INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE

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

ICANN'S RESPONSE TO RESPONDENT'S 15 JUNE 2020 BRIEF[1]

[redacted]
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For Assigned Names and Numbers

[1] ICANN commenced this arbitration on 16 January 2020, limited solely to Atgron's failure to pay Registry-Level Fees. After receiving an extension of time, Atgron filed its Answer one day late on 1 April, and then unilaterally filed a revised version, which it called a "final brief," on 4 April. On 6 May, ICANN filed its Reply to the counterclaims Atgron asserted in its Answer. The Arbitrator then allowed Atgron, which had since retained counsel, to file a brief responding to issues raised by the Arbitrator at the 14 May 2020 Case Management Conference. Atgron filed that brief on 15 June 2020. This filing contains ICANN's response to Atgron's 15 June brief.

I. INTRODUCTION

Atgron admitted in its Answer that it failed to pay required Registry-Level Fees to ICANN and that this was a "breach of Article 6" of the Registry Agreement.[2] Atgron now argues that its refusal to pay was justified by ICANN's supposed prior material breaches of the Registry Agreement. First and foremost, ICANN did not breach the Registry Agreement. Indeed, Atgron fails to tie any of its litany of complaints to any requirement imposed by the Registry Agreement. But even if Atgron had a colorable argument, the Registry Agreement precludes Atgron's prior material breach argument because the Registry Agreement explicitly states that Atgron's payment obligations are independent of the other obligations imposed by the Agreement; and, in California, any breach of an independent obligation "is not, as a matter of law, a material breach" that could excuse Atgron's payment obligations.[3]

Atgron's counterclaims fare no better. Even aside from the lack of an ICANN breach, Atgron could not obtain any damages because the Registry Agreement caps them at the amount of Registry-Level Fees Atgron has paid in the last 12 months, which is zero. Nor can Atgron obtain the decree of specific performance it seeks, because that decree would modify the Registry Agreement rather than enforce its existing terms. ICANN made each of these points in its Reply (filed on 6 May 2020), and Atgron fails to respond substantively to any of them. As such, and as further explained in ICANN's Reply, the Arbitrator should dismiss Atgron's counterclaims and award ICANN the relief it seeks.

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[2] Atgron's Answer ¶¶ 1, 6.

[3] *Flagship W., LLC v. Excel Realty Partners, L.P.*, No. 102-cv-05200 OWW DLB, 2005 WL 4701939, at *4 (E.D. Cal. Sept. 30, 2005)*, vac. on other grounds*, *Flagship W., LLC v. Excel Realty Partners LP*, 337 F. App'x 679 (9th Cir. 2009).

II. ARGUMENT

A. Atgron Breached the Registry Agreement By Failing to Pay Required Fees

Atgron has failed to pay required Registry-Level Fees to ICANN since October 2018. Atgron admitted as much and conceded that its non-payment of Registry-Level Fees was a "breach of Article 6" of the Registry Agreement.[4] Atgron cannot now simply ignore that admission and try to justify its refusal to pay required fees by claiming an alleged material breach by ICANN. First, Atgron's admission of a breach is binding on Atgron.[5] Second, Atgron did not assert any material breach defense in its Answer, thereby waiving it.[6]

Third, the Registry Agreement is clear that there is no justification for non-payment of fees: "[a]ll payments due under this Agreement will be made in a timely manner throughout the Term and notwithstanding the pendency of any dispute (monetary or otherwise) between Registry Operator and ICANN."[7] Under California law, "[b]reach of an independent covenant is not, as a matter of law, a material breach."[8] As a result, when covenants are independent, "breach of one does not excuse performance of the other."[9] The question whether covenants are

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[4] Atgron's Answer ¶¶ 1, 6.

[5] *See, e.g.*, *Barsegian v. Kessler & Kessler*, 215 Cal. App. 4th 446, 452 (2013) ("[A] judicial admission is ordinarily a factual allegation by one party that is admitted by the opposing party. The factual allegation is removed from the issues in the litigation because the parties agree as to its truth." (emphasis omitted)).

[6] *See* ICC Rules of Arbitration art. 5(1)(d) (requiring the Answer to include the respondent's "response to the relief sought").

[7] Registry Agreement § 7.4, Atgron Ex. 1, at 41.

