INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Claimant, v. ATGRON, INC., Respondent.	Case No.: 25074/MK

RESPONDENT'S ARBITRATION BRIEF

Respondent Atgron, Inc. (Atgron) submits this Arbitration Brief in the above-captioned arbitration commenced by claimant the Internet Corporation for Assigned Names and Numbers (ICANN). The purpose of this brief is to expand on Atgron's defenses to the single claim asserted by ICANN, and Atgron's claims against ICANN. This brief will also address the questions raised by the arbitrator during a May 13, 2020 conference call.[1]

I.

INTRODUCTION

What ICANN attempts to portray as a simple, undisputed failure by Atgron to pay "registry-level" fees, is anything but simple and undisputed. ICANN's conduct, as alleged in Atgron's March 31, 2020 *Answer and Affirmative Defenses*, and as expanded upon in the concurrently filed Declaration of Adrienne McAdory, has caused Atgron needless but considerable expense. This conduct acts as a complete bar to ICANN's claim and supports Atgron's claims against ICANN.

At the heart of Atgron's claims is ICANN's conduct in promising to counsel Atgron on the fees and costs associated with entering the "emergency transition" process set forth in ¶2.13 of the Registry Agreement; and ICANN's subsequent refusal to cooperate with Atgron to facilitate its exit from this process. The "emergency transition" process allows ICANN, in its sole discretion, to appoint an "emergency back-end registry operator" (EBERO) to perform certain "critical" back-end registry functions if certain benchmarks and other requirements set forth in the Registry Agreement are not met. With Atgron's contract with its current back-end registry operator set to expire in November 2017, ICANN mentioned EBERO to Atgron as a possible alternative solution. However, despite ICANN's undisputed promised to counsel Atgron on the consequences of this process and, more importantly, the associated costs, ICANN reneged

[1] ICANN has been afforded an opportunity to reply to the issues raised in this brief by June 29, 2020. Atgron reserves the right, with the arbitrator's permission, to file a sur-reply to any issues raised in ICANN's reply brief, as appropriate.

on its promise. Instead, ICANN triggered EBERO and then, *more than a month later*, advised Atgron of the costs. By then, it was too late for Atgron to make an informed decision as to whether to enter EBERO, or continue for another year with its existing back-end provider.

Moreover, Atgron has been mired in EBERO for almost two years because of ICANN's refusal to assist Atgron in formulating an exit or "transition" plan. In 2017, ICANN willingly partnered with Atgron's then-current back-end provider and ICANN's chosen EBERO (but not Atgron) to allow an orderly transition into EBERO. Now, ICANN refuses the same level of cooperation with Atgron, its contracting party, to facilitate an exit from EBERO.

Although the dispute is markedly more complex that ICANN portrays, the remedy is relatively simple. Award Atgron its damages as requested herein; compel ICANN to provide the access Atgron requires to [redacted] to formulate a "transition plan" allowing the back-end registry functions to be transitioned from the [redacted] to Atgron; and award the other relief requested below.

II.

ATGRON'S NON-PAYMENT OF REGISTRY-LEVEL FEES IS EXCUSED UNDER SEVERAL ALTERNATIVE THEORIES

ICANN alleges a single claim against Atgron for non-payment of "registry-level" fees required under Article 6 of the parties' Registry Agreement. At the time of filing its request for arbitration on or about January 16, 2020, ICANN contended the unpaid fees totaled $37,500. ICANN claims that because it is undisputed that this amount is unpaid, ICANN is therefore entitled to the equivalent of a directed verdict against Atgron. ICANN is mistaken.[2]

As discussed at length in Atgron's *Answer and Affirmative Defenses* and expanded upon in the concurrently filed Declaration of Adrienne McAdory and in this brief, ICANN has, from at

[2] ICANN's representation of Atgron's position on non-payment of fees is disingenuous. In its *Answer*, Atgron admits to non-payment of registry-level fees. (Answer, ¶1). However, in its *Reply to Atgron's Counterclaims*, ICANN misrepresents that "Atgron admits that it breached the Registry Agreement." (*Id.*, ¶12). "Non-payment" is not synonymous with a "breach" for the reasons discussed herein.

