true names and capacities when the same have been
2 ascertained.

3 **JURISDICTION AND VENUE**

4 8. This Court has subject matter jurisdiction over this action under 28 U.S.C.
5 § 1332(a) as the parties are completely diverse in citizenship and the amount in
6 controversy exceeds \$75,000.

7 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in
8 that Defendant ICANN resides and transacts business in this judicial district. Moreover,
9 a substantial part of the events, omissions, and acts that are the subject matter of this
10 action occurred within the Central District of California.

11 **FACTS COMMON TO ALL CAUSES OF ACTION**

12 **A. ICANN’S FORMATION AND PURPOSE**

13 10. ICANN is a non-profit corporation originally established to assist in the
14 transition of the Internet domain name system from one of a single domain name
15 operator to one with multiple companies competing to provide domain name
16 registration services to Internet users “in a manner that w[ould] permit market
17 mechanisms to support competition and consumer choice in the technical management
18 of the [domain name system].”

19 11. ICANN’s ongoing role is to provide technical coordination of the
20 Internet’s domain name system by introducing and promoting competition in the
21 registration of domain names, while ensuring the security and stability of the domain
22 name system. In that role, and as relevant here, ICANN was delegated the task of
23 administering generic top level domains (“gTLDs”) such as .COM, .ORG, or, in this
24 case, .WEB.

25 12. Article 4 of ICANN’s Articles of Incorporation requires ICANN to
26 “operate for the benefit of the Internet community as a whole, carrying out its activities
27 in conformity with relevant principles of international law and applicable international
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1 conventions and local law and, to the extent appropriate and consistent with these
2 Articles and its Bylaws, through open and transparent processes that enable competition
3 and open entry in Internet-related markets.” A true and correct copy of ICANN’s
4 Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by
5 reference.

6 13. ICANN is accountable to the Internet community for operating in a manner
7 consistent with its Bylaws and Articles of Incorporation as a whole. ICANN’s Bylaws
8 require ICANN, its Board of Directors and its staff to act in an open, transparent and
9 fair manner with integrity. A true and correct copy of ICANN’s Bylaws are attached
10 hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN
11 Bylaws require ICANN, its Board of Directors, and staff to:

- 12 a. “Mak[e] decisions by applying documented policies neutrally and
13 objectively, with integrity and fairness.”
- 14 b. “[Act] with a speed that is responsive to the needs of the Internet
15 while, as part of the decision-making process, obtaining informed input
16 from those entities most affected.”
- 17 c. “Remain[] accountable to the Internet community through
18 mechanisms that enhance ICANN’s effectiveness.”
- 19 d. Ensure that it does “not apply its standards, policies, procedures, or
20 practices inequitably or single out any particular party for disparate
21 treatment unless justified by substantial and reasonable cause, such as the
22 promotion of effective competition.”
- 23 e. “[O]perate to the maximum extent feasible in an open and
24 transparent manner and consistent with procedures designed to ensure
25 fairness.”

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1 **B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK**

2 14. ICANN is the sole organization worldwide with the power and ability to
3 administer the bid processes for, and assign rights to, gTLDs. As of 2011, there were
4 only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

5 15. In or about 2011, ICANN approved the expansion of a number of the
6 gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains
7 Internet Expansion Program (the “New gTLD Program”).

8 16. In January 2012, as part of the New gTLD Program, ICANN invited
9 eligible parties to submit applications to obtain the rights to operate various new gTLDs,
10 including, the .WEB and .WEBS gTLDs (collectively referred to herein as “.WEB” or
11 the “.WEB gTLD”). In return, ICANN agreed to (a) conduct the bid process in a
12 transparent manner and (b) abide by its own bylaws and the rules and guidelines set
13 forth in ICANN’s gTLD Applicant Guidebook (“Applicant Guidebook”). A true and
14 correct copy of the Applicant Guidebook is attached hereto as Exhibit C and
15 incorporated herein by reference.

16 17. The Applicant Guidebook obligates ICANN to, among other things,
17 conduct a thorough investigation into each of the applicants’ backgrounds. This
18 investigation is necessary to ensure the integrity of the application process, including a
19 potential auction of last resort, and the existence of a level playing field among those
20 competing to secure the rights to a particular new gTLD. It also ensures that each
21 applicant is capable of administering any new gTLD, whether secured at the auction of
22 last resort or privately beforehand, thereby benefiting the public at large.

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

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1 8. ... In addition, Applicant acknowledges that [sic] to allow
2 ICANN to conduct thorough background screening
3 investigations:

4 ...

5 c. Additional identifying information may be required to
6 resolve questions of identity of individuals within the applicant
7 organization; ...

8 ...

9 11. Applicant authorizes ICANN to:

10 a. Contact any person, group, or entity to request, obtain,
11 and discuss any documentation or other information that, in
12 ICANN's sole judgment, may be pertinent to the application;

13 b. Consult with persons of ICANN's choosing regarding
14 the information in the application or otherwise coming into
15 ICANN's possession...

16 19. To aid ICANN in fulfilling its investigatory obligations, "applicant[s]
17 (including all parent companies, subsidiaries, affiliates, agents, contractors, employees
18 and any and all others acting on [their] behalf)" are required to provide extensive
19 background information in their respective applications. In addition to serving the
20 purposes noted above, this information also allows ICANN to determine whether an
21 entity applicant or individuals associated with an entity applicant have engaged in the
22 automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant
23 Guidebook, including convictions of certain crimes or disciplinary actions by
24 governments or regulatory bodies. Finally, this background information is important to
25 provide transparency to other applicants competing for the same gTLD.

