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AWARD

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COUR INTERNATIONALE D'ARBITRAGE — INTERNATIONAL COURT OF ARBITRATION

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 25074/MK/PDP

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

(U.S.A.)

vs/

ATGRON, INC.

(U.S.A.)

This document is an original of the partial award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

PARTIAL AWARD

ICC Arbitration 25074/MK

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (U.S.A.) vs/ ATGRON, INC. (U.S.A.)

The Parties and their Representatives

Claimant and Counter-Respondent

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Having been appointed in accordance with section 5.2 of the Registry Agreement between the Parties dated 1 October 2013, and having examined the submissions, proof and allegations of the Parties, I, THE UNDERSIGNED ARBITRATOR, now find, conclude and issue this Partial Award as follows:

I. Introduction

A. The Parties

1. Claimant and Counter-Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") is a California not-for-profit public benefit corporation that coordinates the technical aspects of the Internet's Domain Name System ("DNS") on behalf of the Internet community. (Claimant's Request for Arbitration ["Request"] ¶ 9.) ICANN enters into registry agreements with entities that act as "registry operators," which are the companies that operate and manage generic top-level domains ("gTLDs"), such as the ".ORG" portion of ICANN.org. (*Id*. ¶ 10.)

2. Respondent and Counter-Claimant Atgron, Inc. ("Atgron") is a Delaware corporation incorporated on or about May 23, 2011 in order to contract with ICANN and provide registry services related to the top level domain ".WED." (Declaration of Adrienne McAdory ["McAdory Decl."] ¶ 2.) On 1 October 2013, Atgron and ICANN entered into a Registry Agreement (the "Agreement") for this purpose. (Request ¶ 16.)

B. The arbitration agreement

3. Claimant and Respondent have made claims under arbitration agreement contained in the Agreement, which provides:

> **5.2 Arbitration.** Disputes arising under or in connection with this Agreement that are not resolved pursuant to Section 5.1, including requests for specific performance, will be resolved through binding arbitration conducted pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce. The arbitration will be conducted in the English language and will occur in Los Angeles County, California. Any arbitration will be in front of a single arbitrator, unless (i) ICANN is seeking punitive or exemplary damages, or operational sanctions, (ii) the parties agree in writing to a greater number of arbitrators, or (iii) the dispute arises under Section 7.6 or 7.7. In the case of clauses (i), (ii) or (iii) in the preceding sentence, the arbitration will be in front of three arbitrators with each party selecting one arbitrator and the two selected arbitrators selecting the third arbitrator. In order to expedite the arbitration and limit its cost, the arbitrator(s) shall establish page limits for the parties' filings in conjunction with the arbitration, and should the arbitrator(s) determine that a hearing is necessary, the hearing shall be limited to one (1) calendar day, provided that in any arbitration in which ICANN is seeking punitive or exemplary damages, or operational sanctions, the hearing may be extended for one (1) additional calendar day if agreed upon by the parties or ordered by the arbitrator(s) based on the arbitrator(s) independent determination or the reasonable request of one of the parties thereto. The prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards. In the event the arbitrators determine that Registry Operator has been repeatedly and willfully in fundamental and material breach of its obligations set forth in Article 2, Article 6 or Section 5.4 of this Agreement, ICANN may request the arbitrators award punitive or exemplary damages, or operational sanctions (including without limitation an order temporarily restricting Registry Operator's right to sell new registrations). Each party shall treat information received from the other party pursuant to the arbitration that is appropriately marked as confidential (as required by Section 7.15) as Confidential Information of such other party in accordance with Section 7.15. In any litigation involving ICANN concerning this Agreement, jurisdiction

and exclusive venue for such litigation will be in a court located in Los Angeles County, California; however, the parties will also have the right to enforce a judgment of such a court in any court of competent jurisdiction.

C. Applicable law, rules, and place of the arbitration

4. The Parties agreed that the law of the State of California governs this dispute. (*See* Terms of Reference ¶ 22.)

5. The ICC Arbitration Rules in force as of 1 March 2017 govern these proceedings.

6. In light of the Parties' disagreement, on 12 March 2020, pursuant to Article 18(1) of the Rules, the Court fixed the City of Los Angeles, CA (U.S.A.) as the place of arbitration.

D. Defined terms

7. Unless otherwise stated, terms used herein are as defined in the Terms of Reference.

II. Procedural History

8. On 16 January 2020, the Secretariat received a Request for Arbitration filed by Claimant (the "Request").

9. In the Request, Claimant indicated that in accordance with the arbitration agreement, the arbitration is submitted to a sole arbitrator.

10. The Secretariat notified the Request to Respondent on 22 January 2020.

11. By email dated 24 February 2020, Respondent requested the ICC to designate a sole arbitrator. On 25 February 2020, the Secretariat notified the Parties of its understanding that the Parties have agreed to submit the arbitration to a sole arbitrator.

12. On 1 April 2020, following an extension of time granted by the Secretariat, the Secretariat received an Answer to the Request for Arbitration, including Counterclaims, filed by Respondent (the "Answer").

13. On 16 April 2020, upon the U.S. National Committee's proposal, I was appointed by the Court as sole arbitrator in this matter (the "Arbitrator). On the same day and pursuant to Article 16 of the Rules, the file was transmitted to me.

14. On 6 May 2020, Claimant submitted a Reply to Respondent's Counterclaims (the "Reply").

15. On 7 May 2020, Mr. David Campbell Smith notified the Secretariat and the Arbitrator that his firm was retained to represent Respondent, which had previously been acting in *pro per*.

16. As required by Article 24 of the Rules, the Arbitrator convened a case management conference to consult with the Parties on procedural measures that may be adopted pursuant to Article 22(2) of the Rules and Appendix IV to the Rules. The case management conference was held via telephone conference on 14 May 2020.

17. During the case management conference, the Parties agreed that this matter would be heard on the papers in lieu of a live evidentiary hearing. In addition, in view of the fact that it had recently retained counsel, Respondent was granted the opportunity to file a supplemental brief responding to issues raised by the Arbitrator. Claimant was granted the opportunity to file a response. These agreements were reflected in the Procedural

Timetable referred to below.

18. On 15 May 2020, the Terms of Reference were signed by the Parties and the Arbitrator.

19. On 18 May 2020 and after receiving input from the Parties, the Arbitrator signed the Procedural Timetable and forwarded the same to the Secretariat.