least September 2017 and continuing, breached numerous obligations under the Registry Agreement. For example:

(a) In September 2017, ICANN expressly promised Atgron that it would provide Atgron with the fees and costs associated with entering and exiting EBERO. Atgron relied on ICANN's promise to permit it to make an informed decision about whether to proceed down the EBERO path, or continue with Atgron's existing back-end provider. ICANN reneged on its promise and triggered EBERO on December 7, 2017. Only more than a month later did ICANN provide Atgron the promised fees and costs, which were at least $35,000 more than continuing with its current provider.

(b) ICANN has repeatedly frustrated Atgron's ability to perform the tasks necessary to exit EBERO. In 2017, ICANN partnered and cooperated with Atgron's then-current back-end provider, the [redacted] and ICANN's chosen EBERO, [redacted], to create a plan to allow for the orderly transition of [redacted]s functions to [redacted]. (Tellingly, that process completely excluded Atgron). Now, however, ICANN refuses the same level of cooperation to assist Atgron in exiting from the EBERO. ICANN insists that Atgron deal only with it (ICANN), not [redacted], the EBERO. Indeed, this insistence was affirmed in a communication from ICANN to Atgron as recently as June 12, 2020. (Ex. 19). Any argument by ICANN that Atgron does not need direct access to [redacted] rings hollow. Atgron has no information about the specifics of [redacted]'s systems and processes, so Atgron is unable to formulate a series of educated, informed and coherent questions for ICANN to convey to [redacted]. What Atgron needs is the same three-party partnership ICANN stood up in 2017, only this time the partnership will be with ICANN, Atgron and [redacted]

As discussed below, the conduct above by ICANN amounts to a material breach of the Registry Agreement. Not only does ICANN's conduct give rise to claims by Atgron, but ICANN's conduct excuses Atgron's continued non-payment of registry-level fees.[3]

[3] As set forth in the Declaration of Adrienne McAdory, despite ICANN's breaches and other actionable conduct

It is well-settled law that a party's breach of material provisions of a contract excuses the non-breaching party's performance. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176, 98 Cal. Rptr. 837 (1971); *Superior Motels, Inc. v. Rinn Motor Hotels, Inc*., 195 Cal. App. 3d 1032, 241, Cal Rptr. 487 (1987). A breach is material if it amounts to conduct that is "so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. . . ." *Superior Motor, supra, citing Jacob & Youngs v. Kent*, 230 N.Y. 239 (1921).

There is no question that ICANN's breach was material. Under the Registry Agreement, the decision of whether or not to trigger EBERO (and transition out of EBERO) is solely ICANN's decision. (See, e.g., Ex. 1, ¶2.13). Moreover, the job of a back-end registry service provider (whether a third-party provider like [redacted] or an EBERO chosen by ICANN) is to provide "Critical Functions", a defined terms that speaks for itself as to its importance. (Ex. 6, p. 132). So any decision related to the appointment of a back-end service provider goes to a core function of the Registry Agreement, namely to provide secure and stable "registry services" and adhere to the myriad other benchmarks and safeguards set forth in the Registry Agreement and various addenda. The process is so critical that ICANN can invoke EBERO without the assistance of, or to the complete exclusion of, its contracting party (as it did in this instance). Not only that, but the process of transitioning from the EBERO is "complex" (ICANN's own characterization), time-consuming and expensive. Putting EBERO in this context, it is clear that any EBERO-related breaches by ICANN would be "critical" breaches. As ICANN's conduct amounts to a material breach of the Registry Agreement, Atgron's non-payment of registry-level fees is excused or justified.

Atgron's justification for non-payment of registry-level fees is supported by several alternative theories, including waiver and unclean hands. *See, e.g., Ford v. Superior Court*, 176 Cal. App . 2d 754, 1 Cal. Rptr. 559 (1959); *Unilogic v. Burroughs Corp*., 10 Cal. Ap 4th 612, 12

commencing in September 2017, Atgron continued paying registry-level fees for almost a year, finally stopping in October 2018. (McAdory Decl., ¶30.)