26 20. Indeed, ICANN deemed transparency into an applicant's background so
27 important when drafting the Applicant Guidebook that applicants submitting a new
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1 gTLD application are required to undertake a continuing obligation to notify ICANN
2 of “any change in circumstances that would render any information provided in the
3 application false or misleading,” including “applicant-specific information such as
4 changes in financial position and changes in ownership or control of the applicant.”

5 21. As a further condition of participating in the .WEB auction, ICANN
6 required Plaintiff and other applicants to agree to a broad covenant not to sue in order
7 to apply for the .WEB contention set (the “Purported Release”). The Purported Release
8 applies to all new gTLD applicants and states, in relevant part:

9 Applicant hereby releases ICANN . . . from any and all claims by applicant
10 that arise out of, are based upon, or are in any way related to, any action,
11 or failure to act, by ICANN . . . in connection with ICANN’s . . . review of
12 this application. . . . Applicant agrees not to challenge . . . and irrevocably
13 waives any right to sue or proceed in court.

14 22. The Purported Release is not subject to negotiation. If a potential applicant
15 does not agree to the release, it cannot be considered for participation in the .WEB
16 auction. The Purported Release is also entirely one-sided in that it allows ICANN to
17 absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the
18 Purported Release does not apply equally as between ICANN and the applicants
19 because it does not prevent ICANN from proceeding with litigation against an applicant.

20 23. In lieu of the rights ICANN claims are waived by the Purported Release,
21 ICANN purports to provide applicants with an independent review process, as a means
22 to challenge ICANN’s actions with respect to a gTLD application. The IRP is
23 effectively an arbitration, operated by the International Centre for Dispute Resolution
24 of the American Arbitration Association, comprised of an independent panel of
25 arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

26 24. In accordance with the IRP, any entity materially affected by a decision or
27 action by the Board that the entity believes is inconsistent with the Articles of
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1 Incorporation or Bylaws may submit a request for independent review of that decision
2 or action. In order to be materially affected, the person must suffer injury or harm that
3 is directly and causally connected to the Board’s alleged violation of the Bylaws or the
4 Articles of Incorporation, and not as a result of third parties acting in line with the
5 Board’s action.

6 **C. THE AUCTION PROCESS FOR NEW gTLDs**

7 25. A large number of new gTLDs made available by ICANN in 2012 received
8 multiple applications. In accordance with the Applicant Guidebook, where multiple
9 new gTLD applicants apply to obtain the rights to operate the same new gTLD, those
10 applicants are grouped into a “contention set.”

11 26. Pursuant to the Applicant Guidebook, a contention set may be resolved
12 privately among the members of a contention set or facilitated by ICANN as an auction
13 of last resort. Applicants are encouraged to privately resolve a new gTLD contention
14 set (i.e., reach a determination as to which applicant will ultimately be assigned the right
15 to operate the new gTLD at issue). An ICANN auction of last resort will only be
16 conducted when the members of a contention cannot reach agreement privately. By
17 refusing to agree to resolve a contention set privately, one member of a contention set
18 has the ability to force the other members, all of whom may be willing to resolve the
19 contention set privately, to an ICANN auction of last resort.

20 27. For purposes of this matter, it is important to understand that the manner
21 in which a contention set is resolved—whether by private agreement or ICANN
22 auction—determines which entities will receive the proceeds from the winning bid.
23 When a contention set is resolved privately, ICANN receives no financial benefit; in an
24 ICANN auction, the entirety of the auction proceeds go to ICANN.

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1 **D. PLAINTIFF’S APPLICATION FOR THE .WEB gTLD**

2 28. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB
3 contention set. Plaintiff also submitted with its application the sum of \$185,000—the
4 mandatory application fee.

5 29. In consideration of Plaintiff paying the \$185,000 application fee, ICANN
6 agreed to conduct the application process for the .WEB gTLD in a manner consistent
7 with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth
8 in both the Applicant Guidebook and the Auction Rules, and in conformity with the
9 laws of fair competition. Plaintiff would not have paid the \$185,000 mandatory
10 application fee absent the mutual consideration and promises set forth above.

11 30. Plaintiff’s application passed ICANN’s “Initial Evaluation” process on
12 July 19, 2013. It is an approved member of the .WEB contention set and qualified to
13 participate in the ICANN auction process for .WEB.

14 **E. NDC’S APPLICATION FOR THE .WEB gTLD**

15 31. On June 13, 2012, NDC submitted application number 1-1296-36138 for
16 the .WEB contention set.

17 32. Among other things, the application required NDC to provide “the
18 identification of directors, officers, partners, and major shareholders of that entity.” As
19 relevant here, NDC provided the following response to Sections 7 and 11 of the
20 application:

21 **Secondary Contact**

22 **7(a). Name**

23 Mr. Nicolai Bezonoff

24 **7(b). Title**

25 Manager
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Applicant Background

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

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

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

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

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

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

33. By submitting its application for the .WEB gTLD and electing to participate in the .WEB contention set, NDC expressly agreed to the terms and conditions set forth in the Applicant Guidebook as well as Auction Rules, including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant Guidebook.