20. On 4 June 2020, the Court fixed 18 November 2020 as the time limit for the Final Award.

21. On 15 June 2020, Respondent filed an Arbitration Brief (the "Respondent's Arbitration Brief").

22. On 29 June 2020, Claimant filed a Response to Respondent's 15 June 2020 Brief (the "Claimant's Response").

23. On 23 July 2020, the Arbitrator closed the proceedings as to the matters covered in this Partial Award.

III. Factual Background

24. The factual findings that follow are derived from the briefs, affidavits, and exhibits presented to me. To the extent that these findings differ from any party's position, that is the result of determinations by me as to credibility and relevance, burden of proof considerations, legal principles, and the weighing of the evidence.

25. On 1 October 2013, the Parties entered into the Agreement, pursuant to which Atgron became the registry operator of the .WED gTLD.

26. Under the Agreement, Atgron is responsible for, *inter alia*, maintaining five critical registry functions for .WED; however, it may contract with a third party back-end registry operator for this purpose. (Atgron Exh. 6, at 132-33.) If the critical functions are not maintained and an "emergency threshold" of time is reached, ICANN is entitled under the Agreement to effectuate an emergency transition of the gTLD to an Emergency Back-End Registry Operator ("EBERO")—a back-end service provider that steps in to ensure stable operation of the gTLD on a temporary basis. (Agreement § 2.13.)

A. Transition of the gTLD to an EBERO

27. For a period of time, Atgron had contracted with a back-end operator, [redacted], to provide the critical registry functions for .WED. In or around February 2017, Atgron planned to set up its own in-house registry operation, which would take over back-end registry functions once Atgron's contract with [redacted] expired in November 2017. (Answer ¶ 12.)

28. In September 2017, Atgron realized that it was not ready to take registry operations in-house by November 2017 and requested an extension of its contract with [redacted]. [redacted] offered a new, one-year contract for USD [redacted]; however, unlike prior contracts that contemplated quarterly payments, the new contract required Atgron to pay the entire annual fee up front. Adrienne McAdory, President and CEO of Atgron, would later explain that "there was no possibility of her paying the [redacted] fee due to recent news about the lack of a quarterly payment from a commercial real estate venture but if a payment plan was provided she could pay at least [redacted] per month until January and then could pay more at that point." (Atgron Exh. 9, at 272.)

29. On 16 September 2017, Atgron informed ICANN that it was unable either to renew its contract with [redacted] or to find another "reasonably priced" registry service provider ("RSP") and that it "must be off [redacted]'s system by the end of November . . . ." (*Id*. at 215.) On 26 September 2017, ICANN informed Atgron that, "if we can't get [redacted] to

extend . . . or get another ICANN approved RSP to step in, ICANN will have no choice but to invoke EBERO." (*Id*. at 219.)

30. On 29 September 2017, the Parties held a telephone conference to discuss possible options, one of which was for Atgron to complete the Material Subcontracting Arrangement ("MSA") process—required in order to bring back-end registry functions in-house—before Atgron's agreement with [redacted] was set to terminate in 8 weeks' time. (*Id*. at 272-74.) ICANN advised against this option because, in the best-case scenario, the MSA process would take 12 weeks to complete (and up to one year in the worst-case scenario), which would still necessitate triggering EBERO. (*Id*. at 272.) Atgron then asked if MSA testing could continue even after the EBERO process was initiated, such that the .WED TLD could eventually be returned to Atgron after the tests were completed successfully. (*Id*. at 273.) ICANN "agreed to look into the questions about transferring ownership of the TLD back to Atgron after the EBERO process had been initiated including any associated fees . . . ." (*Id*.)

31. On 6 October 2017, [redacted] unexpectedly agreed to accept quarterly payments, thus mooting the options discussed by the Parties during the telephone conference. (Atgron Exh. 9, at 263-64.) But it later back-tracked and insisted on a lump-sum, USD [redacted] payment. (*Id*. at 280-81.) This prompted Atgron to inform ICANN on 24 November 2017 that "w[e] do need to have the EBERO conversation after all." (*Id*. at 281.)

32. On 27 November 2017, ICANN replied:

> Sorry to hear that the contract with [redacted] didn't work out? [*sic*] Have you contacted any of the other Registry Service Providers from the list we sent to you? You may want to consider exhausting those options prior to having an EBERO call because as mentioned previously there is currently no process for taking the TLD out of EBERO and there are no guarantees regarding it's [*sic*] being returned to you.

(*Id*. at 280.)

33. Atgron either (a) was unable to, or (b) determined, based on the limited information then in its position and despite the aforementioned risk of not regaining the .WED gTLD, that it would not:

- pay [redacted] USD [redacted] to extend the contract for a year; or
- retain one of the other approved RSPs on ICANN's list.

34. Three days later, [redacted] confirmed to ICANN that "[redacted] will cease to provide registry services midnight UTC Monday December 4th as a courtesy to avoid the weekend." (*Id*. at 285.) [redacted]'s impending cessation of services meant that critical registry functions would begin to fail the thresholds identified in Specification 10 of the Agreement. Pursuant to section 2.13 of the Agreement, this allowed ICANN to effectuate an emergency transition of the .WED gTLD to an EBERO.

35. On 7 December 2017, ICANN sent a Notice of Breach to Atgron. (ICANN Exh. F.) On 8 December 2017, ICANN designated [redacted] to be the EBERO.[1]

B. Atgron's failure to pay Registry-Level Fees

36. During this same time period, Atgron was experiencing financial hardship and began

[1] https://www.icann.org/news/announcement-2017-12-08-en.

missing payments of Registry-Level Fees owed to ICANN under Article 6 of the Agreement. Atgron failed to pay two quarterly invoices dated 31 July and 31 October 2017 by the stated due date. ICANN's Notice of Breach listed these failures as one among several claimed breaches. (*See ante* ¶ 35.)

37. In January 2018, Atgron paid its then-past due Registry-Level Fees, and subsequently paid its Registry-Level Fees up through the quarterly pay period ending in June 2018 (although its payment in each instance was late). (Request ¶ 17.) Atgron's last payment of Registry-Level Fees was in October 2018 (for the 31 July 2018 invoice, which was due on 30 August 2018). (*Id*. ¶ 18.) Atgron has failed to pay any Registry-Level Fees since that time. (*Id*.)

C. Atgron's efforts to exit EBERO

38. After the .WED gTLD was transitioned to [redacted], Atgron continued to pursue the MSA process in order to bring back-end registry functions in-house and be in a position to exit EBERO. (*See* Answer ¶¶ 22-26.)

39. On 2 March 2018, ICANN informed Atgron of the precise steps that Atgron would need to complete for these purposes. (Atgron Exh. 9, at 315-18.) One of those steps was for Atgron, as the registry operator, to submit an MSA Transition Plan for review. (*Id*. at 317; Atgron Exh. 8, at 204.)

