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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

VERANDAGLOBAL.COM, INC., a Florida corporation, and BRYAN TALLMAN, a California citizen,

Plaintiffs,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation, and DOES 1–10,

Defendants.

Case No. 23STCV19554

Assigned to Hon. Stephen I. Goorvitch

DEFENDANT ICANN'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFFS' VERIFIED FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[[Proposed] Order and Declaration of Jeffrey A. LeVee Filed Concurrently Herewith]

Date: May 13, 2024
Time: 8:30 a.m.
Dept: 39

Complaint Filed: August 16, 2023

Reservation ID: 379209426336

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 13, 2024 at 8:30 A.M., in Department 39 of this Court, located at 111 North Hill Street, Los Angeles, CA 90012, Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does demur to Plaintiffs VerandaGlobal.com d/b/a First Place Internet, Inc. ("FPI") and Bryan Tallman's (collectively, "Plaintiffs") Verified First Amended Complaint ("Amended Complaint") in its entirety pursuant to California Code of Civil Procedure ("CCP") § 430.30. Plaintiffs' entire Amended Complaint fails to state a claim for any of the five causes of action asserted, and Plaintiffs lack standing to pursue their claims. Accordingly, the Amended Complaint should be dismissed with prejudice.

This motion is based upon this notice of motion, the accompanying memorandum of points and authorities, the declaration of Jeffrey A. LeVee pursuant to CCP § 430.41, pleadings and other records on file herein, and such further evidence and argument as may be presented to the Court.

Dated: April 15, 2024

JONES DAY

By: */s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

DEMURRER

Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") hereby demurs to Plaintiffs VerandaGlobal.com d/b/a First Place Internet, Inc. ("FPI") and Bryan Tallman's (collectively, "Plaintiffs") Verified First Amended Complaint ("Amended Complaint") on each of the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

1. The first cause of action for unfair competition under California Business and Professions Code Sections 17200 et seq. fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SECOND CAUSE OF ACTION

2. The second cause of action for breach of contract fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

3. The second cause of action for breach of contract also fails to specify whether the contract sued upon is oral, written, or implied by conduct. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO THIRD CAUSE OF ACTION

4. The third cause of action for breach of duty of good faith and fair dealing fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO FOURTH CAUSE OF ACTION

5. The fourth cause of action for quasi-contract fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO FIFTH CAUSE OF ACTION

6. The fifth cause of action for fraudulent inducement fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO ALL CAUSES OF ACTION

7. All causes of action fail to state facts sufficient to constitute a cause of action against ICANN because Plaintiffs lack standing to sue ICANN. Cal. Civ. Proc. Code § 430.10.

Dated: April 15, 2024

JONES DAY

By: */s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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INTRODUCTION

Plaintiffs VerandaGlobal.com d/b/a First Place Internet ("FPI") and Brian Tallman's (collectively, "Plaintiffs") Verified First Amended Complaint ("Amended Complaint" or "FAC") against the Internet Corporation for Assigned Names and Numbers ("ICANN") fails to cure ***any*** of the deficiencies that caused this Court to sustain ICANN's demurrer to Plaintiffs' original Complaint. As this Court concluded in its February 15, 2024, Minute Order Sustaining ICANN's Demurrer ("Order" attached hereto as Exhibit A), "[s]imply, the complaint [did] not clearly identify a policy requiring ICANN to permit registration of single character domain names." (Order at 3.) Plaintiffs' FAC contains a host of new meaningless allegations, but like the original Complaint, none of the allegations link any action, "policy," or statement ***by ICANN*** to the single-character second-level domain names that Plaintiffs seek to register. Because Plaintiffs do not—and cannot—identify an ICANN policy that ICANN has violated, Plaintiffs will never be able to cure the deficiencies identified in this Court's Order, and the Court should sustain ICANN's demurrer to the FAC without leave to amend.

Plaintiffs fundamentally misunderstand ICANN's role in domain name registrations. ICANN is a nonprofit public benefit corporation that *oversees the technical coordination* of the Internet's unique identifiers, including the domain name system ("DNS"), which converts numeric Internet Protocol ("IP") addresses recognized by computers into easily remembered Internet domain names, such as lacourt.org. "Registrants" are able to subscribe to operate domain names through "registrars"—but not through ICANN. As ICANN's Bylaws confirm, ICANN does not register individual second-level domain names and does not act as a "registry" or "registrar" for such domain names.