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

35. In addition to a continuing obligation to provide complete, updated, and accurate information related to its application, Section 6.10 of the Applicant Guidebook,

1 strictly prohibits an applicant from “resell[ing], assign[ing], or transfer[ring] any of
2 applicant’s rights or obligations in connection with the application.” An applicant that
3 violates this prohibition is subject to disqualification from the contention set.

4 36. ICANN failed to investigate credible evidence supporting a determination
5 that NDC violated each of these guidelines—evidence that it held for over a month prior
6 to the .WEB auction date. Despite the urging of multiple .WEB applicants and NDC’s
7 written admissions of potentially disqualifying changes to NDC’s application, ICANN
8 continues to turn a blind eye to the direct detriment of other .WEB applicants and to
9 ICANN’s foundational duties to administer the New gTLD Program with fairness and
10 transparency.

11 **F. NDC’S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS**
12 **APPLICATION**

13 37. On or about June 1, 2016, Plaintiff learned that NDC was the only member
14 of the .WEB contention set unwilling to resolve the contention set in advance and in
15 lieu of the ICANN auction.

16 38. At the time, Plaintiff found the decision unusual given NDC’s historical
17 willingness and enthusiasm to participate in the private resolution process. Overall,
18 NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were
19 resolved privately with NDC’s agreement. The auction for the .WEB gTLD is the first
20 auction in which NDC has pushed for an ICANN auction of last resort.

21 39. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to
22 whether NDC might reconsider its recent decision to forego resolution of the .WEB
23 contention set prior to ICANN’s auction of last resort. In response, NDC stated that its
24 position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is
25 identified on NDC’s .WEB application as Secondary Contact, Manager, and COO, is
26 “no longer involved with [NDC’s] applications.” NDC also made statements indicating
27 a potential change in the ownership of NDC, including an admission that the board of
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1 NDC had changed to add “several others” and that he had to check with the “powers
2 that be,” implying that he and his associate on the email were no longer in control. The
3 email communication containing these statements is set forth in pertinent part below:

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5 **From:** Jose Ignacio Rasco <r@straat.co>
6 **Subject:** Re: .web
7 **Date:** June 7, 2016 at 11:32:17 AM EDT
8 **To:** Jon Nevett <jon@donuts.email>
9 **Cc:** Juan Diego Calle <j@straat.co>

10 Jon,

11 [Redacted]

12 Nicolai is at NSR full time and no longer involved with our TLD applications. I’m still running our
13 program and Juan sits on the board with me and several others.

14 [Redacted]

15 Best,
16 Jose

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

24 41. After engaging in a series of discussions with ICANN staff, Plaintiff
25 decided to formally raise the issue with the ICANN Ombudsman on or about June 30,
26 2016; as of the initiation of this lawsuit, Plaintiff’s most recent correspondence with the
27 ICANN Ombudsman, dated July 10, 2016, in which it provided further information
28 related to the statements made by NDC, remains unanswered.

42. At every opportunity, Plaintiff raised the need for a postponement of the
.WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the

1 contradictory representations made by NDC in relation to its pending application; (b)
2 address NDC’s continued status as an auction participant; and (c) provide all the other
3 .WEB applicants the necessary transparency into who they were competing against. It
4 also discussed the matter with ICANN staff and the Ombudsman at ICANN’s most
5 recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

6 43. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund
7 Technologies GmbH, each members of the .WEB contention set, sent correspondence
8 to ICANN stating their own concerns in proceeding with the auction of last resort
9 scheduled for July 27, 2016. The correspondence stated:

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

15 **G. ICANN’S DECISION TO PROCEED WITH THE .WEB AUCTION**

16 44. On July 13, 2016, ICANN issued a statement denying the collective
17 request of multiple members of the .WEB contention set to postpone the July 27, 2016
18 auction to allow for a full and transparent investigation into apparent discrepancies in
19 the NDC application, as highlighted by NDC’s own statements. Without providing any
20 detail, ICANN simply stated as follows:

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

25 45. Contrary to its obligations of accountability and transparency, ICANN’s
26 decision did not address the manner or scope of the claimed investigation nor did it
27 address whether a specific inquiry was made into (a) Mr. Bezsonoff’s current status, if
28 any, with NDC, (b) the identity of “several other[.]” new and unvetted members of

1 NDC's board, or (c) any change in ownership—the very issues raised by NDC's own
2 statements. The correspondence was also silent as to any investigation into whether
3 NDC had either resold, assigned, or transferred all or some of the rights to its .WEB
4 application.

5 46. Plaintiff was unable to learn any further information regarding the extent
6 of the investigation undertaken by ICANN, other than it was limited to inquiries only
7 to NDC and no independent corroboration was sought or obtained.

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

12 48. To be clear, the financial benefit to ICANN of resolving the .WEB
13 contention set by way of an ICANN auction is no small matter—as of the filing of this
14 lawsuit, ICANN's stated net proceeds from the 15 ICANN auctions conducted since
15 June 2014 total \$101,357,812. The most profitable gTLDs from those auctions
16 commanded winning bids of \$41,501,000 (.SHOP), \$25,001,000 (.APP), \$6,706,000
17 (.TECH), \$5,588,888 (.REALTY), \$5,100,175 (.SALON) and \$3,359,000 (.MLS).
18 ICANN has not yet determined what it will do with the enormous proceeds from these
19 auctions.

