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 ASSIGNED NAMES AND NUMBERS  
 9

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA  
 12 WESTERN DIVISION  
 13

14 DOTCONNECTAFRICA TRUST,  
 15 Plaintiff,  
 16 v.  
 17 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND  
 18 NUMBERS,  
 19 Defendant.  
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Case No. CV 16-862-RGK (JCx)

Assigned for all purposes to the  
 Honorable R. Gary Klausner

**ICANN'S NOTICE OF MOTION  
 AND MOTION TO DISMISS  
 COMPLAINT**

[Memorandum of Points and  
 Authorities; Request for Judicial  
 Notice; and [Proposed] Order Filed  
 Concurrently]

Hearing Date: March 28, 2016

Hearing Time: 9:00 a.m.

Hearing Location: Courtroom 850

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that, on March 28, 2016, at 9:00 a.m., or as soon  
3 thereafter as counsel may be heard in the courtroom of the Honorable R. Gary  
4 Klausner, Courtroom 850, United States District Court for the Central District of  
5 California, 255 East Temple Street, defendant Internet Corporation for Assigned  
6 Names and Numbers (“ICANN”) will and hereby does move to dismiss the  
7 complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

8 ICANN seek to dismiss each and every cause of action asserted in the  
9 complaint for failure to state a claim. The primary basis for ICANN’s motion is  
10 that, in the very contract that plaintiff argues that ICANN has breached, Plaintiff  
11 executed a release and covenant not to sue that bars each and all of Plaintiff’s  
12 claims in this case.

13 Pursuant to L.R. 7-3, ICANN informed Plaintiff of the basis for this motion  
14 by letter dated January 22, 2016 and again during a January 25, 2016 hearing that  
15 occurred in Los Angeles Superior Court (prior to removal) on Plaintiff’s application  
16 for temporary restraining order, which the Superior Court denied. ICANN’s letter  
17 of January 22, 2016 explained in detail that the release and covenant to not to sue  
18 barred the claims in the complaint and asked Plaintiff to dismiss the complaint on  
19 that basis. On January 24, 2016, Plaintiff’s counsel promised to respond in writing  
20 to ICANN’s January 22, 2016 letter, but he never did so.

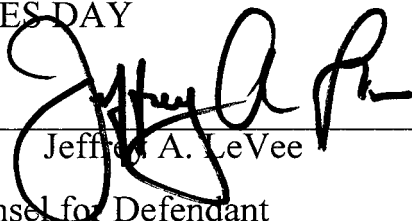
21 This motion is based on this notice of motion and motion, the accompanying  
22 memorandum of points and authorities and request for judicial notice, the complaint,  
23 all pleadings and papers on file in this action, and such further evidence and  
24 argument as may be presented at or before the hearing on this matter.  
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Dated: February 16, 2016

JONES DAY

By:



Jeffrey A. LeVee

Counsel for Defendant

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14 DOTCONNECTAFRICA TRUST,  
 15 Plaintiff,  
 16 v.  
 17 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND  
 18 NUMBERS,  
 19 Defendant.

Case No. CV 16-00862-RGK

Assigned for all purposes to the  
 Honorable R. Gary Klausner

**MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT OF ICANN'S  
 MOTION TO DISMISS  
 COMPLAINT**

[Notice of Motion and Motion to  
 Dismiss Complaint; Request for  
 Judicial Notice; and [Proposed]  
 Order Filed Concurrently Herewith]

Hearing Date: March 28, 2016  
 Hearing Time: 9:00 a.m.  
 Hearing Location: Courtroom 850

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1 **INTRODUCTION**

2 In the very contract that Plaintiff DotConnectAfrica Trust alleges defendant  
3 Internet Corporation for Assigned Names and Numbers (“ICANN”) to have  
4 breached, DCA waived its rights to file this lawsuit and released ICANN from all  
5 of the claims asserted in the complaint. Accordingly, this case must be dismissed.

6 ICANN is tasked with coordinating portions of the Internet’s domain name  
7 system (“DNS”), which permits Internet users to find websites and communicate  
8 within the global Internet. ICANN also evaluates potential “top-level domain”  
9 (“TLD”) operators, and recommends that TLDs be added to the DNS. A TLD is  
10 the portion of a domain name to the right of the last dot, such as .COM, .NET  
11 and .ORG.