Plaintiffs are individual registrants of various single-character second-level domain names in certain non-ASCII[1] versions of the top-level domains .COM and .NET (the Katakana, Hangul, and Hebrew language script versions) (referred to as Internationalized Domain Names ("IDN")

[1] "ASCII" stands for American Standard Code for Information Interchange. As Plaintiffs note, ASCII colloquially refers to the English language. (FAC ¶ 45.)

generic top-level domains ("gTLDs")). (FAC ¶ 37.) Inexplicably, Plaintiffs claim that, because they have registered a second-level domain in an IDN gTLD, they magically hold the "uncontested sole right" to automatically register that same second-level domain in ".COM" (as listed in Plaintiffs' Exhibits B1 and B2). (FAC ¶ 3.)

By way of example, Plaintiffs claim that, because Plaintiff FPI has registered <W.コム (Katakana IDN ".com")> and <1.닷넷 (Hangul IDN ".net")>, then FPI should automatically be granted the sole right to operate <W.COM> and <1.NET>. In other words, Plaintiffs claim that ICANN has a "buy one, get another one automatically policy" (although Plaintiffs do not allege, because they cannot, any other domain holder who has taken advantage of this alleged "policy"). Further, despite Plaintiffs' many attempts to label statements as ICANN "policy"—most of which were not even made by ICANN—Plaintiffs remain unable to point to ***any*** policy or statement that establishes Plaintiffs' "uncontested sole right" to operate the ASCII gTLD versions of the domain names in Exhibits B1 and B2. (FAC ¶ 3.) Exhibits A1 and A2 of Plaintiffs' FAC (i.e., ICANN's alleged "policies") exemplify this obvious shortcoming because neither provides a "policy" that could form a basis for Plaintiffs' FAC.

The law could not be more clear: a demurrer should be sustained "when [t]he pleading does not state facts sufficient to constitute a cause of action." *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc*., 2 Cal. 5th 505, 512 (2017) (quoting Cal. Civ. Proc. Code § 430.10(e)) (internal quotation marks omitted). Each of Plaintiffs' five causes of action fails to allege ***even a single fact*** to support a claim by Plaintiffs against ICANN. First, Plaintiffs have not cured any deficiencies in their contract-based claims (counts two through four) because ***there is no contract*** between the parties. This Court's Order specifically stated it was "problematic" that Plaintiffs did not attach or quote ***any*** relevant contractual language. (Order at 2.) Once again, Plaintiffs do not attach a contract to the FAC and fail to quote any provisions of the alleged agreement, because none exists. Second, Plaintiffs' claim for fraudulent inducement fails because ICANN made ***no promise*** to Plaintiffs regarding an "uncontested sole right" to operate the ASCII gTLD versions of the domains Plaintiffs registered. (FAC ¶ 3.) Indeed, even the letter from Verisign—***not ICANN***—that ICANN posted on its website along with the *thousands* of other letters ICANN has

received does not grant Plaintiffs the relief they seek. Finally, Plaintiffs cannot state a claim for Unfair Competition because it is derivative of Plaintiffs fraudulent inducement claim. (Order at 5.) In sum, ICANN has not made a statement, or sanctioned any "policy," that entitles Plaintiffs to the domain name registrations they seek. ICANN respectfully requests that this Court sustain ICANN's demurrer to Plaintiffs' Amended Complaint, this time with prejudice.

SUMMARY OF PLAINTIFFS' ALLEGATIONS

A. ICANN's Role in the DNS and Plaintiffs' Domain Registrations

ICANN is a California nonprofit public benefit corporation that oversees the technical coordination of, among other things, the Internet's DNS. (FAC ¶ 7.) ICANN was created as part of a federal initiative to privatize the Internet so that no one group or government would have a right to, or responsibility over, the DNS. (FAC ¶ 53 n. 23.)