20 **H. PLAINTIFF'S REQUEST FOR RECONSIDERATION**

21 49. ICANN's Bylaws provide an established accountability mechanism by
22 which an entity that believes it was materially affected by an action or inaction by
23 ICANN staff that contravened established policies and procedures may submit a request
24 for reconsideration or review of the conduct at issue. The review is conducted by
25 ICANN's Board Governance Committee.

26 50. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member
27 of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in
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1 response to the actions and inactions of ICANN staff in connection with the decision
2 set forth in the ICANN’s July 13, 2016 correspondence.

3 51. The Reconsideration Request sought reconsideration of (a) ICANN’s
4 determination that it “found no basis to initiate the application change request process”
5 in response to the contradictory statements of NDC and (b) ICANN’s improper denial
6 of the request made by multiple contention set members to postpone the .WEB auction
7 of last resort, which would have provided ICANN the time necessary to conduct a full
8 and transparent investigation into material discrepancies in NDC’s application and its
9 eligibility as a contention set member.

10 52. The Reconsideration Request highlighted the following issues:

- 11 a. ICANN’s failure to forego a full and transparent investigation into
12 the material representations made by NDC is a clear violation of the
13 principles and procedures set forth in the ICANN Articles of
14 Incorporation, Bylaws and the Applicant Guidebook.
- 15 b. ICANN is the party with the power and resources necessary to delay
16 the ICANN auction of last resort while the accuracy of NDC’s
17 current application is evaluated utilizing the broad investigatory
18 controls contained in the Applicant Guidebook, to which all
19 applicants, including NDC, agreed.
- 20 c. Postponement of the .WEB auction of last resort provides the most
21 efficient manner for resolving the current dispute for all parties by
22 (i) sparing ICANN and the many aggrieved applicants the time and
23 expense of legal action while (ii) avoiding the very real likelihood
24 of a court-mandated unwinding of the ICANN auction of last resort
25 should it proceed.
- 26 d. ICANN’S July 13, 2016 decision raises serious concerns as to
27 whether the scope of ICANN’s investigation was impacted by the
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1 inherent conflict of interest arising from a perceived financial
2 benefit to ICANN if the Auction goes forward as scheduled.

- 3 e. ICANN’s New gTLD Program Auctions guidelines state that a
4 contention set would only proceed to auction where all active
5 applications in the contention set have “**no pending ICANN**
6 **Accountability Mechanisms,**” i.e., no pending Ombudsman
7 complaints, Reconsideration Requests or IRPs.

8 53. The issues raised by Plaintiff were similar to those raised by applicants for
9 other gTLDs in similar contexts; issues that were deemed well-founded by an
10 independent panel assigned to review ICANN’s compliance with its mandatory
11 obligations and bylaws in relation to its administration of the application processes for
12 the New gTLD Program.

13 54. On July 21, 2016, ICANN denied the Request for Reconsideration. In
14 doing so, ICANN relied solely on statements from NDC that directly contradicted those
15 contained in NDC’s earlier correspondence—a clear red flag. Once again, despite the
16 credibility issues raised by NDC’s own contradictory statements, ICANN failed and
17 refused to contact Mr. Bezsonoff or interview the other individuals identified in
18 Sections 7 and 11 of NDC’s application prior to reaching its conclusion. ICANN also
19 failed to investigate whether NDC had either resold, assigned, or transferred all or some
20 of its rights to its .WEB application.

21 55. On July 22, 2016, Plaintiff initiated ICANN’s Independent Review
22 Process by filing ICANN’s Notice of Independent Review. The IRP remains pending.

23 **I. THE .WEB AUCTION RESULTS**

24 56. On July 27, 2016, the .WEB auction proceeded as scheduled. The
25 following day, ICANN reported NDC as the winning bidder of the .WEB gTLD.
26 According to ICANN, NDC’s winning bid amount was \$135 million, more than *triple*
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1 the previous highest price paid for a new gTLD and a sum greater than all of the prior
2 ICANN auction proceeds combined.

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

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

16 59. VeriSign did not apply for the .WEB gTLD and was not a disclosed
17 member of the .WEB contention set. At no point prior to the .WEB auction did NDC
18 disclose (a) its relationship with VeriSign; (b) the fact that NDC had effectively become
19 a proxy for VeriSign as a result of VeriSign agreeing to fund NDC’s .WEB auction
20 bids; or (c) the fact that NDC had either resold, assigned, or transferred all or some of
21 its rights to its .WEB application to VeriSign.

22 60. As alleged above, VeriSign is the registry operator for the .COM and .NET
23 gTLDs, which together account for the greatest market share among all gTLDs. Indeed,
24 on July 28, 2016, VeriSign reported combined registrations for the .COM and .NET
25 registries of 143.2 million domains, *more than six times greater* than the combined total
26 registrations of approximately 23 million for all other existing gTLDs.

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1 61. On information and belief, VeriSign did not apply for, or disclose its
2 interest in, the .WEB gTLD in an effort to avoid heightened scrutiny of its application
3 by ICANN, the other .WEB applicants, the domain name industry at large and, most
4 importantly, the U.S. Department of Justice; specifically, VeriSign's apparent
5 acquisition of NDC's application rights was an attempt to avoid allegations of anti-
6 competitive conduct and antitrust violations in applying to operate the .WEB gTLD,
7 which is widely viewed by industry analysts as the strongest competitor to the .COM
8 and .NET gTLDs.