40. In early 2019, a disagreement emerged between the Parties regarding whether ICANN should provide Atgron with information from, or direct access to, [redacted] for purposes of completing the MSA Transition Plan. ICANN has taken the position that, apart from a few questions that Atgron might need to ask of [redacted] in order to effectuate a smooth transition, all information for the MSA Transition Plan must come from Atgron (who is also the proposed new RSP). (*Id*. at 334-36; Atgron Exh. 11, at 534.) This is to "ensure that the new RSP understands the tasks and technology necessary to successfully transition a TLD without an impact to Critical Functions." (*Id*.)

41. By contrast, Atgron was advised by a consultant that it would be impossible to produce a MSA Transition Plan without data from [redacted] or access to the transition plan that [redacted] and [redacted] used when .WED entered EBERO. (Atgron Exh. 9, at 336, 339.)

IV. Contentions of the Parties and relief sought

A. The Claim

42. ICANN asserts that Article 6 of the Agreement requires Atgron to pay Registry-Level Fees on a quarterly basis within 30 calendar days following the date of the invoice provided by ICANN. Atgron has failed to pay invoices for Registry-Level fees dated October 2018, January 2019, April 2019, July 2019, October 2019, January 2020, and April 2020. (Terms of Reference ¶ 34.) As of 6 May 2020, Atgron's unpaid overdue fees total USD [redacted]. (*Id*.)

43. Pursuant to Article 4.3 and Article 5.2 of the Agreement, ICANN seeks:

    a. A declaration that Atgron is in breach of its payment obligations under the Agreement;

    b. An award of all Registry-Level Fees still unpaid as of the date the final award is rendered; and

    c. An award of costs and reasonable attorneys' fees.

(Request ¶ 34.)

B. The Defence

44. Atgron admits to non-payment of the Registry-Level Fees "in the amount of US [redacted] as of 31 March 2020." (Answer ¶ 1.) Nonetheless, it claims that this non-payment is excused because of ICANN's own breaches of the Agreement, which Atgron claims are material because they amount to conduct that is "so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract." (Respondent's Arbitration Brief, at 4.) In addition, Atgron contends that non-payment is excused due to waiver and unclean hands. (*Id*. at 4.)

45. Accordingly, Atgron requests that ICANN take nothing on its claims. (*Id*. at 10.)

C. The Counterclaim

46. Atgron asserts that ICANN has breached sections 2.13 and 3.1 of the Agreement by, among other things:

    a. denying Atgron information about the EBERO-related fees and costs to allow Atgron to make an informed decision whether to enter EBERO or stick with [redacted];

    b. failing to consult with Atgron when the back-end registry functions were transitioned from [redacted] to [redacted];

    c. improperly causing the entire COI account to be forfeited the minute EBERO was invoked, rather than depleting the account by USD [redacted] per year; and

    d. hindering 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—in particular, with respect to creating an MSA Transition Plan.

    (*Id*. at 5-6.; Answer ¶¶ 12-31.)

47. It also asserts that ICANN breached section 3.5 of the Agreement (which requires ICANN to coordinate the "authoritative root server system" so that it is operated and maintained "in a stable and secure manner") by triggering EBERO on 7 December 2017 without Atgron's involvement, thereby causing the root zone to fail and resulting in a "breach notice" from ICANN. (Respondent's Arbitration Brief, at 6; Answer ¶¶ 32-39.)

48. Finally, Atgron asserts that ICANN has two conflicts of interest. The first relates to the fact that ICANN chose [redacted] to be the EBERO for .WED even though [redacted] is currently also serving as the back-end registry operator for .WEDDING, which Atgron contends is somehow in competition with .WED. The second relates to Atgron's allegation that ICANN has a financial interest in seeing its Agreement with Atgron terminated so that the .WED gTLD may be auctioned off to the highest bidder. (Answer ¶¶ 40-43.)

49. Atgron seeks:

    a. An award of USD [redacted] in damages, as set forth in Atgron's Present Value of Losses, dated 20 February 2020. (*See* Atgron Exh. 18.)

    b. Permission to exit from the EBERO as follows:

        i. Atgron shall have direct access to [redacted] to allow Atgron to formulate a "transition plan" applicable under the standard, non-EBERO MSA process;

ii. Atgron shall be permitted until 30 September 2020 to complete only those tasks set forth in ICANN's 12 June 2020 table (Atgron Exh. 19) that are required under the standard, non-EBERO MSA process, i.e., steps 1 a-e and step 5, with no "transition fee";

iii. Upon satisfaction of (i) and (ii) above, Atgron shall be deemed to have transitioned from the EBERO and will be deemed a registry operator in good standing;

c. Waiver of ICANN's demand that Atgron pay a USD [redacted] "financial evaluation fee" or replenish the COI and no other undisclosed fees related to this matter be imposed (*see* Atgron Exh. 19);

d. The expungement of ICANN's breach notice sent to Atgron on 7 December 2017 such that ICANN cannot terminate the Agreement due to the breach [redacted] initiated at ICANN's direction on 7 December 2017;

e. Specific written remediation guidance from ICANN within forty-eight hours to remedy any issues as they arise during "technical testing" for the MSA;

f. 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. (Agron Exh. 15, at 662-63);

g. Waiver of current and future "registry-level" operator fees (Agreement § 6.1) and any "additional fee on late payments" (*id*. § 6.6) until renewal of the Agreement in October 2023;

h. Waiver of the USD [redacted] "technical testing" and any " retesting" fees for the MSA process;

i. The return of Atgron's USD [redacted] COI payment;

j. An award of 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

k. Any further relief the arbitrator determines is appropriate.

(Respondent's Arbitration Brief, at 10-11.)

D. The Defence to the Counterclaim

50. ICANN asserts that there was no breach of section 2.13 or section 3.1 of the Agreement because:

a. The Agreement does not require ICANN to provide detailed information regarding fees or costs to Atgron;

b. ICANN did not make any further enforceable promise to provide such information;

c. The type of EBERO- and MSA-related costs and fees were publicly available on ICANN's website in materials referenced in the Agreement, and nothing in the Agreement requires ICANN to provide cost estimates in advance of an EBERO event;

d. The Agreement does not require ICANN to consult with Atgron during the emergency transition process;

e. The COI is a bank deposit or irrevocable line of credit intended to cover the day-to-day operations of the gTLD in the event an EBERO is necessary and, consistent with that purpose, it was used to pay an USD [redacted] "Standard Emergency Event Fee" charged by [redacted] to serve as EBERO for up to three years; and

f. The Registry Transition Processes document 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; although the former may envision coordination between ICANN, [redacted], and [redacted], the latter puts the burden solely on Atgron to develop a Transition Plan and demonstrate that it is capable of operating the .WED gTLD.

(Reply ¶¶ 14-25; Claimant's Response, at 6.)