12 Plaintiff’s Complaint arises out of its application to ICANN to operate the  
13 TLD known as .AFRICA (“Application”), and every cause of action relates to its  
14 Application. However, the terms of the Application bar this lawsuit. Specifically,  
15 in submitting the Application, Plaintiff agreed to a release and covenant not to sue  
16 ICANN with respect to any and all claims relating in any way to the Application.

17 Plaintiff alleges in its Complaint that ICANN “denied” its Application and  
18 failed to evaluate its Application in accordance with the terms of the New gTLD  
19 Applicant Guidebook (“Guidebook”). The Guidebook sets forth the various  
20 requirements and procedures governing the review of new generic TLD (“gTLD”)  
21 applications, and Plaintiff agreed to abide by its terms when Plaintiff submitted its  
22 Application. The Guidebook also contains an explicit covenant in which Plaintiff:  
23 (i) waived its right to file any lawsuits against ICANN related to ICANN’s  
24 consideration of Plaintiff’s Application; and (ii) released and forever discharged  
25 ICANN from “any and all claims” relating to ICANN’s “action or inaction” in  
26 connection with Plaintiff’s Application. As another district court recently found,  
27 that covenant is “clear and comprehensive” and bars all lawsuits by gTLD  
28 applicants against ICANN. *Commercial Connect v. Internet Corp. for Assigned*



1 *Names and Nos.*, No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at \*8-10  
2 (W.D. Ky. Jan. 26, 2016).

3 Even if the covenant not to sue did not bar Plaintiff's Complaint (which it  
4 does), many of its claims are otherwise defective. In particular, Plaintiff alleges  
5 that ICANN breached its contract with Plaintiff, but the actual terms of that contract,  
6 which ICANN is permitted to rely upon in this Motion, do not restrict ICANN from  
7 doing exactly what Plaintiff alleges to be the breach. Further, Plaintiff does not and  
8 cannot plead its fraud and intentional misrepresentation claims with the requisite  
9 specificity.

10 In sum, Plaintiff has not alleged and cannot allege facts sufficient to state a  
11 claim against ICANN, and its Complaint should be dismissed with prejudice.

## 12 **BACKGROUND**

### 13 **ICANN and the New gTLD Program:**

14 ICANN is a California non-profit public benefit corporation with its principal  
15 place of business in Los Angeles, California. (Compl. ¶ 2.) Pursuant to a series of  
16 agreements over the years with the United States Department of Commerce,  
17 ICANN oversees the technical coordination of the Internet's DNS on behalf of the  
18 Internet community, ensuring the DNS's continued security, stability, and integrity.  
19 (*See* Request For Judicial Notice ("RJN") Ex. 1 ("ICANN Bylaws") at 6 (Art. I, §  
20 1); *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124,  
21 1127-28 (9th Cir. 2015).) The essential function of the DNS is to convert numeric  
22 IP addresses into easily-remembered domain names that permit users to find  
23 specific websites, such as "USCOURTS.GOV" and "ICANN.ORG." The ".GOV"  
24 and ".ORG" in these addresses, just like the more well-known ".COM," are referred  
25 to as TLDs. *Name.Space, Inc.*, 795 F.3d at 1127.

26 Throughout its history, ICANN has sought to expand the number of  
27 accessible TLDs in the DNS in order to promote consumer choice and competition.  
28 To that end, in 2012, ICANN launched the "New gTLD Program," which resulted

1 in nearly 2,000 applications for new gTLDs, including Plaintiff's Application for  
2 the .AFRICA gTLD. (Compl. ¶¶ 10-11, 15.)

3 In connection with the New gTLD Program, ICANN published the  
4 Guidebook, which sets forth all of the requirements and the criteria by which new  
5 gTLD applications are evaluated. (Compl. ¶ 13.) Although Plaintiff's claims are  
6 based on ICANN's alleged failure to abide by the terms of the Guidebook, Plaintiff  
7 fails to attach the relevant portions of the Guidebook to its Complaint. Nonetheless,  
8 as explained in the accompanying Request for Judicial Notice, the Court may  
9 consider the relevant terms of the Guidebook in ruling on this Motion because  
10 Plaintiff has sued for breach of a contract, which permits the Court to consider the  
11 terms of the actual contract.