9 62. Had VeriSign's apparent acquisition of NDC's application rights been
10 fully disclosed to ICANN by NDC, as required by Sections 1.2.7, 6.1 and 6.10 of the
11 Applicant Guidebook, among other provisions, the relationship would have also
12 triggered heightened scrutiny of VeriSign's Registry Agreements with ICANN for
13 .COM and .NET, as well as its Cooperative Agreement with the Department of
14 Commerce.

15 **FIRST CAUSE OF ACTION**

16 **(Breach of Contract against Defendant ICANN)**

17 63. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
18 as though fully set forth herein.

19 64. In June 2012, ICANN invited eligible parties to submit applications to
20 obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program.
21 In doing so, ICANN promised the potential applicants that it would (a) conduct the bid
22 process in a transparent manner, (b) ensure competition, and (c) abide by its own
23 Bylaws and the rules set forth in the Applicant Guidebook.

24 65. On or about June 13, 2012, Plaintiff submitted an application to ICANN
25 to obtain the rights to the .WEB gTLD. In consideration of ICANN's promise to abide
26 by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in
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1 the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff
2 paid ICANN a sum of \$185,000—the mandatory application fee.

3 66. In consideration of Plaintiff paying the sum of \$185,000, ICANN promised
4 to conduct the application process for the .WEB gTLD in a manner consistent with its
5 own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both
6 the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair
7 competition.

8 67. Plaintiff would not have paid the \$185,000 mandatory application fee or
9 spent time and other resources absent the mutual consideration and promises set forth
10 above. Plaintiff performed all conditions, covenants, and promises on its part to be
11 performed in accordance with the agreed upon terms of participating in the New gTLD
12 Program, except those obligations, if any, that it has been prevented or excused from
13 performing as a result of the misconduct set forth in this Complaint.

14 68. ICANN has materially breached its obligations to Plaintiff, as set forth in
15 ICANN’s Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a)
16 failing to thoroughly investigate the issues raised by NDC’s own statements and (b)
17 refusing to postpone the .WEB auction of last resort to allow for a full and transparent
18 investigation into the apparent discrepancies in NDC’s .WEB application.

19 69. Specifically, ICANN’s acts and omission violated, among other things:

- 20 a. Article 1, section 2.8 and Article III, Section 1 of ICANN’s Bylaws,
21 which require ICANN to “[m]ak[e] decisions by applying
22 documented policies neutrally and objectively, with integrity and
23 fairness” and “operate to the maximum extent feasible in an open
24 and transparent manner and consistent with procedures designed to
25 ensure fairness.” ICANN obligates each applicant who seeks to
26 participate in the New gTLD auction process to affirm that the
27 statements and representations contained in the application are true
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1 and accurate; applicants also undertake a continuing obligation to
2 update their application when changes in circumstance affect an
3 application's accuracy. By failing to engage in a thorough, open,
4 and transparent investigation of the contradictory statements made
5 by NDC in relation to its application, as well as an apparent change
6 of control with potential antitrust implications, ICANN plainly—
7 and inexplicably—failed to reach its decisions by “applying
8 documented policies neutrally and objectively, with integrity and
9 fairness.”

- 10 b. Article 1, section 2.9 of ICANN's Bylaws, which requires ICANN
11 to “[act] with a speed that is responsive to the needs of the Internet
12 while, as part of the decision-making process, obtaining informed
13 input from those entities most affected.” In undertaking only a
14 cursory examination of the contradictory statements made by NDC
15 and the apparent change in NDC's rights to its application, ICANN
16 failed to balance ICANN's interest in a swift resolution of the
17 concerns raised by the members of the .WEB contention set with its
18 obligation to obtain sufficient assurances and information from the
19 individuals and entities at the center of the statements made by
20 NDC; at the very least, ICANN should have (a) conducted
21 interviews with Mr. Bezsonoff and all other individuals identified in
22 Section 11 of NDC's application prior to reaching its conclusion and
23 (b) investigated whether NDC had either resold, assigned, or
24 transferred all or some of its rights to its .WEB application.
- 25 c. Article 1, section 2.10 of ICANN's Bylaws, which requires ICANN
26 to “[r]emain[] accountable to the Internet community through
27 mechanisms that enhance ICANN's effectiveness.” By failing to
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1 make use of the processes established in Sections 6.8 and 6.11 to the
2 Applicant Guidebook in investigating an admitted failure by NDC
3 to abide by its continuing obligation to update its application,
4 ICANN staff disregarded the very accountability mechanisms put in
5 place to serve and protect the .WEB contention set, the Internet
6 community, and the public at large. This error was compounded by
7 the cursory dismissal of the concerns raised by multiple members of
8 the .WEB contention set relating to the accuracy of the
9 representations made in NDC's application. By failing to apprise
10 the members of the contention set as to the manner and scope of the
11 investigation conducted by ICANN staff, ICANN failed to ensure
12 that it would hold itself accountable to any gTLD applicant, let alone
13 the Internet community and the public.

- 14 d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN
15 shall not apply its standards, policies, procedures, or practices
16 inequitably or single out any particular party for disparate treatment
17 unless justified by substantial and reasonable cause, such as the
18 promotion of effective competition." There can be no questioning
19 the fact that the Staff Action resulted in disparate treatment in favor
20 of NDC. On one hand, there are clear statements from NDC that
21 representations made in its application are inaccurate and there is
22 ample evidence that NDC has either resold, assigned, or transferred
23 all or some of its rights to its .WEB application. On the other hand,
24 when pressed by multiple members of the contention set to fully
25 investigate the matter, ICANN provided only a conclusory
26 statement that raises more questions than it resolves. To the extent
27 it had reason to engage in such disparate treatment of the members
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1 of the .WEB contention set, ICANN failed to provide such a reason
2 in reaching the determinations at issue in this Request.