Cal. Rptr. 2d 741 (1992). Although Atgron continued to pay fees after ICANN's breach, Atgron was certainly justified in withholding payments over a year later, when ICANN's conduct persisted.

III.

ATGRON'S CLAIMS

A. Atgron has alleged claims against ICANN for breach of ¶¶2.13, 3.1 and 3.5 of the Agreement. Below, Atgron will discuss ICANN's breach of its duties under those provisions and the legal theories that support Atgron's claims.

(a) Paragraph 2.13. This provision sets forth the circumstances under which ICANN can designate an EBERO. In essence, it allows ICANN to designate an EBERO, provides the procedure for a registry operator to "transition back" (*i.e.,* out of EBERO) and provides that ICANN shall "retain and may enforce its rights under the [COI]". As discussed above and elsewhere, ICANN fell well short of its obligations under this provision. For example:

The very process by which ICANN invoked EBERO was improper. ICANN denied Atgron information about the EBERO-related fees and costs to allow Atgron to make an informed, educated decision whether to enter EBERO or stick with [redacted]. Additionally, ICANN did not consult with Atgron as the back-end registry functions were transitioned from [redacted] to [redacted]. At a minimum, involving Atgron would have allowed it to gain some level of familiarity with [redacted]'s systems and processes, so that Atgron would not be completely in the dark, as it is now, as it attempts to exit out of EBERO.

ICANN also improperly caused the entire COI account to be forfeited the minute EBERO was invoked. Atgron was led to believe (as confirmed by the Agreement) that the $18,000 COI funds would cover the EBERO for 3-5 years. Finally, ICANN is frustrating Atgron's efforts to transition out of the EBERO by refusing to provide the same level of cooperation with [redacted] and [redacted] when EBERO was invoked; and by hindering Atgron's efforts to exit the EBERO.

(b) Paragraph 3.1. This provision imposes an affirmative covenant on ICANN to operate in its dealings with Atgron in an "open and transparent manner." This is not a defined term, but common sense dictates what is required of ICANN. Words of a contract are to be understood and interpreted in their ordinary and popular sense, rather than according to their strict legal meaning. *Mountain Air Enters, LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 220 Cal. Rptr. 3d 650 (2017). For example, a promise to use "best efforts" does not create an obligation equivalent to a fiduciary duty, but it requires the promisor to use the diligence of a reasonable person under comparable circumstances . *California Pines Property Owners Assn. v. Pedotti*, 206 Cal. App. 4th 384, 395, 141 Cal Rptr. 793 (2012).

ICANN's conduct described was the anthesis of open and transparent. ICANN withheld the promised EBERO information from Atgron; it excluded Atgron from the "entering EBERO" process; and it is thwarting Atgron's efforts to exit EBERO. ICANN unquestionably breached this covenant.

(c) Paragraph 3.5. This provision, specifically subsection (c), requires ICANN to coordinate the "authoritative root server system" so that it is operated and maintained "in a stable and secure manner." As set forth in Atgron's *Answer* (¶¶32-39) ICANN's triggering of EBERO on December 7, 2017 without Atgron's involvement, caused the root zone to fail, resulting in a "breach notice" from ICANN claiming the breach was attributed to Atgron. It was ICANN, not Atgron, that caused the root server system to fail.

B. Breach of these provisions of the Agreement by ICANN gives rise to causes of action for breach of contract and breach of the implied covenant.

(a) Breach of Contract. There is no doubt that ICANN has breached the Agreement. To establish a claim for breach of contract, Atgron must prove the following elements: (1) the existence of a contract; (2) Atgron's performance or excuse for nonperformance; (3) all conditions required for ICANN's performance occurred; (4) ICANN's breach; and (4) Atgron's damages proximately caused by ICANN's breach. *Prop. Cal. SCJLW One Corp. v. Leamy*, 25

Cal. App.5th 1155, 236 Cal. Rptr. 3d 500 (2018); *Acoustics, Inc. v. Trepte Construction. Co.,*14 Cal. App. 3d 887, 92 Cal. Rptr. 723 (1971).