The Internet is succinctly described as "an international network of interconnected computers[.]" *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997); (FAC ¶ 53 n. 23.) Each computer and server has a unique identity, known as an IP address, consisting of a series of numbers. Because a series of numbers can be hard to remember, the founders of the Internet created the DNS, which converts numeric IP addresses into easily remembered domain names such as "weather.com" or "uscourts.gov." (FAC ¶ 53 n. 23.) In these examples, .COM and .GOV are known as a generic "top-level domain" or "gTLD", and the portion immediately to the left of the period, such as "uscourts," is known as the "second-level domain." (FAC ¶ 53 n. 23.)

In order to obtain a second-level domain name, consumers, known as "registrants," contract with entities called "registrars" to register the second-level domain name in a specific gTLD (for instance, a registrant may wish to register weather.com or weather.net, which are separate registrations and could be registered by different registrants). (FAC ¶ 53 n. 23.) In turn, those registrars register the domain name with the appropriate gTLD registry (in the example above, in .COM or .NET). (FAC ¶ 53 n. 23.) Plaintiffs' original Complaint acknowledged that ICANN does not contract with individual registrants like Plaintiffs. (Compl. ¶ 24.) Instead, to coordinate the DNS, ICANN contracts with "registry operators" that manage and run the various

gTLDs that operate on the Internet. (Compl. ¶ 24; FAC ¶ 53 n. 23.)

Initially, second-level domains and gTLDs were only available in ASCII script. In 2009, ICANN implemented IDNs, which allows registry operators to operate gTLDs in the native scripts of certain languages and also allows registrants to register domain names in the native scripts of certain languages; the native script could be utilized in either the second-level portion of the domain or the top-level portion or both. (*See* Compl. ¶ 38.) For example, users can register domains that could be in the following script combinations: ASCII.ASCII (friend.com), ASCII.IDN (friend.コム) , IDN.IDN (ともだち. コム), or IDN.ASCII (ともだち.com), which are separate domain registrations that could have different registrants. (*See* Compl. ¶ 38.)

From 2015 through 2020, Plaintiffs registered various ASCII.IDN domain registrations – ASCII second-level domains in the IDN Katakana, Hangul, and Hebrew scripts of .COM and .NET (e.g., 1.コム (Katakana ".com")). (FAC ¶ 37.) Plaintiffs believe that they now have the "uncontested sole right" to the ASCII.ASCII versions of these domains in .COM and .NET (e.g., 1.com). (FAC ¶ 3.) Based on this mistaken belief, Plaintiff FPI wrote to ICANN and demanded these registrations in .COM and .NET. (FAC ¶ 99.) Plaintiffs allege that ICANN violated its Bylaws and "policies," as well as agreements with Verisign Inc. (the registry operator of .COM and .NET) and the Department of Commerce, by not providing these domain names to Plaintiffs, which is demonstrably wrong on many levels. (FAC ¶¶ 101–105.)

B. There is No "Policy" That Entitles Plaintiffs to the Relief They Seek

Plaintiffs' claims remain based on the core allegation that ICANN adopted a "policy" by posting a 2013 letter from Verisign on ICANN's website that, according to Plaintiffs, gave Plaintiffs the "sole right" to obtain these domains in the English ASCII versions of .COM and .NET simply because Plaintiffs had registered these second-level domains in certain IDN versions of .COM and .NET. (FAC ¶¶ 2, 3, 19, 34, 35, 75–80.) The Court already has rejected this theory and Plaintiffs do not allege in the FAC that there is any ***other*** statement on ICANN's website (or otherwise) that allegedly links, discusses, or even alludes to entitlement to an ASCII gTLD domain name when the corresponding domain in an IDN gTLD has been registered.

Plaintiffs claim the "policies" that support this allegation are "quoted verbatim in Exhibits

A1 and A2." (FAC ¶ 19.) But Exhibit A1 and A2 are literally makeshift compilations of statements ***doctored by Plaintiffs*** in an attempt to address this Court's Order. Both exhibits are terribly misleading because they contain no identifying information as to who authored each statement or its context. For example, Plaintiffs allege that the ICANN Board adopted a "policy" regarding single-character domain names in its June 26, 2008 Resolution. (FAC ¶¶ 1, 19, 34.) Plaintiffs base this allegation on the Board's general statement that "based on both the support of the community for new gTLDs and the advice of staff that the introduction of new gTLDs is capable of implementation, the Board adopts the GNSO policy ***recommendations*** for the introduction of new gTLDs." (FAC ¶ 1, Exhibit A1) (emphasis added). Nowhere in this statement does the ICANN Board state that it is creating the policy that Plaintiffs reference in the FAC. In fact, the Board specifically stated that "the Board directs staff to continue ***to further develop and complete*** its detailed implementation plan, continue communication with the community on such work . . . ***for the board and community to approve before the new gTLD introduction process is launched."*** (Exhibit A1) (emphasis added). In short, nothing in the Board's Resolution establishes the "policy" that Plaintiffs are trying to conjure. (FAC ¶¶ 3, 19.)