51. ICANN also asserts that there was no breach of section 3.5 of the Agreement because it was Atgron's own improper actions during the EBERO transition—not ICANN's—that caused the root zone to fail and, in any event, there was no evidence that ICANN failed to maintain the authoritative root server system "in a stable and secure manner." (Reply ¶ 28.)

52. ICANN further asserts that there is no conflict of interest because (a) [redacted] is not the registry operator for .WEDDING but merely the back-end registry operator, and (b) if the Agreement is terminated, ICANN would not receive any proceeds from the new operator of .WED. (*Id*. ¶ 31-32.)

53. Finally, ICANN claims that the counterclaims are legally barred because:

a. The Agreement caps Atgron's claim for actual damages at the Registry-Level Fees Atgron actually paid in the last 12 months, which is zero;

b. Atgron's lost profit calculations are speculative; moreover, lost profits are a species of special damages that are excluded by section 5.3 of the Agreement; and

c. Atgron's failure to pay the Registry-Level Fees entitles ICANN to terminate the Agreement, thus eliminating any basis for specifically performing that agreement going forward; even if not, Atgron's remaining requests for relief are improper because they require the Arbitrator to modify the Agreement, and it is settled law that courts may not rewrite contracts for the parties.

(*Id*. ¶¶ 33-44; Claimant's Response, at 7-10.)

V. Issues to be Decided

54. Respondent's primary defence to Claimant's claims is that its duty to pay the Registry-Level Fees was excused, in part due to Claimant's material breach of the Agreement. For this reason, the Arbitrator will address issues relating to Respondent's counterclaims first, before turning to the issues raised by Claimant's claims.

55. The issues to be decided and the order in which they will be considered is as follows:

a. Did ICANN breach section 2.3 or section 3.1 of the Agreement?

b. Did ICANN breach section 3.5 of the Agreement?

c. Did ICANN have a conflict of interest?

d. Did Atgron breach Article 6 of the Agreement?

e. To what remedies is ICANN entitled?

f. To what remedies is Atgron entitled?

VI. Consideration and Findings

A. Issue #1: Did ICANN breach section 2.3 or section 3.1 of the Agreement?

56. Section 2.13 provides, in pertinent part:

> Registry Operator agrees that, in the event that any of the emergency thresholds for registry functions set forth in Section 6 of Specification 10 is reached, ICANN may designate an emergency interim registry operator of the registry of the TLD (an "Emergency Operator") in accordance with ICANN's registry transition process . . . (as the same may be amended from time to time, the "Registry Transition Process") until such time as Registry Operator has demonstrated to ICANN's reasonable satisfaction that it can resume operation of the registry for the TLD without the reoccurrence of such failure. Following such demonstration, Registry Operator may transition back into operation of the registry for the TLD pursuant to the procedures set out in the Registry Transition Process . . . . In addition, in the event of such failure, ICANN shall retain and may enforce its rights under the Continued Operations Instrument.

57. Section 3.1 of the Agreement provides that, "[c]onsistent with ICANN's expressed mission and core values, ICANN shall operate in an open and transparent manner."

58. Atgron's counterclaims require me to determine whether ICANN had a duty (a) under section 2.13, or (b) pursuant to its obligation of openness and transparency under section 3.1, to refrain from acting in the four main ways alleged by Atgron. (*See ante* ¶ 46.). I also consider whether ICANN (c) breached the implied covenant of good faith and fair dealing.

(a) Section 2.13

59. **First,** nothing in section 2.13 expressly requires ICANN to provide a list of fees and costs to Atgron. Section 2.13 merely outlines the conditions under which (a) ICANN may designate an EBERO operator and (b) the registry operator may transition back to operating the registry for the TLD.

60. Atgron contends, however, that during the 29 September 2017 telephone conference, ICANN promised that it would "look into" the fees associated with entering and exiting EBERO yet ultimately failed to do so. (McAdory Decl. ¶ 19, 21; Respondent's Arbitration Brief, at 1, 3.) Atgron's argument can be construed in several different ways.

61. One interpretation is that Atgron's request and ICANN's promise to "look into" the fees is *ex post* evidence of what the parties originally intended about the meaning of section 2.13 of the Agreement, rather than a modification of the Agreement. (Respondent's Arbitration Brief, at 9.) The trouble with this argument is that ICANN's only duty to disclose fees and costs in section 2.13 is the duty to "document" costs that were "incurred" by ICANN and the EBERO in connection with an emergency transition—that is, in connection with an event that has already occurred. (*See* Agreement § 2.13.) Section 2.13 does not impose a duty on ICANN to investigate and report on fees and costs that may be incurred if an emergency transition were triggered sometime in the future—for example, in order to help a registry operator "make an informed decision to

enter EBERO." (McAdory Decl. ¶ 26.) Although the Parties' *ex post* course of performance may be relevant in interpreting ICANN's existing duties under section 2.13, I am unpersuaded that it creates any additional duties to disclose the nature or extent of fees that might be incurred in the future. The creation of such additional duties would amount to a modification of the Agreement. (*See post* ¶ 63.)

62. Another interpretation is that ICANN's promise to "look into fees" is an independently enforceable promise. The first problem with this interpretation is that Atgron's counterclaim is framed in terms of a beach of the Agreement, not of an independent promise. (Respondent's Arbitration Brief, at 5.) The second is that Atgron has failed to explain why such an independent promise would be legally enforceable—for example, because it was supported by consideration or because Atgron relied to its detriment.[2] No legal value was exchanged for ICANN's promise. And although Atgron asserts that it "relied on ICANN's promise to permit it to make an informed decision about whether to proceed down the EBERO path . . . ." (Respondent's Arbitration Brief, at 3), I decline to find any detrimental reliance. Atgron did not have a real choice whether or not to enter EBERO. (*See post* ¶ 84.) Even if it did, the choice was not made in reliance on a promise to "look into" fees; rather, the choice was made <u>despite</u> the promise not being fulfilled. (*See post* ¶ 85.)

63. A final interpretation, advanced by ICANN and which Atgron in any event rejects (*see* Respondent's Arbitration Brief, at 9), is that the Agreement was modified by ICANN's 29 September 2017 promise. (*See* Reply ¶ 19.) But as ICANN points out, the Agreement contains a clause that precludes modifications "unless executed in writing by both parties." (Agreement § 7.6(i).) Such clauses are enforceable in California. (*See* Cal. Civ. Code § 1698(c).) Here, the notes of the telephone conference were not "executed" because they were unsigned.

64. **Second**, nothing in section 2.13 or the Registry Transition Processes document incorporated by reference therein expressly requires ICANN to consult with Atgron during the emergency transition process to an EBERO.