12 Plaintiff fails to attach or mention Module 6 of the Guidebook, which sets  
13 forth the terms and conditions for the New gTLD Program that all applicants,  
14 including Plaintiff, accepted and acknowledged by submitting a gTLD application.  
15 Among those terms and conditions is a release and covenant not to sue (hereinafter,  
16 "Release and Covenant Not To Sue") barring all claims against ICANN or its  
17 Affiliated Parties (as defined in Guidebook Module 6) arising out of ICANN's or  
18 those Affiliated Parties' evaluation of any new gTLD application:

19  
20 6. Applicant hereby releases ICANN and the ICANN Affiliated  
21 Parties [i.e., ICANN's affiliates, subsidiaries, directors, officers,  
22 employees, consultants, evaluators, and agents] from any and all  
23 claims by applicant that arise out of, are based upon, or are in any way  
24 related to, any action, or failure to act, by ICANN or any ICANN  
25 Affiliated Party in connection with ICANN's or an ICANN Affiliated  
26 Party's review of this application, investigation or verification, any  
27 characterization or description of applicant or the information in this  
28 application, any withdrawal of this application or the decision by  
ICANN to recommend, or not to recommend, the approval of  
applicant's gTLD application. **APPLICANT AGREES NOT TO  
CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA,  
ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO  
THE APPLICATION, AND IRREVOCABLY WAIVES ANY  
RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER  
JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL  
CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES  
WITH RESPECT TO THE APPLICATION. . . .**

1  
2 (RJN Ex. B (Guidebook Module 6) at 36 (¶ 6) (bold emphasis added).) Module 6  
3 also makes clear that ICANN has the absolute discretion to “determine not to  
4 proceed with any and all applications for new gTLDs.” (*Id.* at 34-35 (¶ 3).)

5 An applicant that is dissatisfied with the manner in which ICANN evaluated  
6 its application is not left without recourse. ICANN’s Bylaws provide for several  
7 accountability mechanisms to ensure that ICANN operates in accordance with its  
8 Articles of Incorporation, Bylaws, policies and procedures. (*See* RJN Ex. A  
9 (ICANN’s Bylaws) at 8-21 (Arts. IV, V).) For example, an aggrieved applicant can  
10 file a “request for reconsideration,” which is a mechanism that asks the ICANN  
11 Board to re-evaluate certain Board or staff actions and inactions that the applicant  
12 believes have harmed it. (*Id.* at 9-14 (Art. IV, § 2).) In addition, an aggrieved  
13 applicant can file a “request for independent review,” which asks independent  
14 panelists to evaluate whether an action of ICANN’s Board was consistent with  
15 ICANN’s Articles of Incorporation and Bylaws. (*Id.* at 14-18 (Art. IV, § 3).) As  
16 discussed below, Plaintiff took advantage of both these accountability mechanisms  
17 and in fact prevailed in the independent review procedure that it initiated.

18 **Plaintiff’s Application for .AFRICA:**

19 In 2012, Plaintiff submitted an application to operate the .AFRICA gTLD,  
20 thereby accepting and acknowledging the Guidebook, including the Release and  
21 Covenant Not To Sue and all of the above-identified terms, conditions, procedures,  
22 and policies. Because Plaintiff applied for a gTLD that represents the name of a  
23 geographic region, the terms of the Guidebook require that Plaintiff obtain and  
24 provide documentation of support from at least 60% of the governments in that  
25 region. (RJN Ex. C (Guidebook Module 2) at 42-44 (§ 2.2.1.4.2).) The Guidebook  
26 provides that a Geographic Names Panel operated by a third-party vendor must  
27 verify the relevance and authenticity of an applicant’s documentation. (*Id.* at 45-47  
28 (§ 2.2.1.4.4).)

1 The Guidebook also provides that ICANN’s Governmental Advisory  
2 Committee (“GAC”)<sup>1</sup> may issue specific advice to ICANN concerning any  
3 application for a new gTLD. (RNJ Ex. D (Guidebook Module 3) at 49-51 (§ 3.1).)  
4 Where the GAC issues “consensus advice” against a particular application, this  
5 creates a “strong presumption for the ICANN Board that the application should not  
6 be approved.” (*Id.* at 50 (§ 3.1).)