[8] *Flagship W., LLC v. Excel Realty Partners, L.P.*, No. 102-CV-05200 OWW DLB, 2005 WL 4701939, at *4 (E.D. Cal. Sept. 30, 2005), *vac. on other grounds*, *Flagship W., LLC v. Excel Realty Partners LP*, 337 F. App'x 679 (9th Cir. 2009); *see also In re Blixseth*, No. MT-19-1057-FBH, 2019 WL 7372662, at *6 (9th Cir. B.A.P. Dec. 16, 2019) (same). The cases Atgron cites are not to the contrary. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal. 3d 176 (1971), concerns the statute of limitations applicable to legal malpractice actions and says nothing at all about the doctrine of material breach. And *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032 (1987), addresses material breach in the context of "the silence of the parties" over whether a particular breach would excuse the other party's performance, and thus did not address the applicable standard where, as here, the contract itself makes clear that the obligation is independent.

[9] *Verdier v. Verdier*, 133 Cal. App. 2d 325, 334 (1955); *see also Colaco v. Cavotec SA*, 25 Cal. App. 5th 1172, 1176 (2018).

independent "is wholly one of construction of the agreement."[10] Here, the Registry Agreement makes the independence of payment obligations from the Agreement's other provisions plain;[11] it expressly prohibits Atgron's refusal to pay Registry-Level Fees due to some other dispute between Atgron and ICANN;[12] and it precludes Atgron's material breach defense.[13]

B. ICANN Did Not Breach the Registry Agreement

Even if Atgron's material breach defense was viable (which it is not), that defense and Atgron's counterclaims require a showing that ICANN actually breached the Registry Agreement. Atgron does not, and cannot, show any such breach.[14]

1. The 29 September Call Did Not Modify The Registry Agreement

Atgron says that "the heart of" its claims is a 29 September 2017 phone call in which ICANN staff said they would "look into" the EBERO-related fees.[15] Atgron describes this as an "express[] promise[]" and alleges that ICANN "reneged on" it.[16] But ICANN staff's statement that they would "look into" a question is not a contractual promise. And regardless, it is not an

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[10] *Verdier*, 133 Cal. App. 2d at 334.

[11] Registry Agreement § 7.4, Atgron Ex. 1, at 41.

[12] *See* McAdory Decl. ¶ 30 ("As a result of ICANN's delaying tactics, Atgron decided on October 16, 2018 not to continue paying ICANN's registry operator fees"); *see also* Atgron Ex. 11, at 530. In addition, Ms. McAdory's declaration is improper and should be disregarded; the Procedural Timetable authorized a brief, not new evidence.

[13] The alleged breaches that Atgron raises also are not material because they do not "frustrate the purpose of the contract." *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (1987). And Atgron's "alternative theories" of "waiver and unclean hands" fare no better. Atgron provides no explanation of why it believes these doctrines apply or how they could excuse Atgron's payment obligations—it merely lists them and cites cases that generally reference them. ICANN has never waived its right to collect Registry-Level Fees; it has consistently demanded that they be paid in full. And, as explained in the next section, far from committing the inequitable conduct required to support an unclean hands defense, ICANN has complied at all times with its obligations under the Registry Agreement.

[14] Atgron also alleges for the first time that ICANN breached the implied covenant of good faith and fair dealing. Atgron did not assert this counterclaim in its Answer, so it is waived. *See* ICC Rules of Arbitration art. 5(5). Regardless, for the reasons given below, Atgron does not allege any action by ICANN to frustrate Atgron's contractual rights so as to potentially breach the implied covenant.

[15] Atgron's 15 June Br. at 1; Atgron Ex. 9, at 273.

[16] Atgron's 15 June Br. at 3.

enforceable promise – the Registry Agreement contains an integration clause and precludes modifications "unless executed in writing by both parties."[17] As ICANN's Reply explained, such provisions are enforceable under California law, and Ms. McAdory's notes from the 29 September call do not qualify as an executed writing.[18] Atgron counters that it is instead relying on the phone call itself, and the written notes merely confirm Ms. McAdory's memory of the call.[19] But a phone call is not an executed writing either, and is therefore equally unenforceable.