65. **Third**, ICANN did not breach section 2.13 by causing the entire USD [redacted] COI to be paid to [redacted]. Section 2.13 provides:

> [I]n the event of [an emergency transition to an EBERO], ICANN shall retain and may enforce its rights under the Continued Operations Instrument.

66. The Applicant Guidebook, incorporated into Specification 8 of the Agreement, provides:

> The Continuing Operations Instrument (COI) is invoked by ICANN if necessary to pay for an Emergency Back End Registry Operator (EBERO) to maintain the five critical registry functions for a period of three to five years.

(Atgron Exh. 7, at 188.)

67. Here, the contract between ICANN and [redacted] required ICANN to pay a flat fee of USD [redacted] for up to three years of operations. (Atgron Exh. 10, §§ 5.2 & Exh. D-1.) Atgron did not dispute this fact in its Arbitration Brief. I therefore find that ICANN was authorized under section 2.13 and Specification 8 of the Agreement to draw down the entire USD [redacted] COI in order to pay for the EBERO's services.

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[2] Although the Parties did not brief this issue, in order for a promise to be enforceable in California, it must either be supported by consideration or the promisee must establish the elements promissory estoppel. (*See* Cal. Civ. Code § 1550 (consideration); *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority*, 23 Cal. 4th 305, 310 (2000) (promissory estoppel).)

68. Atgron next argues that even if the COI draw-down was warranted, there was no basis for ICANN to charge any additional fees, such as the USD [redacted] financial evaluation fee imposed by ICANN on 2 March 2018. (Answer ¶¶ 18-20.) However, the Registry Transition Processes document contemplates that Atgron may incur fees in the course of transferring .WED's critical registry functions to the EBERO—fees that are separate from and in addition to any service fees charged by the EBERO. For example, the Registry Transition Processes document specifically provides that "ICANN . . . will determine which evaluations are necessary and collect the information and evaluation fee. The fee will cover the cost of the evaluations that are conducted by external providers." (Atgron Exh. 6, at 136.)

69. **Fourth**, nothing in section 2.13 expressly requires ICANN to extend the same level of cooperation to Atgron when exiting EBERO that it extended to [redacted] and [redacted] when entering it. (*See* Respondent's Arbitration Brief at 5.)

70. As set forth more fully in the Registry Transition Processes document, the transition of a gTLD into an EBERO (see "Emergency Back-End Registry Operator Temporary Transition Process") is a different procedure from the transition of a gTLD out of an EBERO (see "Registry Transition Process with Proposed Successor"). The former is an emergency process used "in a situation of unacceptable risk" and is designed to be a temporary measure only. (Atgron Exh. 6, at 139-140.) It was neither impermissible nor unreasonable in such circumstances for ICANN to (a) facilitate coordination between its existing back-end operator ([redacted]) and the EBERO ([redacted]) in order to ensure a smooth transition and (b) exclude Atgron—which at the time was not even performing back-end operations—from that coordination.

71. By contrast, the latter is a process by which the registry operator regains control of the gTLD on a longer-term basis. Doing so requires the registry operator (Atgron) to complete certain steps designed to prove that it (and any RSP it sub-contracts with) has the technical competence necessary to perform and maintain the critical registry functions to operate the gTLD. (Agreement § 2.13; Atgron Exh. 6, at 134-37.) And because Atgron sought to bring back-end registry functions in-house, one such step was to prepare and submit an MSA Transition Plan. (*See ante* ¶ 39.)

72. Atgron argues that "[w]hen ICANN triggered EBERO, ICANN, [redacted] and [redacted] collaborated to produce an appropriate transition plan," but that during .WED's transition out of EBERO, ICANN required Atgron to produce "the 'transition plan' (that [redacted] could not provide without collaboration with [redacted])" all by itself. (McAdory Decl. ¶ 28(a).) The problem with this argument is that it compares apples with oranges. As ICANN has argued, it had no duty to extend the same level of cooperation to Atgron when exiting EBERO that it extended to [redacted] and [redacted] when entering it. (*See ante* ¶ 50.f.) The Registry Transition Processes document does not contemplate a "transition plan" for an emergency transition to an EBERO. (*See* Atgron Exh. 6, at 139-44.). Even if it did, there is no evidence that such an emergency transition plan is the same as the elaborate Transition Plan contemplated for the MSA process, which is designed to test whether the registry operator and/or its new RSP understands the technology necessary to successfully transition .WED without an impact to the critical functions. (*See ante* ¶ 40; Atgron Exh. 8, at 208-13; Atgron Exh. 9, at 334, 346-48.)

73. Atgron is correct that [redacted], *qua* EBERO, is required under the Registry Transition Processes document to "collaborate and cooperate with the new operator in order to achieve an orderly transition [from an EBERO back to the previous registry operator] with minimum impact to registrants and gTLD . . . users." (Atgron Exh. 6, at 144.) But the same is not true of ICANN. At most, the Registry Transition Processes document imposes on ICANN an implied duty not to unreasonably hinder [redacted] ability to collaborate and communicate with Atgron.

74. ICANN did not breach any such implied duty, however. To the contrary, ICANN offered that "if in the course of completing the transition plan, Atgron has specific questions or areas where input is needed from [redacted], please set forth any such applicable specific questions and ICANN will pass them along to [redacted]." (McAdory Decl. ¶ 28(a).) It also stated that once Atgron was ready to submit the Transition Plan, input from ICANN and/or [redacted] would be provided but that the burden was on Atgron to identify the precise areas where input was needed. (Atgron Exh. 12, at 537.)

75. For the foregoing reasons, I find that ICANN is not in breach of section 2.13 of the Agreement.

(b) Section 3.1

76. As the party alleging breach, Atgron bears the burden to establish what operating in an "open and transparent manner" in section 3.1 requires, so as to enable me to determine what conduct falls below that standard. Atgron has not provided me with any guidance on the objectively reasonable meaning of this phrase, however.

77. I do not construe section 3.1 as placing an affirmative duty on ICANN to provide all information specifically requested by registry operators. The reason is that in some circumstances, ICANN may have an independent right or duty to withhold such information. In others, the cost and effort involved in ascertaining and providing information will far outweigh its potential benefits to the recipient. Sometimes emergencies or short deadlines will necessitate less than full transparency. I therefore interpret section 3.1 as articulating a basic principle that is subject to override given the totality of the circumstances.

78. I now turn to the four main ways in which Atgron contends ICANN breached section 3.1. (*See ante* ¶ 46.)

79. **First,** Atgron argues that ICANN failed to advise Atgron of the financial impact of entering and exiting EBERO, including the fact that Atgron would incur a USD [redacted] financial evaluation fee. (*See* Answer ¶ 19.)