7 On April 11, 2013, while the Geographic Names Panel was reviewing  
8 Plaintiff’s Application, the GAC, in accordance with the Guidebook, issued  
9 consensus advice that Plaintiff’s Application should not proceed. (Compl. Ex. A  
10 (Final Decl. in *DCA v. ICANN*) ¶ 112.) On June 4, 2013, after providing Plaintiff  
11 with an opportunity to respond, ICANN’s Board accepted the GAC’s advice,  
12 meaning that Plaintiff’s Application would not continue to be processed. (*Id.* ¶ 5.)

13 Plaintiff filed a reconsideration request challenging the Board’s acceptance  
14 of the GAC’s consensus advice against Plaintiff’s Application, and later filed a  
15 request for independent review. (*Id.* ¶¶ 6-8) Following a lengthy independent  
16 review proceeding, the three-member independent review panel declared Plaintiff  
17 to be the prevailing party and recommended that ICANN “continue to refrain from  
18 delegating the .AFRICA gTLD and permit [Plaintiff’s] application to proceed  
19 through the remainder of the new gTLD application process.” (*Id.* ¶¶ 113-15, 133.)

20 ICANN’s Board promptly reviewed and accepted the recommendation of the  
21 independent review panel. As a result, ICANN returned Plaintiff’s application to  
22 processing. Subsequently, in the summer of 2015, the Geographic Names Panel  
23

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24 <sup>1</sup> A number of “Advisory Committees” advise ICANN’s Board on various  
25 topics described in the ICANN Bylaws. The role of the GAC, which is composed  
26 of members of national governments and distinct economies as recognized in  
27 international fora, is to “consider and provide advice on the activities of ICANN as  
28 they relate to concerns of governments, particularly matters where there may be an  
interaction between ICANN’s policies and various laws and international  
agreements or where they may affect public policy issues.” (RNJ Ex. A (Bylaws)  
at 22-23 (Art. XI, § 2.1(a)).)

1 determined that Plaintiff's application did not have the requisite 60% support from  
 2 African governments. As provided by the Guidebook, Plaintiff was allowed a  
 3 lengthy period in which to supplement its documentation of support. Plaintiff  
 4 provided its supplemental documentation on January 27, 2016, and that  
 5 documentation is currently being reviewing by the Geographic Names Panel.  
 6 Contrary to what Plaintiff alleges, therefore, its Application has not been "denied."<sup>2</sup>

7 **Plaintiff's Claims Against ICANN:**

8 Plaintiff asserts claims for breach of contract, intentional and negligent  
 9 misrepresentation, fraud, and unfair competition. Plaintiff alleges that ICANN  
 10 breached its contract with Plaintiff – the Guidebook – by failing to review  
 11 Plaintiff's Application for .AFRICA in accordance with ICANN's Articles of  
 12 Incorporation, Bylaws, and the Guidebook and allegedly assisting a competing  
 13 applicant for .AFRICA. (Compl. ¶ 24; *see also id.* ¶¶ 14-40.) Plaintiff alleges  
 14 intentional and negligent misrepresentation claims, alleging that ICANN failed to  
 15 review Plaintiff's Application in accordance with ICANN's Articles of  
 16 Incorporation, Bylaws, and the Guidebook, and that ICANN failed to participate in  
 17 good faith in independent review proceedings. (*Id.* ¶¶ 41-50.) Plaintiff alleges a  
 18 claim for "fraud and conspiracy to commit fraud," alleging that ICANN conspired  
 19 with third-parties (the African Union Commission and a competing applicant) to  
 20 deny Plaintiff's Application. (*Id.* ¶¶ 51-62.) Finally, Plaintiff alleges claims for  
 21 unfair competition and negligence arising out of the same operative facts. (*Id.*  
 22 ¶¶ 63-74.)

23 **LEGAL STANDARD**

24 Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be  
 25 dismissed when the allegations fail to set forth a set of facts, which if true, would

26 \_\_\_\_\_  
 27 <sup>2</sup> Plaintiff does not include in its Complaint the facts set forth in this  
 28 paragraph, which are provided to the Court for background only and are not  
 relevant to the resolution of ICANN's Motion to Dismiss.