There is no question, based on these facts, that Atgron has a claim for breach of contract.

(b) Breach of Implied Covenant of Good Faith. Every contract contains an implied covenant of good faith and fair dealing providing that no party will do anything to injure the rights of the other party to receive the benefits of the agreement. *Comunale v. Traders & General Ins. Co.,* 50 Cal. 2d 654, 328 P. 2d 198 (1958). The covenant imposes a duty on each party to refrain from doing anything that would render performance impossible, and to do everything that the contract presupposes the contracting party will do to accomplish its purpose. *Harm v. Frasher*, 181 Cal. App. 2d 405, 5 Cal. Rptr. 367 (1960). The covenant is a supplement to express contract covenants to prevent a contracting party from engaging in conduct that, while not technically breaching any express covenants, frustrates the other party's rights to the benefits of the contract. *Racine & Laramie, Ltd. v. Department of Parks & Recreation,* 11 Cal. App. 4th 1026, 14 Cal. Rptr. 2d 335 (1992).

Again, based on the facts alleged in Atgron's various submissions, Atgron has alleged a claim for breach of the implied covenant of good faith and fair dealing.

IV.

ICANN'S ARGUMENTS ARE UNPERSUASIVE

A. Atgron's Damages are Not Capped at $0. ICANN points out that ¶5.3 of the Agreement limits ICANN's liability to an amount not exceeding the "registry-level" fees paid within the preceding twelve months. ICANN then argues that because Atgron has not paid any fees in the last twelve months, ICANN's liability to Atgron is $0. (Reply at ¶19).

This argument makes no sense in the context of this dispute. As discussed above, Atgron was legally justified in not paying registry-level fees because of ICANN's misconduct. The natural conclusion of ICANN's curious argument is that, even if Atgron had a legally justifiable reason not to pay registry fees, that justification precludes Atgron from affirmatively seeking any

damages from ICANN. This conclusion is illogical, allows ICANN to avoid the consequences of its conduct, and is simply wrong.[4]

B. Atgron is Properly Seeking General Damages. ICANN makes the unsupported, conclusory argument that "the damages that Atgron seeks are all consequential or special damages." Because the Agreement precludes recovery of "special" or "consequential" damages, ICANN contends that Atgron cannot recover damages. (Reply ¶37). ICANN offers no analysis that Atgron's damages are "special" or "consequential". Simply labelling them as such is not sufficient.

Atgron's damages are clearly in the nature of general damages. Civil Code §3300 provides that "[f]or the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Damages recoverable for breach of contract are limited to damages that actually were contemplated by or within the reasonable contemplation of the parties at the time they entered into the contract. *California Press Mfg. Co. v. Stafford Packing Co*., 192 Cal. 479, 221 P. 345 (1923); *Brandon & Tibbs v. George Kevorkian Accountancy Corp*., 226 Cal. App. 3d 442, 277 Cal. Rptr. 40 (1990)]. "General" damages are those that naturally arise from the breach, or might have been reasonably contemplated or foreseen by the parties as the probable result of the breach *Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co*., 66 Cal. App.3d 101, 135 Cal. Rptr. 802 (1977).

All of Atgron's damages are a foreseeable consequence of ICANN's breach, were proximately caused by ICANN's breaches, and are recoverable as general damages. ICANN offers no meaningful (or any) analysis to the contrary.

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[4] Atgron stands by its contention that ¶5.3 is an unenforceable liquidated damages provision. If, instead of describing the cap as limited to "twelve-months' worth of fees", the provision read "damages are limited to $25,000", there is no question that would be a liquidated damage provision. Clever semantics or draftsmanship should not alter the result.

C. Atgron's Damages are Supported by Proper Expert Opinion. ICANN makes the baseless contention that Atgron's expert damage analysis (Ex. 18) should be disregarded because it was unsigned. (Reply, ¶37). This argument is ironic given that ICANN attached an unsigned copy of the Registry Agreement to its Request for Arbitration. In any event, a signed copy of Ex. 18 is attached hereto.