Moreover, Atgron's contention that a lack of detailed cost information prevented it from making "an informed educated decision whether to enter EBERO or stick with [redacted]" is a fiction.[20] Atgron had no alternative to EBERO no matter the exit cost, because it did not have the funds to extend its agreement with [redacted], and it could not find an alternative provider.[21] Ms. McAdory's own notes explain that "there *was no possibility* of her paying the $15,000 fee" to extend her contract with [redacted].[22] Likely that is why Ms. McAdory never followed up with ICANN about her request for information on EBERO fees between the 29 September call and 7 December EBERO transition.[23] The fact that Atgron would have been unable to provide all five of the critical registry functions for .WED, thereby necessitating transfer to an EBERO no matter what information ICANN had provided, precludes any award of damages to Atgron on its

[17] Registry Agreement §§ 7.6(i), 7.10, Atgron Ex. 1, at 48, 54.

[18] ICANN's Reply ¶ 19.

[19] Atgron's 15 June Br. at 9–10.

[20] *Id.* at 5.

[21] ICANN's Reply ¶¶ 20–21.

[22] Atgron Ex. 9, at 272 (emphasis added).

[23] *See* Atgron Ex. 9, at 244–303 (Atgron's correspondence with ICANN Registry Services staff between 29 September and 7 December 2017, showing no follow-up inquiry on EBERO-related fees). In fact, Ms. McAdory's new declaration admits that the issue was "mooted" after the 29 September meeting by [redacted]'s initial indication that it might accept quarterly payments. McAdory Decl. ¶ 22.

counterclaims.[24]

2. ICANN Did Not Breach Section 2.13 of the Registry Agreement

Section 2.13 empowered ICANN to transfer operation of .WED to an EBERO when Atgron failed to ensure the provision of critical registry functions and governed the parties' duties relating to that appointment.[25] Atgron argues that ICANN breached section 2.13 by not providing detailed up-front information about EBERO-related fees and costs.[26] Atgron fails to acknowledge, however, that most of this information is publicly available on ICANN's website and that nothing in section 2.13 required ICANN to provide an up-front detailed list of fees and costs to Atgron.[27]

Atgron also complains that ICANN "did not consult with Atgron" about the EBERO transfer.[28] But nothing in section 2.13 or the Registry Transition Process incorporated therein required such consultations. When Atgron failed to ensure the provision of critical registry functions for .WED by allowing its contract with [redacted] to expire, ICANN focused on ensuring a smooth transition to the EBERO so that website operators and internet users would not be adversely affected.[29] Pursuant to the Registry Agreement and the Registry Transition Process, ICANN took the necessary steps to protect Atgron's registrants, in part, because Atgron was no longer able to do so.

Next, Atgron complains that ICANN "caused" the entire $18,000 Continued Operations

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[24] *See* Restatement (Second) of Contracts § 244 ("A party's duty to pay damages for total breach by non-performance is discharged if it appears after the breach that there would have been a total failure by the injured party to perform his return promise.").

[25] Registry Agreement § 2.13, Atgron Ex. 1, at 29.

[26] Atgron's 15 June Br. at 5.

[27] ICANN's Reply ¶ 17.

[28] Atgron's 15 June Br. at 5.

[29] *See* ICANN's Reply ¶¶ 15–16

Instrument ("COI") to be paid to the EBERO, [redacted].[30] Atgron seems to not understand the purpose of the COI and ignores ICANN's explanation that ICANN's publicly available contract with [redacted] required a flat, up-front payment of $18,000 for up to 3 years of operations.[31] Nothing in section 2.13 precluded such an arrangement.

Finally, Atgron complains that ICANN "is frustrating" Atgron's efforts to transition .WED out of EBERO by not "provid[ing] the same level of cooperation" it provided when .WED transitioned into EBERO.[32] But the two processes are not analogous. ICANN oversaw the transfer to an EBERO as an emergency measure after Atgron failed to ensure the provision of critical registry functions for .WED. The transfer back to Atgron, in contrast, is Atgron's responsibility—Atgron, not ICANN, must develop the transition plan and complete the required steps to demonstrate that Atgron is capable of operating the .WED gTLD and, as per Atgron's choice, is capable of being its own back-end provider. Consistent with this distinction, the Registry Transition Process incorporated by reference into section 2.13 sets forth one process to govern the transition of a gTLD *into* an EBERO, and a different one to govern the exit *from* EBERO.[33] And, unlike the process for transition into an EBERO, the process for exiting EBERO involves a series of assessments and evaluations that the *registry operator*—not ICANN—must complete.[34] Atgron does not identify any requirement imposed by section 2.13 or the applicable Registry Transition Process that ICANN has not scrupulously followed.

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[30] Atgron's 15 June Br. at 5.

[31] ICANN's Reply ¶ 22 (citing Atgron Ex. 10, §§ 1.1(c), 5.2, & Ex. D-1).