3 70. ICANN also promised that a contention set would only proceed to auction
4 where all active applications in the contention set have “**no pending ICANN**
5 **Accountability Mechanisms.**” ICANN breached this promise by refusing to postpone
6 the .WEB auction of last resort while Plaintiff’s Reconsideration Request remains
7 pending and its Ombudsman complaint remains unresolved. ICANN further breached
8 this promise by moving forward with the .WEB auction of last resort while Plaintiff’s
9 IRP, initiated on July 22, 2016, remains pending.

10 71. On information and belief, Plaintiff alleges that the breaches set forth
11 above resulted from a pre-textual “investigation” into the admissions made by NDC and
12 ICANN’s issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
13 alleges that ICANN intentionally failed to abide by its contractual obligations to
14 conduct a full and open investigation into NDC’s admission because it was in ICANN’s
15 interest that the .WEB contention set be resolved by way of an ICANN auction. As
16 such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful
17 acts described above.

18 72. As a direct and proximate result of ICANN’s breaches, Plaintiff has
19 suffered, and will continue to suffer, without limitation, losses of revenue from third
20 parties, profits, consequential costs and expenses, market share, reputation, and
21 goodwill, in an amount to be determined at trial but not less than twenty-two million,
22 five hundred thousand dollars (\$22,500,000) plus interest.

23 **SECOND CAUSE OF ACTION**

24 **(Breach of the Covenant of Good Faith and Fair Dealing against Defendant**
25 **ICANN)**

26 73. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
27 as though fully set forth herein.

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1 74. An implied covenant of good faith and fair dealing exists between Plaintiff
2 and ICANN as a result of the contractual relationship entered into as part of the .WEB
3 gTLD application process.

4 75. ICANN breached the covenant of good faith and fair dealing when it acted
5 in a way that deprived Plaintiff of the benefits of the agreement as set forth in the
6 Applicant Guidebook, namely that the administration of the bid process for the .WEB
7 gTLD would be founded on the principles of fairness and transparency.

8 76. ICANN breached the covenant of good faith and fair dealing when it:

- 9 a. Failed to conduct due diligence and an adequate investigation into
10 apparent violations of the Applicant Guidebook raised by NDC's
11 admissions, including but not limited to failing to investigate
12 whether NDC had either resold, assigned, or transferred all or some
13 of its rights to its .WEB application;
- 14 b. Failed to conduct interviews with Mr. Bezsonoff and all other
15 individuals identified in Sections 7 and 11 of NDC's application as
16 part of an investigation into apparent violations of the Applicant
17 Guidebook raised by NDC's admissions;
- 18 c. Failed to provide a necessary level of transparency into the identity
19 and leadership of a competing applicant;
- 20 d. Refused to postpone the ICANN auction of last resort to allow for a
21 full and transparent investigation into the apparent violations of the
22 Applicant Guidebook raised by NDC's admissions; and
- 23 e. Failed to conduct a reasonable inquiry into NDC's impermissible
24 resale, transfer, or assignment of its rights in the .WEB application
25 to VeriSign.

26 77. On information and belief, Plaintiff alleges that the breaches set forth
27 above resulted from a pre-textual "investigation" into the admissions made by NDC and
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1 ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
2 alleges that ICANN intentionally failed to abide by its obligations to conduct a full and
3 open investigation into NDC's admission because it was in ICANN's interest that the
4 .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff
5 alleges that ICANN willfully and intentionally committed the wrongful acts described
6 above.

7 78. As a direct and proximate result of ICANN's breaches as set forth above,
8 Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue
9 from third parties, profits, consequential costs and expenses, market share, reputation,
10 and good will.

11 **THIRD CAUSE OF ACTION**

12 **(Negligence against Defendant ICANN)**

13 79. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
14 as though fully set forth herein.

15 80. ICANN owed Plaintiff a duty to act with proper care and diligence in
16 administering the .WEB auction process in accordance with its own Bylaws, Articles
17 of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

18 81. ICANN breached the duty owed Plaintiff by, among other things:

- 19 a. Failing to conduct due diligence and an adequate investigation into
20 apparent violations of the Applicant Guidebook raised by NDC's
21 admissions, including whether NDC resold, assigned or transferred
22 any of its rights or obligations in connection with the application to
23 VeriSign;
- 24 b. Failing to conduct interviews with Mr. Bezsonoff and all other
25 individuals identified in Sections 7 and 11 of NDC's application as
26 part of an investigation into apparent violations of the Applicant
27 Guidebook raised by NDC's admissions;
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- 1 c. Refusing to postpone the ICANN auction of last resort to allow for
2 a full and transparent investigation into the apparent violations of
3 the Applicant Guidebook raised by NDC’s admissions; and
4 d. Failing to provide a rationale for the decision set forth in the July
5 13, 2016 correspondence.

6 82. As a direct and proximate result of ICANN’s breaches as set forth above,
7 Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue
8 from third parties, profits, consequential costs and expenses, market share, reputation,
9 and good will.

10 **FOURTH CAUSE OF ACTION**

11 **(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against**
12 **Defendant ICANN)**

13 83. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
14 as though fully set forth herein.