80. I decline to find that a general principle of openness and transparency requires ICANN to disclose the precise amount of the fees that Atgron would incur in the course of exiting EBERO. Atgron has not demonstrated that those amounts could have been calculated with reasonable certainty by ICANN at the point in time when Atgron requested the information.[3] In any event, it is sufficient that the Agreement and other publicly available documents placed Atgron on notice that it was responsible for paying all reasonable costs that would be incurred by both ICANN and the EBERO. (*See* Agreement § 2.13; Registry Transition Processes, available at https://www.icann.org/resources/pages/transition-processes-2013-04-22-en.) Atgron has moreover failed to establish that the fees charged by ICANN were unreasonable.

81. While 'best practice' might have been for ICANN to reply promptly to Ms. McAdory's requests for information, it was not unreasonable for ICANN to have failed to do so given the circumstances. The conference call during which Ms. McAdory requested information about the MSA and other fees necessary to exit EBERO took place on 29 September 2017. As ICANN has argued (*see* Reply ¶ 18), exactly one week later, [redacted] agreed to accept quarterly payments, thus mooting the need to consider the EBERO option and ICANN's need to respond to Ms. McAdory's requests. (*See*

[3] The calculation of those fees appears also to be tied to the need for technical and financial evaluations, which in turn was "[b]ased on the events leading to EBERO." (Atgron Exh. 9, at 315.) It is not clear to me that ICANN could have appreciated the full nature and scope of those events prior to the emergency transition being completed.

ante ¶ 31; Atgron Exh. 9, at 328.) I find that ICANN's failure to respond to Atgron during that one-week period was not unreasonable.

82. In addition, I am not convinced that receiving the information requested by Atgron would have made any difference to the outcome. In that case, even if there had been a technical violation of section 3.1, it would not have amounted to a breach of contract.

83. In California, a party must prove actual injury and damages in order to prevail on a cause of action for breach of contract. (*Bramalea California, Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th 468, 473 (2004).) Atgron contends that it was injured because,

> [h]aving this information would have allowed [Ms. McAdory] to make an informed decision to enter EBERO or come up with the [redacted] fee. Advising me on January 12, 2018, almost a month after EBERO was triggered, deprived me of that choice. Had ICANN properly advised me of the financial consequences of entering EBERO, I would have chosen the [redacted] option, which was at least [redacted] cheaper than entering EBERO.

(McAdory Decl. ¶ 26.)

84. This claim is surprising given that Atgron made it appear to ICANN that it could not afford to pay [redacted] and that, if [redacted] did not offer it a quarterly payment plan, it would have no choice but to enter EBERO. For example, Ms. McAdory stated that "there was no possibility of her paying the [redacted] fee" by the time the [redacted] contract expired on 30 November 2017; indeed, she could not even pay a Registry-Level Fee invoice for USD [redacted]—outstanding since July 2017—until January 2018.[4] (*See ante* ¶ 28; Atgron Exh. 9, at 272.) In addition, Atgron informed ICANN that it was unable to find a reasonably priced RSP that could substitute-in for [redacted]. (*See ante* ¶ 29.) If the foregoing is true, entering EBERO was inevitable regardless of what information ICANN could or should have disclosed to Atgron.

85. Now Atgron takes the position that it had the financial wherewithal to pay [redacted] all along. If that is true, and Atgron made a deliberate choice to allow .WED to enter EBERO without first receiving the fee-based information that it had requested during the 29 September 2017 telephone conference, it did so at its own peril.

86. ICANN had explained the negative consequences of entering EBERO—a process reserved for "emergenc[ies]"—and had advised Atgron to pursue it only as a last choice. For example, on 29 September 2017, ICANN noted:

> To be clear, we do not recommend [triggering EBERO]; we do not recommend any compliance breach. The EBERO is triggered not because the registry didn't pass the MSA process, but because Adrienne [McAdory] has indicated to ICANN that her existing RSP [redacted] might shut down the TLD on 30 November. If [redacted] shuts her down on 30 November and there is no backup, . . . [it would] be a compliance breach of the Agreement.

Likewise, when Atgron informed ICANN that "[w]e do need to have the EBERO conversation after all" when [redacted] withdrew its offer to accept quarterly payments,

[4] At one point ICANN even offered to "help with extending [redacted] so you can finish proper testing for transition? We'd like to avoid having .WED go to EBERO." (Atgron Exh. 9, at 220.) Atgron responded: "The use of the EBERO funds to pay [redacted] would not be helpful to us because we would have to replenish the funds and we cannot afford [redacted]. This would be a disaster to owe the escrow again and [redacted]'s higher fee and still be responsible for paying ICANN [redacted] to change RSPs which we must do." (*Id*. at 219.)

ICANN advised it to exhaust all other options first. (*See ante* ¶ 32.)

87. **Second,** ICANN did not fail to act in an open and transparent manner by excluding Atgron from consultations between [redacted] and [redacted] during the emergency transition to EBERO. I find that ICANN's priority at the time was to ensure a smooth transition to the EBERO so that website operators and Internet users would not be adversely affected; it was not to ensure that Atgron be included in every discussion. And because Atgron was the registry operator rather than the back-end service provider, it was anyhow unlikely to be familiar enough with the technical aspects of the transition to participate meaningfully. (*See* Atgron Exh. 9, at 334.)

88. I appreciate that involving Atgron would have been helpful in allowing Atgron to "gain some level of familiarity with [redacted] 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." (Respondent's Arbitration Brief, at 5.) I can also imagine Ms. McAdory's frustration when ICANN offered [redacted]—an organization ICANN has no agreement with—benefits of consultation that it refused to provide to its own counterparty, Atgron. (McAdory Decl. ¶ 28(a).) But especially given the emergency nature of the EBERO process, I decline to find that these slights constitute a breach of ICANN's duties of openness and transparency.

89. **Third,** ICANN did not breach its duty to act in an open and transparent manner by failing to correct Ms. McAdory's "assum[ption]" that the COI would be depleted by only USD [redacted] during the first year of the [redacted] contract. (*Id*. ¶ 20.) There is no evidence that Ms. McAdory communicated her assumption to ICANN, and I do not interpret section 3.1 as requiring ICANN to disclose information in quantities sufficient to correct all mistaken assumptions that a registry operator might make in this type of situation. Although Atgron specifically inquired about the COI "burn rate" (*see* Atgron Exh. 9, at 307; Atgron Exh. 11, at 486, 495), this did not happen until after the .WED gTLD reached 100% of the emergency threshold on 7 December 2017. Any response to such inquiries by ICANN therefore could not have helped Atgron make an "informed decision to enter EBERO or come up with the [redacted] fee." (*See ante* ¶ 83.)