1 entitle the plaintiff to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (a claim  
2 must be facially plausible in order to survive a motion to dismiss); *Bell Atl. Corp. v.*  
3 *Twombly*, 550 U.S. 544, 555 (2007). The pleadings must raise the right to relief  
4 beyond the speculative level; a plaintiff must provide “more than labels and  
5 conclusions, and a formulaic recitation of the elements of a cause of action will not  
6 do.” *Twombly*, 550 U.S. at 555. On a motion to dismiss, the court is not required  
7 to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S.  
8 at 678.

9 To satisfy the heightened requirements of Rule 9(b), which applies to  
10 Plaintiff’s fraud and intentional misrepresentation claims, Plaintiff must allege  
11 “more than the neutral facts necessary to identify the transaction,” including the  
12 who, what, when, where, and how of the alleged fraud. *Vess v. Ciba-Geigy Corp.*  
13 *USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

## 14 ARGUMENT

### 15 **I. PLAINTIFF’S CLAIMS ARE BARRED BY THE RELEASE AND** 16 **COVENANT NOT TO SUE CONTAINED IN THE GUIDEBOOK.**

17 The Court should dismiss the entire Complaint because, in the very contract  
18 Plaintiff seeks to enforce against ICANN—Plaintiff’s Application for .AFRICA  
19 submitted pursuant to the terms of the Guidebook—Plaintiff explicitly waived its  
20 right to file suit against ICANN and specifically released ICANN with respect to all  
21 the claims asserted in the Complaint. Although Plaintiff failed to attach a copy of  
22 the contract to its Complaint, ICANN is entitled to rely upon the actual terms of  
23 that contract in this Motion, as explained in the concurrently filed Request for  
24 Judicial Notice. *See Commercial Connect*, 2016 U.S. Dist. LEXIS 8550, at \*8-10  
25 (Guidebook’s release barred new gTLD applicant’s claims).

26 A written release extinguishes any claim covered by its terms. *Skrbina v.*  
27 *Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, “a general release can  
28 be completely enforceable and act as a complete bar to all claims (known or

1 unknown at the time of the release) despite protestations by one of the parties that  
 2 he did not intend to release certain types of claims.” *San Diego Hospice v. Cty. of*  
 3 *San Diego*, 31 Cal. App. 4th 1048, 1053 (1995) (citing *Winet v. Price*, 4 Cal. App.  
 4 4th 1159, 1173 (1992)). Since a release acts as a complete bar to recovery, any  
 5 claims covered by a release must be dismissed with prejudice. *Grillo v. State of*  
 6 *California*, No. C 05-2559 SBA, 2006 WL 335340, at \*7-8 (N.D. Cal. Feb. 14,  
 7 2006).

8 By submitting its Application, Plaintiff accepted and acknowledged the terms  
 9 and conditions set forth in Module 6 of the Guidebook, which explicitly include the  
 10 Release and Covenant Not To Sue. The language could not be more clear:

11 6. Applicant hereby releases ICANN and the ICANN Affiliated  
 12 Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers,  
 13 employees, consultants, evaluators, and agents] from any and all  
 14 claims by applicant that arise out of, are based upon, or are in any way  
 15 related to, any action, or failure to act, by ICANN or any ICANN  
 16 Affiliated Party in connection with ICANN’s or an ICANN Affiliated  
 17 Party’s review of this application, investigation or verification, any  
 18 characterization or description of applicant or the information in this  
 19 application, any withdrawal of this application or the decision by  
 20 ICANN to recommend, or not to recommend, the approval of  
 21 applicant’s gTLD application. **APPLICANT AGREES NOT TO**  
 22 **CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA,**  
 23 **ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO**  
 24 **THE APPLICATION, AND IRREVOCABLY WAIVES ANY**  
 25 **RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER**  
 26 **JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL**  
 27 **CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES**  
 28 **WITH RESPECT TO THE APPLICATION. . . .**

(RJN Ex. B (Guidebook Module 6) at 36 (¶ 6) (bold emphasis added).)