[32] Atgron's 15 June Br. at 5.

[33] *See* Registry Transition Process, Atgron Ex. 6, at 134–137, 139–144 (describing both an "Emergency Back-End Registry Operator Temporary Transition Process" and a different "Registry Transition Process with proposed successor," and explaining that the registry operator will need to follow the latter to regain control of a gTLD after an EBERO is appointed).

[34] *See id.*

3. ICANN Did Not Breach Section 3.1 of the Registry Agreement

Section 3.1 of the Registry Agreement provides that "ICANN shall operate in an open and transparent manner."[35] Atgron insists that "common sense dictates" what this requires, but Atgron does not specify what that is, or offer any response to ICANN's explanation for why it did not breach this provision.[36] As ICANN has explained, ICANN has consistently complied with its contractual commitments and its publicly available policies and procedures.[37]

4. ICANN Did Not Breach Section 3.5(c) of the Registry Agreement

Section 3.5(c) of the Registry Agreement requires ICANN to "use commercially reasonable efforts to . . . coordinate the Authoritative Root Server System so that it is operated and maintained in a stable and secure manner."[38] Atgron again claims that ICANN somehow breached this provision, but ignores ICANN's detailed explanation that the email message Atgron's allegations rely on actually references a situation created by Atgron's own improper actions during the EBERO transition, not by anything that ICANN did. Moreover, there is no indication that this affected the "stable and secure" operations of the root, or harmed Atgron in any way.[39]

C. The Relief Atgron's Counterclaims Seek Is Legally Barred

Aside from the lack of any breach by ICANN, Atgron is not entitled to the relief it seeks.

1. The Registry Agreement Precludes Any Damages Award

The Registry Agreement precludes any award of damages to Atgron because it caps ICANN's liability at the Registry-Level Fees Atgron actually paid in the last 12 months, which

[35] Registry Agreement § 3.1, Atgron Ex. 1, at 31.

[36] Atgron's 15 June Br. at 6; *see* ICANN Reply ¶¶ 24–25.

[37] ICANN's Reply ¶¶ 24–25.

[38] Registry Agreement § 3.5(c), Atgron Ex. 1, at 31.

[39] ICANN's Reply ¶¶ 26–29.

in this case is zero.[40] Atgron complains that this limitation "makes no sense" and is "illogical" because it means 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."[41] But as ICANN's Reply explained, limitation-of-liability provisions of this sort are commonplace and fully enforceable under California law.[42] And while Atgron "stands by its contention" that the provision "is an unenforceable liquidated damages provision,"[43] Atgron cites no supporting precedent and offers no distinction of the cases ICANN cited, which clearly hold that provisions limiting liability are distinct from liquidated damages provisions.[44]

In any event, Atgron's argument that the provision is "illogical" fails because it is not possible for Atgron to have "a legally justifiable reason not to pay registry fees."[45] As explained above, the Registry Agreement requires that Registry-Level Fee payments be made regardless of any other dispute.[46] Thus, the provision caps Atgron's damages at $0 only because Atgron itself breached the Registry Agreement by wrongly withholding payment of Registry-Level Fees.[47]

2. The Registry Agreement Precludes Atgron's Special Damages

The special damages Atgron seeks are also precluded by the Registry Agreement's provision that "[i]n no event shall either party be liable for special, punitive, exemplary or

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[40] ICANN's Reply ¶¶ 34–35; Registry Agreement § 5.3, Atgron Ex. 1, at 37.

[41] Atgron's 15 June Br. at 7–8.

[42] *See, e.g.*, *Grouse River Outfitters, Ltd. v. Oracle Corp.*, 2018 WL 6099783, at *2 (N.D. Cal. Nov. 21, 2018).

[43] Atgron's 15 June Br. at 8 n. 4.

[44] *See Grouse River Outfitters, Ltd.*, 2018 WL 6099783, at *2; *Markborough Cal., Inc. v. Superior Court*, 227 Cal. App. 3d 705, 714 (1991); *Wheeler v. Oppenheimer*, 140 Cal. App. 2d 497, 500 (1956).

[45] Atgron's 15 June Br. at 7.

[46] Registry Agreement § 7.4, Atgron Ex. 1, at54.