15 84. The California Unfair Competition Law (“UCL”) protects both consumers
16 and competitors by prohibiting “unfair competition,” which is defined, in the
17 disjunctive, by Business and Professions Code section 17200 as including “any
18 unlawful, unfair or fraudulent business act or practice” as well as “unfair, deceptive,
19 untrue or misleading advertising.”

20 85. Plaintiff has standing to pursue this claim under Business and Professions
21 Code section 17204 because Plaintiff has suffered injury in fact and has lost money or
22 property as a result of ICANN’s actions as set forth above. The losses include, but are
23 not limited to, expenses incurred by Plaintiff in exhausting every available formal and
24 informal avenue of recourse with ICANN prior to the filing of the above-captioned
25 action, including legal fees related to the preparation and submission of the
26 Reconsideration Request. Losses also include the \$185,000 application fee paid to
27 ICANN to participate as an application in the .WEB contention set.
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1 86. The following acts and omissions of ICANN, among others, were unlawful
2 under the UCL:

- 3 a. ICANN’s imposition of the unenforceable contract terms contained
4 in the Purported Release, in violation of California Civil Code
5 section 1668, which declares violative of public policy those
6 contracts that “have for their object, directly or indirectly, to exempt
7 anyone from the responsibility for his own fraud, or willful injury to
8 the person or property of another, or violation of law, whether
9 willful or negligent....”
- 10 b. ICANN’s imposition of the unenforceable contract terms contained
11 in the Purported Release, in violation of California Civil Code §
12 1770(a)(19), which defines as unlawful, the “[i]nser[tion] of an
13 unconscionable provision in [a] contract.”

14 87. The following acts and omissions of ICANN, among others, were unfair
15 under the UCL:

- 16 a. Plaintiff hereby incorporates by this reference the allegations of
17 Paragraph 86 and its subparts as stated herein; each act therein
18 alleged is also an unfair act or practice under the UCL;
- 19 b. ICANN’s decision to conduct a cursory investigation into the
20 apparent violations of the Applicant Guidebook raised by NDC’s
21 admissions without regard for rights of the other .WEB contention
22 set members;
- 23 c. ICANN’s decision to forego a postponement of the ICANN auction
24 of last resort scheduled for July 27, 2016 without conducting an
25 open and transparent investigation into the apparent violations of the
26 Applicant Guidebook raised by NDC’s admissions; and
- 27 d. ICANN’s decision to allow NDC to continue to participate as a
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.WEB contention set member despite NDC’s own admission of inaccuracies contained in its application, in violation of the guidelines contained in the Applicant Guidebook.

88. The following acts and omissions of ICANN, among others, were fraudulent under the UCL in that they were likely to deceive, and in fact did deceive, members of the public:

- a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 86 and its subparts as if restated herein; each is also a fraudulent act or practice under the UCL;
- b. ICANN’s false representation that it would make all decisions in administering the .WEB auction process “by applying documented policies neutrally and objectively, with integrity and fairness”;
- c. ICANN’s false representation that in administering the .WEB auction process, it would “[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected”;
- d. ICANN’s false representation that in administering the .WEB auction process, it would “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness”;
- e. ICANN’s false representation that in administering the .WEB auction process, it would “apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment”;
- f. ICANN’s false representation that all applicants would be subject to the same agreement, rules, and procedures;
- g. ICANN’s false representation that it would require applicants to

1 update their applications with “any change in circumstances that
2 would render any information provided in the application false or
3 misleading,” including “applicant-specific information such as
4 changes in financial position and changes in ownership or control of
5 the applicant”;

6 h. ICANN’s false representation that a contention set would only
7 proceed to auction where all active applications in the contention set
8 have “**no pending ICANN Accountability Mechanisms**”; and

9 i. ICANN’s false representation that an applicant would be
10 disqualified from participating in the .WEB contention set for
11 “resell[ing], assign[ing], or transfer[ing] any of [the] applicant’s
12 rights or obligations in connection with the application.”

13 89. On information and belief, the conduct identified in Paragraphs 86-88 and
14 their subparts resulted from the intentional conduct of ICANN.

15 90. With specific reference to the conduct identified in Paragraphs 87-88 and
16 their subparts above, Plaintiff alleges that ICANN’s “investigation” into the admissions
17 made by NDC and ICANN’s subsequent issuance of its July 13, 2016 decision were
18 pre-textual in nature, the goal of which was to ensure ICANN secured a windfall from
19 the .WEB contention set being resolved by way of an ICANN auction of last resort.
20 Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual
21 obligations to conduct a full and open investigation into NDC’s admission because it
22 was in ICANN’s interest that the .WEB contention set be resolved by way of an ICANN
23 auction. As such, Plaintiff alleges that it was in ICANN’s interest to willfully and
24 intentionally commit the wrongful acts described above. Pursuant to Business and
25 Professions Code section 17203 and the equitable powers of the Court, Plaintiff seeks
26 an order (a) enjoining ICANN from proceeding with the .WEB ICANN auction of last
27 resort until the claims presented by way of the above-captioned action are resolved; (b)
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1 enjoining ICANN from entering into a Registry Agreement with any party for the .WEB
2 gTLD pending a final decision on the merits of this matter; and (c) enjoining ICANN
3 from engaging in the unlawful, unfair and fraudulent business acts and practices
4 described above. Plaintiff also seeks an order requiring ICANN to comply with its own
5 Bylaws, Articles of Incorporation, and the rules and procedures set forth in the
6 Applicant Guidebook, in the continued administration of the .WEB contention set
7 process and to take such corrective actions and adopt such remedial measures as are
8 necessary to prevent the further occurrence of the acts or practices alleged herein.