ICANN then contends, again without support, that the expert opinion is "deeply flawed" because it "disregards the most recent 2017 data on registrations", among other perceived deficiencies. Simply attacking Atgron's expert report, without offering any evidentiary support, legal analysis, or rebuttal expert evidence, does not make Atgron's report "deeply flawed."

ICANN has a propensity for ascribing labels to Atgron's claims (see the "special" damage discussion above) or evidence (like its attack on Atgron's expert report here) without any analysis or support. Even in the relatively informal context of an arbitration, arguments that fall into this category should be summarily dismissed.

D. Specific Performance is an Appropriate Form of Relief. ICANN contends that specific performance is not available where, as here, the Agreement will in the near future be terminated. ICANN posits that because it will undoubtedly prevail and Atgron will not be able to cure any breach, the Agreement will be terminated and any claim by Atgron for specific performance will be moot. (Reply, ¶39). There is absolutely no legal support for this arrogant and premature argument.

E. Atgron's Notes are Not Barred by the Integration Clause. Another of ICANN's curious arguments is that Atgron's September 29, 2017 notes are inadmissible as violative of the Agreement's integration clause. (Reply, ¶19). While these notes are indeed damaging to ICANN's position, Atgron is not introducing the notes to modify the Agreement. Rather, these notes are a contemporaneous document that corroborate what Atgron's CEO, Adrienne McAdory, independently knows. She testified as much in her concurrently filed declaration. These notes would also serve as proper rebuttal evidence if ICANN disputed their

contents. ICANN does not offer any evidence to contradict the notes, so there is nothing to rebut.

V.

RELIEF REQUESTED

For the reasons stated herein, in Atgron's *Answer and Affirmative Defenses*, the June 14, 2020 Declaration of Adrienne McAdory and in any further written or oral submissions that may be permitted, Atgron requests the following relief:

1. That ICANN take nothing by way of its Request for Arbitration;
2. That Atgron be awarded damages of [redacted], as set forth in *Atgron's Present Value of Losses,* dated February 20, 2020. (Ex. 18);
3. That Atgron be permitted to exit from the EBERO as follows:
    a. Atgron shall have direct access to [redacted] to allow Atgron to formulate a "transition plan" applicable under the standard, non-EBERO MSA process;
    b. Atgron shall be permitted until September 30, 2020 to complete only those tasks set forth in ICANN's June 12, 2020 table (Ex. 19) that are required under the standard, non-EBERO MSA process, i.e., steps 1 a-e and step 5, with no "transition fee";
    c. Upon satisfaction of a-b above, Atgron shall be deemed to have transitioned from the EBERO and will be deemed a registry operator in good standing;
4. That ICANN's demand set forth in Ex. 19, that Atgron pay a $13,050 "financial evaluation fee" or replenish the COI, be waived (see Ex. 19, #2 in table) and no other undisclosed fees related to this matter be imposed;
5. The expungement of ICANN's breach notice sent to Atgron on December 7, 2017 such that ICANN cannot terminate the Agreement due to the breach [redacted] initiated at ICANN's direction on December 7, 2017;

6. Specific written remediation guidance from ICANN within forty-eight hours to remedy any issues as they arise during "technical testing" for the MSA;
7. An immediate closure of ICANN's October 2013 RSEP and an amendment to the Agreement to allow Atgron to sell third-level registrations with the same language as the .PRO agreement with the list of .WED extensions requested. (Ex. 15 at pp. 662-663);
8. Waiver of current and future "registry-level" operator fees (Agreement, ¶6.1) and any "additional fee on late payments" (Agreement, ¶6.6) until renewal of the Agreement in October 2023;
9. Waiver of the $4,000 "technical testing" and any "retesting" fees for the MSA process;
10. The return of Atgron's $18,000 COI payment. This payment was returned to all registry-operators on the six-year anniversary of their respective agreements;
11. That Atgron be awarded its reasonable attorneys' fees and costs (which costs to include the mediation and arbitration costs set forth in the Declaration of Adrienne McAdory at ¶33); and
12. For any further relief the arbitrator determines is appropriate.

June 15, 2020

Respectfully submitted,
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EXHIBIT 18