90. Moreover, as stated above, a party must prove actual injury and damages in order to prevail on a cause of action for breach of contract. (*See ante* ¶ 82.) If Atgron had no choice but to enter EBERO (*see ante* ¶ 84), information about the COI burn rate would not have made a difference anyhow. On the other hand, if Atgron had a choice but entered EBERO without first receiving a definitive answer about the COI burn rate, the answer could not have been material to its decision. (*See ante* ¶ 85.) Either way, there was no injury.

91. **Fourth**, Atgron argues that ICANN failed to provide crucial assistance in connection with the MSA Transition Plan. For example, it claims that on 1 September 2019, it requested from ICANN "a sample of the data that would be provided by [redacted] in the format the data would be provided at the time of transition." (Answer ¶ 25.) But it also concedes that on 14 October 2019, ICANN provided exactly such a sample, stating:

> Although Atgron, Inc. should have access to its prior TLD data and escrow files for .WED and these files are not necessary [to] the completion of a transition plan, the ICANN organization will assist Atgron, Inc. with the request for registry data by provided [*sic*] a sample XML data file using the Secure File Transfer Protocol . . . .

(*Id*. ¶ 26.)

92. Atgron nonetheless continues to assert that ICANN "is aware of the information the

Respondent requires to complete the Transition Plan but refuses to supply the information or access to the EBERO provider." (*Id*. ¶ 28.) But Atgron has not adequately explained what this information consists of, let alone how ICANN's failure to provide the same fell below section 3.1's principle of openness and transparency. (*See* Respondent's Arbitration Brief, at 2.) ICANN's refusal to supply information or direct access to the EBERO provider could also be explained by the overall purpose of the MSA Transition Plan, which is to test whether Atgron possesses the technical competence necessary to perform and maintain the critical registry functions. (*See ante* 71.)

93. The evidence moreover shows that on at least two occasions, ICANN did in fact offer to provide input from [redacted]. (*See ante* ¶ 74.) Although Ms. McAdory claims that these offers were just "a recipe for more delays" (McAdory Decl. ¶ 28(a)), Atgron has not substantiated why delay amounts to a violation of ICANN's duties under section 3.1. Causing delay is not necessarily the same as failing to act in an open and transparent manner.

94. Atgron makes much of the fact that ICANN did not allow Atgron to communicate directly with [redacted] while preparing the Transition Plan, even though it allowed [redacted] to collaborate freely with [redacted] when entering EBERO. (McAdory Decl. ¶ 28(a).) For the reasons stated above, however, this is comparing apples to oranges. (*See ante* ¶¶ 70-72.) Given the longer process involved in transitioning a gTLD to a proposed successor (in this case, Atgron), as well as the need to ensure that the successor has the technical competence necessary to fulfil the five critical registry functions, it was not unreasonable for ICANN to put Atgron to the task of developing the Transition Plan on its own, with assistance from ICANN or [redacted] only where absolutely necessary. (*See* Reply ¶ 25.)

95. For the foregoing reasons, I find that ICANN is not in breach of section 3.1 of the Agreement.

(c) Implied covenant of good faith and fair dealing

96. In its Arbitration Brief, Atgron alleged for the first time that ICANN is in breach of the implied covenant of good faith and fair dealing. (Respondent's Arbitration Brief, at 7.)

97. Every contract contains a covenant of good faith and fair dealing, which provides that "neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658 (1958).) The covenant imposes upon each contracting party the duty to "do everything that the contract presupposes that he will do to accomplish its purpose." (*Harm v. Frasher*, 181 Cal. App. 2d 405, 417 (1960).)

98. Atgron has not attempted to substantiate its claim for breach of the implied covenant other than to say that the claim is "based on the facts alleged in Atgron's various submissions" (Respondent's Arbitration Brief, at 7.) In any event, the evidence in this case suggests that ICANN quite consistently acted in good faith. It helped Atgron think through options when the possibility of entering EBERO was first raised in September 2017 (Atgron Exh. 9, at 272-74) and even offered to help with extending the [redacted] contract—during a time, moreover, when Atgron had not even paid the Registry-Level Fees it owed to ICANN. (*Id*. at 220.) ICANN also demonstrated a willingness to explain its processes and to answer questions. (*Id*. at 323-24.) It explained the mechanics of exiting EBERO and offered to relay questions to [redacted] as necessary. (*Id*. at 315-18, 328-29, 334; Atgron Exh. 12, at 537; McAdory Decl. Exh. 19.) It waived certain EBERO-related fees and evaluations. (Atgron Exh. 9, at 326-27, 346-47.) And it counselled Atgron in ways designed to avoid complications for Atgron, such as entering EBERO.

(*Id*. at 272-74, 280.)

99. For the foregoing reasons, I find that Atgron has failed to prove a breach of the implied covenant of good faith and fair dealing.

B. Issue #2: Did ICANN breach section 3.5(c) of the Agreement?

100. Section 3.5(c) of the 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 . . . ."

101. Citing an e-mail from [redacted] of [redacted], Atgron argues that ICANN somehow "direct[ed]" [redacted] to "deliberately breach[] an emergency threshold for RDDS functions." (Answer ¶ 34.) However, that e-mail states, in pertinent part:

> There is plan which has been agreed between EBERO provider ([redacted]) and [redacted] and approved by ICANN, it ensures continuity of resolution and stability for registrants of .wed TLD. Since there is no technical failure of [redacted], a trigger event as required to start the transition to EBERO. Blocking RDDS (WHOIS) is the safest event to trigger the transition process. It has no impact on DNS or DNSEC, all .wed domains continue to resolve even after a RDDS threshold is reached.

(Atgron Exh. 9, at 296.)

102. Without more explanation it is not clear from this email that (a) an emergency threshold for RDDS functions was actually "breached", (b) this breach was "direct[ed]" by ICANN, or (c) ICANN otherwise failed to operate and maintain the Authoritative Root Server System in a stable and secure manner. If anything, [redacted] email suggests that blocking RDDS was the "safest" course of action and that it had "no impact" on DNS or DNSEC.

103. In its Arbitration Brief, Atgron argues that ICANN nonetheless caused the root zone to fail by "triggering . . . EBERO" without Atgron's involvement. (Respondent's Arbitration Brief, at 6.) But even if I could agree that Atgron's exclusion constituted an unauthorized movement of DNS from Atgron's DNS provider to the EBERO provider (Answer ¶ 34), the evidence is still insufficient for me to conclude that the Authoritative Root Server System was not "operated and maintained in a stable and secure manner." (Agreement § 3.5.)

104. For the foregoing reasons, I find that Atgron has failed to prove that ICANN has breached section 3.5(c) of the Agreement.

C. Issue #3: Does ICANN have a conflict of interest?

105. Atgron has not identified a particular provision of the Agreement or any other applicable law that ICANN has violated due to a conflict of interest. As such, I see no basis for granting relief.