9 91. Plaintiff also seeks an order requiring restitution of any and all monies
10 obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and
11 fraudulent described above. Plaintiff's request includes, but is not limited to, the
12 restitution of any and all fees paid by or monies received from Plaintiff in relation to
13 the .WEB contention set process.

14 92. Preventing the unlawful business practices engaged in by ICANN will
15 ensure a significant benefit to the other .WEB contention set members as well as the
16 public at large. Moreover, the financial burden of pursuing private enforcement
17 substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice,
18 Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant
19 to Civil Code section 1021.5 in an amount subject to proof.

20 **FIFTH CAUSE OF ACTION**

21 **(Declaratory Relief—Against Defendant ICANN)**

22 93. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
23 as though fully set forth herein.

24 94. An actual and justiciable controversy has arisen, and now exists, between
25 Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the
26 Purported Release contained in the Applicant Guidebook.

1 95. As a condition of participating in the .WEB contention set process, ICANN
2 required Plaintiff and other applicants to sign the Applicant Guidebook, which
3 contained a covenant not to sue in order to apply for the .WEB contention set. The
4 Purported Release applies to all New gTLD applicants and states, in relevant part:

5 Applicant hereby releases ICANN . . . from any and all claims by applicant
6 that arise out of, are based upon, or are in any way related to, any action,
7 or failure to act, by ICANN . . . in connection with ICANN’s . . . review of
8 this application. . . . Applicant agrees not to challenge . . . and irrevocably
9 waives any right to sue or proceed in court.

10 96. The Purported Release is not subject to negotiation: If a potential applicant
11 does not agree to the release, it cannot be considered for participation in the .WEB
12 contention set process. The Purported Release is also entirely unilateral in that it allows
13 ICANN to absolve itself of wrongdoing while affording no remedy to applicants.
14 Moreover, the Purported Release does not apply equally as between ICANN and the
15 applicants because it does not prevent ICANN from proceeding with litigation against
16 an applicant.

17 97. Plaintiff seeks a declaration of its rights regarding the enforceability of the
18 Purported Release in light of California Civil Code Section 1668, which prohibits the
19 type of broad exculpatory clauses contained in the Purported Release: “All contracts
20 which have for their object, directly or indirectly, to exempt anyone from responsibility
21 for his own fraud, or willful injury to the person or property or another, or violation of
22 law, whether willful or negligent, are against the policy of the law.”

23 98. Plaintiff maintains that, on its face, the Release is “against the policy of the
24 law” because it exempts ICANN from any and all claims arising out of the application
25 process, even those arising from fraudulent or willful conduct.

26 99. As such, an actual controversy has arisen and now exists between Plaintiff
27 and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial
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1 determination and declaration that the Purported Release is unenforceable,
2 unconscionable, and/or void as a matter of public policy. Such a declaration is
3 necessary and appropriate at this time so that Plaintiff may ascertain its rights with
4 respect to the enforceability of the Purported Release.

5
6 **WHEREFORE**, Plaintiff RUBY GLEN, LLC prays for relief as follows:

- 7 1. For compensatory damages according to proof at the time trial;
- 8 2. For general damages according to proof;
- 9 3. For restitutionary damages according to proof;
- 10 4. An injunction requiring ICANN to refrain from conducting the auction of
11 last resort for the .WEB gTLD pending a final decision on the merits of
12 this matter;
- 13 5. An injunction requiring ICANN to refrain from entering into a Registry
14 Agreement with any party for the .WEB gTLD pending a final decision
15 on the merits of this matter;
- 16 6. An injunction requiring ICANN to refrain from assigning the rights to the
17 .WEB gTLD to any party pending a final decision on the merits of this
18 matter;
- 19 7. Attorneys' fees and costs to the extent permitted by law; and
- 20 8. For such other relief as the Court deems just and proper against all
21 Defendants.

1 Dated: August 8, 2016

By: s/ Paula L. Zecchini

Paula L. Zecchini (SBN 238731)
Aaron M. McKown (SBN 208781)
pzecchini@cozen.com
amckown@cozen.com
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206.340.1000
Toll Free Phone: 1.800.423.1950
Facsimile: 206.621.8783
Attorneys for Ruby Glen, LLC

10 **CERTIFICATE OF SERVICE**

11 The undersigned hereby certifies, under penalty of perjury under the laws of the
12 State of California, that I electronically filed the foregoing document with the Clerk of
13 the Court using the CM/ECF system which will send notification of such filing to the
14 following:

15 **Electronic Mail Notice List**

- 16 •Eric P Enson
epenson@jonesday.com,dfutrowsky@jonesday.com
- 17 •Jeffrey A LeVee
18 jlevee@jonesday.com,vcrawford@jonesday.com,cmcdaniel@jonesday.com
- 19 •Charlotte Wasserstein
20 cswasserstein@jonesday.com,lltouton@jonesday.com,flumlee@jonesday.com,kkelly@jonesday.com

21 SIGNED AND DATED this 8th day of August, 2016 at Seattle, Washington.

22 COZEN O'CONNOR

23
24 By: /s/ Paula Zecchini
Paula Zecchini