There is no question that Plaintiff’s claims arise out of ICANN’s “review of  
 [Plaintiff’s] application” and “the decision by ICANN to recommend, or not to  
 recommend, the approval of applicant’s gTLD application.” (*Id.*) Plaintiff’s first  
 claim against ICANN, for breach of contract, is based on Plaintiff’s allegation that

1 ICANN failed to “review Plaintiff’s [a]pplication in accordance with ICANN’s  
2 Bylaws, Articles of Incorporation, and the new gTLD rules and procedures . . . .”  
3 (Compl. ¶ 24.) Similarly, Plaintiff’s second and third claims, for intentional and  
4 negligent misrepresentation, are based on Plaintiff’s allegation that “ICANN  
5 represented to Plaintiff that Plaintiff’s application for .Africa would be reviewed in  
6 accordance with ICANN’s Bylaws, Articles of Incorporation, and the new gTLD  
7 [rules and procedures].” (*Id.* ¶¶ 42, 47.)

8 Plaintiff’s fourth claim, for fraud and conspiracy to commit fraud, is based on  
9 the allegation that ICANN conspired to “defraud Plaintiff of a fair evaluation  
10 process for the .Africa gTLD,” “improperly den[ied] Plaintiff’s application,” and  
11 improperly accepted a competing application for .AFRICA. (*Id.* ¶ 52.) Plaintiff’s  
12 fifth claim, for unfair competition, is based on the same allegations underlying its  
13 first four claims. (*Id.* ¶ 64.) Plaintiff’s sixth claim, for negligence, is based on  
14 ICANN’s alleged “duty to act with proper care in processing Plaintiff’s application,”  
15 including an alleged duty to investigate the GAC’s advice concerning Plaintiff’s  
16 Application and an alleged duty not to consider or move forward with the  
17 competing application for .AFRICA. (*Id.* ¶¶ 68-73.)

18 All of these claims, by their express terms, arise out of the evaluation of  
19 Plaintiff’s Application and are therefore barred by the Release and Covenant Not to  
20 Sue contained in Module 6 of the Guidebook.

21 The plaintiff in *Commercial Connect v. ICANN*, filed last month in the  
22 Western District of Kentucky, similarly sought to challenge ICANN’s actions with  
23 respect to that plaintiff’s new gTLD application. The district court denied  
24 plaintiff’s motion for preliminary injunction, finding that the Guidebook’s Release  
25 and Covenant Not to Sue was “clear and comprehensive” and barred claims  
26 “aris[ing] out of ICANN’s review of Plaintiff’s [new gTLD] Application . . . .”  
27 *Commercial Connect*, 2016 U.S. Dist. LEXIS 8550, at \*9-10.

28



1 **II. ICANN’S ACTIONS WITH RESPECT TO PLAINTIFF’S**  
 2 **APPLICATION ARE SPECIFICALLY AUTHORIZED BY THE**  
 3 **GUIDEBOOK.**

4 Separate and apart from the Release and Covenant Not To Sue, Plaintiff’s  
 5 claim for breach of contract is insufficiently pled because it is based on Plaintiff’s  
 6 allegations that ICANN acted inconsistently with the terms of the Guidebook  
 7 and/or failed to approve Plaintiff’s Application. (Compl. ¶ 16.) Even assuming  
 8 that such allegations are true (which they are not), they do not support Plaintiff’s  
 9 claims because the terms of Plaintiff’s Application explicitly allow ICANN the  
 10 discretion to “determine not to proceed with any and all applications for new  
 11 gTLDs.” (RJN Ex. B (Guidebook Module 6) at 34-35, 39-40 (¶¶ 3,14); *Klein v.*  
 12 *Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (When reviewing  
 13 breach of contract claims, courts “must determine whether the alleged agreement is  
 14 ‘reasonably susceptible’ to the meaning ascribed to it in the complaint.”))

15 In *Image Online Design*, the plaintiff claimed that ICANN breached its  
 16 agreement with the plaintiff because ICANN did not officially approve or reject the  
 17 plaintiff’s application in conjunction with applications for new gTLDs that were  
 18 submitted in the year 2000. *Image Online Design Inc. v. Internet Corporation for*  
 19 *Assigned Names and Nos.*, No. CV 12-08968-DDP (JCx), 2013 U.S. Dist. LEXIS  
 20 16896 at \*7-13. Judge Pregerson, however, found that “the explicit terms of the  
 21 Agreement contradict the notion that ICANN had an obligation to do anything  
 22 beyond considering [the plaintiff’s] application.” *Id.* at \*10. Here, the analysis is  
 23 the same: ICANN complied and continues to comply with its obligations by  
 24 processing and considering Plaintiff’s Application in accordance with the  
 25 procedures set forth in the Guidebook.