106. Even if there were such a basis, in its Reply ICANN persuasively established that there was no conflict of interest to begin with. (*See* Reply ¶¶ 30-32.) First, [redacted] is not the registry operator but only the back-end operator of .WEDDING; the fact that the registry operator may have a competitive interest in seeing Atgron lose the .WED gTLD therefore does not establish that [redacted], too, has the same interest. Second, according to the Registry Transition Processes document, "any funds collected from [the new Registry Operator] less evaluation costs and outstanding fees due will go to the registry operator

disposing of the gTLD"—that is, to Atgron, not to ICANN. (Atgron Exh. 6, at 139; *see* Atgron Exh. 9, at 328.) Thus, even if .WED were auctioned off by ICANN at an exorbitant price, ICANN does not receive any of those proceeds.

107. In any event, Atgron did not respond to the aforementioned arguments in ICANN's Reply and did not even raise the conflict of interest issue in its subsequent Arbitration Brief. I therefore deem it to have conceded this issue.

108. For the foregoing reasons, I find no actionable conflict of interest.

D. Issue #4: Did Atgron breach Article 6 of the Agreement?

109. Article 6 of the Agreement requires Atgron to pay USD [redacted] in Registry-Level Fees on a quarterly basis within 30 calendar days following the date of the invoice provided by ICANN.[5]

110. ICANN argues that Atgron is in breach of section 6 because it failed to pay five invoices for Registry-Level Fees issued between 31 October 2018 and 31 October 2019, inclusive, amounting to a total of USD [redacted].[6] (Request ¶ 18 & Exh. G.)

111. Atgron concedes that it has failed to pay the aforementioned five invoices plus the 31 January 2020 invoice, reflecting a total outstanding balance of USD [redacted]. (Answer ¶ 1.) Nonetheless, it argues that this failure does not amount to a breach of Article 6 because ICANN's breaches of sections 2.13, 3.1, and/or 3.5 were material, and it is well settled that one party's breach of material provisions of a contract excuses the other party's performance. (Respondent's Arbitration Brief, at 4 (citing cases).)

112. Because I found no breach of the Agreement by ICANN (*see ante* ¶¶ 56-104), *a fortiori* I find no material breach by ICANN and no excuse of Atgron's payment obligations.

113. Even if ICANN had breached the Agreement, the Agreement precludes Atgron from invoking such a breach as a ground for not paying the Registry Level Fees under Article 6. Article 7.4 of the Agreement provides that "[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."

114. As explained above, ICANN's failure to provide a breakdown of fees and costs, failing to explain how the COI would be drawn down, failing to consult with Atgron when transitioning to EBERO, and failing to provide the same level of assistance to Atgron that it provided to [redacted] and [redacted] (when entering EBERO) were not breaches of the Agreement. (*See ante* ¶¶ 75, 95, 99.) Even if they were, Atgron has failed to explain how such breaches would be material enough, either individually or in combination, to "frustrate the purpose of the contract." (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*,

[5] Section 6.1(a) of the Agreement provides, in pertinent part:

> Registry Operator shall pay ICANN a registry-level fee equal to (i) the registry fixed fee of US[redacted] per calendar quarter and (ii) the registry-level transaction fee (collectively, the "Registry-Level Fees"). . . .

Section 6.1(b) of the Agreement provides:

> Subject to Section 6.1(a), Registry Operator shall pay the Registry-Level Fees on a quarterly basis to an account designated by ICANN within thirty (30) calendar days following the date of the invoice provided by ICANN.

[6] Although Atgron initially failed to pay some earlier invoices when they came due, it subsequently paid up the arrears. (Request for Arbitration ¶¶ 16-17.)

195 Cal. App. 3d 1032, 1051 (1987).) Although Atgron asserts that "the job of a back-end registry service provider" is material and that "any decision related to the appointment of a back-end service provider goes to a core function" of the Agreement, this does not necessarily establish that the particular acts of breach alleged against ICANN were material. (*See* Respondent's Arbitration Brief, at 4.)

115. Finally, I see no reason for excusing Atgron's failure to pay the Registry Level Fees on the basis of waiver or unclean hands. (*See* Claimant's Response at 4.)

116. For the foregoing reasons, I find that Atgron is in breach of Article 6.

E. Issue #5: To what remedies is ICANN entitled?

117. Because Atgron is in breach of its duty to pay Registry-Level Fees under Article 6 of the Agreement (*see ante* ¶ 109-116), ICANN is entitled to:

a. A declaration that Atgron is in breach of its payment obligations under the Agreement; and

b. An award of USD [redacted] through 2 March 2020 (Request ¶ 23) plus any Registry-Level Fees still unpaid as of the date the Final Award is rendered. ICANN shall provide competent evidence of the latter in conjunction with its memorandum of costs and fees. (*See post* ¶ 121.)

F. Issue #6: To what remedies is Atgron entitled?

118. Because ICANN is not in breach of the Agreement, Atgron is not entitled to any of the remedies it seeks and there is no need to reach Claimant's defence that the Agreement precludes such remedies. (*See* Reply ¶ 33-44.)

VII. Costs and Fees

119. Section 5.2 of the Agreement provides that "[t]he prevailing party in the arbitration will have the right to recover its costs and reasonable attorneys' fees, which the arbitrator(s) shall include in the awards."

120. ICANN is the prevailing party in this arbitration and is accordingly entitled to an award of costs and reasonable attorneys' fees.

121. The Parties have agreed that the quantum of fees and costs, including costs to be determined under Article 38 of the Rules, will be decided in a Final Award. (*See* Procedural Timetable, at 1-2.)

122. ICANN may file a memorandum of costs and fees, and Atgron may file an opposition to ICANN's memorandum, by the respective deadlines set forth in the Procedural Timetable.

VIII. Disposition

123. Atgron is in breach of its payment obligations under the Agreement.

124. ICANN is entitled to (a) USD [redacted] in damages through 2 March 2020 and (b) any Registry-Level Fees still unpaid through the date of the Final Award. ICANN shall provide competent evidence of item (b) in conjunction with its memorandum of costs. (*See ante* ¶ 121.)

125. ICANN is entitled to costs and reasonable attorneys' fees under section 5.2 of the

Agreement because it has established its claims and is the prevailing party thereon. ICANN is also the prevailing party on Atgron's counterclaims. The quantum of costs and fees will be determined in a Final Award.

126. Atgron's counterclaims are rejected and Atgron shall take nothing under them.

127. This Partial Award determines all issues submitted for decision to date. Any claims or requests not expressly addressed herein are rejected.

Place of Arbitration: City of Los Angeles, CA (U.S.A.)

Dated: September 15, 2020

Sole Arbitrator