[47] Atgron's argument also ignores the potential availability of a decree of specific performance as an alternative to a damages award. The Registry Agreement allows each party to seek "specific performance of the terms of this Agreement." Registry Agreement § 5.4, Atgron Ex. 1, at 37. As explained below, however, Atgron is not entitled to specific performance here because the decree it seeks would modify the parties' agreement rather than enforce it.

consequential damages arising out of or in connection with this Agreement or the performance or nonperformance of obligations undertaken in this Agreement."[48] Atgron seeks to recover lost profits, and "[l]ost profits, if recoverable, are more commonly special rather than general damages."[49] Atgron's cases do not show otherwise, because none addressed whether lost-profit damages were barred by a contractual provision precluding special damages.[50]

Even if lost-profit damages were potentially recoverable (which they are not), Atgron could not recover them because its proffered damages evidence is entirely speculative. Lost-profit "damages must be proven to be certain both as to their occurrence and their extent, albeit not with mathematical precision."[51] Atgron's "expert opinion" on damages comes nowhere close to meeting that standard. ICANN's Reply pointed to numerous leaps of logic and factual gaps in the opinion.[52] Atgron does not address those flaws, but merely complains that ICANN has not offered its own rebuttal expert opinion.[53] Atgron, not ICANN, has the burden of proving its damages with reasonable certainty.[54] The flaws in its expert opinion mean it has not done so.

3. Atgron Is Not Entitled to the Other Relief It Seeks

Finally, Atgron is not entitled to the specific performance that it seeks, for two reasons. First, Atgron's undisputed failure to pay Registry-Level Fees will, once confirmed by the

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[48] Registry Agreement § 5.3, Atgron Ex. 1, at 37.

[49] *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.*, 34 Cal. 4th 960, 968–70, 975 (2004).

[50] *California Press Mfg. Co. v. Stafford Packing Co.*, 192 Cal. 479, 483–87 (1923), *reversed* an award of lost-profits damages, finding them too speculative. In *Brandon & Tibbs v. George Kevorkian Accountancy Crop.*, 226 Cal. App. 3d 442, 457 (1990), the defendant had forfeited the argument that lost-profit damages were not recoverable, so the court did not address it. And *Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 125 (1977), merely quoted a definition of general damages and did not address whether that definition covered lost-profits. Finally, Civil Code § 3300 merely describes what damages are recoverable for breach of contract in general—its description does not distinguish in any way between general and special damages.

[51] *Sargon Enters., Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 774 (2012) (internal quotation marks omitted).

[52] ICANN's Reply ¶ 37.

[53] Atgron's 15 June Br. at 9.

[54] *See Sargon*, 55 Cal. 4th at 774.

Arbitrator, entitle ICANN to terminate the Registry Agreement—particularly because Atgron *still* does not say it will cure its failure to pay.[55] Accordingly, the termination of the Registry Agreement will render the specific relief that Atgron seeks moot because all of that requested relief presupposes the continued existence of the Registry Agreement.[56] Atgron calls this argument "arrogant and premature" but offers no response to it.[57]

Second, the specific relief that Atgron seeks is not enforcement of the Registry Agreement's terms but instead modification of those terms: waiver of contractual requirements; changes to contractual processes; and elimination of contractually imposed fees.[58] But "courts will not rewrite contracts to . . . make better deals for parties than they negotiated for themselves,"[59] and courts "cannot not make better agreements for parties than they themselves have been satisfied to enter into."[60] Atgron does not deny that the specific relief it seeks involves modifications of the Registry Agreement; and Atgron does not, and cannot, cite any authority allowing the Arbitrator to order a modification of the Registry Agreement under the guise of specific performance. The Arbitrator thus lacks authority to grant Atgron the decree it seeks.

III. CONCLUSION

The Arbitrator should: (1) find Atgron to be in breach of its payment obligations under Article 6 of the Registry Agreement; (2) award ICANN all Registry-Level Fees still unpaid as of the date the final award is rendered; (3) award ICANN its costs and reasonable attorneys' fees; and (4) dismiss Atgron's counterclaims.

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[55] *See* ICANN's Reply ¶¶ 39–41.

[56] *Id.*

[57] Atgron's 15 June Br. at 9.

[58] *See* Atgron's 15 June Br. at 10–11; Atgron's Answer at 19–20.

[59] *Series AGI W. Linn of Appian Grp. Inv'rs DE, LLC v. Eves*, 217 Cal. App. 4th 156, 164 (2013).

[60] *Addiego v. Hill*, 238 Cal. App. 2d 842, 846 (1965).

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