26 **III. PLAINTIFF DOES NOT PLEAD ITS FRAUD AND INTENTIONAL**  
 27 **MISREPRESENTATION CLAIMS WITH SPECIFICITY.**

28 Plaintiff’s claims against ICANN for fraud and intentional misrepresentation  
 are insufficiently pled. (Compl. ¶¶ 41-45, 51-62.) Where a claim is “grounded in

1 fraud or [] sounds in fraud, [] the pleading of that claim as a whole must satisfy the  
 2 particularity requirement of Rule 9(b).” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d  
 3 1097, 1103-04 (9th Cir. 2003) (internal citations and quotation marks omitted). To  
 4 satisfy this standard, a plaintiff must identify “the time, place, and content of [the]  
 5 alleged misrepresentation[s],” as well as the “circumstances indicating falseness” or  
 6 “manner in which the representations at issue were false and misleading.” *In re*  
 7 *GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547–48 (9th Cir.1994) (internal citation  
 8 and modifications omitted).

9 Far from meeting this standard, Plaintiff does not identify a single alleged  
 10 misrepresentation by ICANN in support of Plaintiff’s purported claim for fraud and  
 11 conspiracy to commit fraud. *Wilkins v. Nat’l BroaPlaintiffsting Co., Inc.*, 71 Cal.  
 12 App. 4th 1066, 1081 (1999) (“[A] knowingly false representation by the defendant”  
 13 is one element of a claim for fraud.).

14 In support of its claim for intentional misrepresentation, Plaintiff alleges that  
 15 ICANN “represented . . . that Plaintiff’s application [] would be reviewed in  
 16 accordance with ICANN’s Bylaws.” (Compl. ¶ 42.) However, Plaintiff does not  
 17 identify with particularity which statements in the Guidebook (an over 300-page  
 18 document) were allegedly false or misleading, other than to quote (incompletely) a  
 19 provision in the Guidebook regarding GAC Early Warnings that had no direct  
 20 impact on the processing of Plaintiff’s Application. Even taking Plaintiff’s  
 21 allegation as true (which it is not), this could not have resulted in any injury to  
 22 Plaintiff. (Compl. ¶¶ 42-43; *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)  
 23 (one element of a claim for intentional misrepresentation is “resulting damage”).)

24 Plaintiff also alleges that ICANN made false representations regarding the  
 25 independent review process; however, Plaintiff fails to allege with any particularity  
 26 what those false representations were or when they were made. (*Id.* ¶ 42.) And  
 27 Plaintiff does not (and cannot) allege how it was injured by those alleged false  
 28 misrepresentations—Plaintiff was named the prevailing party by the independent

1 review panel and, as a result of that determination, ICANN’s Board returned  
2 Plaintiff’s Application to processing, which is exactly what the review panel  
3 recommended that ICANN do. *Lazar*, 12 Cal.4th at 638.

4 Even if Plaintiff were to allege that ICANN’s treatment of Plaintiff’s  
5 Application was not in conformance with the Guidebook or ICANN’s Bylaws, the  
6 terms and conditions of Plaintiff’s Application explicitly provide that ICANN “has  
7 the right to determine not to proceed with any and all applications for new gTLDs”  
8 and that “[t]he decision to review, consider and approve an application . . . is  
9 entirely at ICANN’s discretion.” (RJN Ex. B (Guidebook) Module 6 ¶ 3.) For this  
10 reason, leave to amend would be futile.

11 **CONCLUSION**

12 For the foregoing reasons, ICANN respectfully requests that the Court grant  
13 ICANN’s Rule 12(b)(6) motion and dismiss Plaintiff’s entire Complaint with  
14 prejudice.

15 Dated: February 16, 2016

JONES DAY

17 By: /s/ Jeffrey A. LeVee  
18 Jeffrey A. LeVee

19 Attorneys for Defendant  
20 INTERNET CORPORATION FOR  
21 ASSIGNED NAMES AND NUMBERS