Moreover, the underlying *recommendations* Plaintiffs reference are irrelevant here. Plaintiffs quote a portion of ICANN's Generic Names Supporting Organization's ("GNSO") report discussing the Introduction of New Generic Top-Level Domains from 2007. (FAC ¶¶ 1, 34, Exhibit A1.) Yet, this Court explicitly acknowledged that the working group's 2007 report ***does not*** constitute a policy. (Order at 3.) And, in fact, this alleged "policy" from the GNSO's report is ***silent*** regarding whether single-character registrants in IDN gTLDs (like Plaintiffs) have any right to automatically obtain the corresponding domain in the ASCII gTLD equivalent (e.g., that registering <1.ㅋㅅ> somehow entitles the registrant to <1.com>).[2]

C. Verisign's July 2013 Letter is Not an "ICANN Policy"

Plaintiffs Amended Complaint is nearly unintelligible when discussing Verisign's July

[2] Plaintiffs attempt to summarize a host of alleged ICANN policies on pages 6 and 7 of the FAC. These "policies" are not relevant and seem to be an attempt to confuse the issue. The only way that ICANN could violate the "policies" referenced on pages 6 and 7 would be if ICANN had a separate policy expressly granting the express right to equivalent domains that Plaintiffs claim they are entitled to, which ICANN does not have.

2013 letter to ICANN. Plaintiffs seem to be alleging that, because the IDN Guidelines state that "[a]ny information fundamental to the understanding of a ***registry's IDN policies*** that is not published by the IANA will be made directly available online by the registry[,]" then Plaintiffs were "reasonably" entitled to rely on Verisign's letter as "ICANN policy." (FAC ¶¶ 35–40, 75–80, 89.) Notably, the statement quoted by Plaintiffs about IDN Guideline implementation pertains to a "***registry's*** IDN implementation policies"—not ***ICANN's*** policies. (FAC ¶¶ 35, 73, 89.) Moreover, Exhibit A2 is inexplicably mislabeled as "ICANN policy" and fails to even provide the entirety of Verisign's letter. (FAC ¶ 19.) Plaintiffs also fail to acknowledge that Verisign's letter does ***not*** state that it grants an automatic entitlement to registrants like Plaintiffs (i.e. the relief sought) or that it intends to create a policy, much less an ***ICANN policy.*** To the contrary, the letter explicitly states that the purpose of the letter was to "provide ICANN with more detail about [Verisign's] IDN.IDN plans[.]" (FAC ¶ 74, n. 37.) Plaintiffs also seem to allege that merely posting Verisign's letter on ICANN's website somehow constitutes "adoption" of a "policy." (*See e.g.*, FAC ¶¶ 75–80.) It is difficult to comprehend how any visitor to ICANN's website would (or reasonably could) conclude that ICANN has somehow adopted or sanctioned as "policy" the contents of each of the *thousands* of letters posted on ICANN's Correspondence webpage. (FAC ¶ 74, n. 37.) Moreover, Plaintiffs' conclusory allegations do not come anywhere close to reflecting an accurate or logical understanding of how ICANN makes or implements policy, nor do Plaintiffs allege any ***facts*** to support their allegation that ICANN's posting of a letter written by a third party somehow creates ICANN policy. (*See* FAC ¶ 78.)

LEGAL STANDARD

A demurrer tests the sufficiency of the allegations of a complaint. *Schmidt v. Found. Health*, 35 Cal. App. 4th 1702, 1706 (1995) (citing Cal. Civ. Proc. Code § 589(a)). A demurrer should be sustained "when [t]he pleading does not state facts sufficient to constitute a cause of action." *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 512 (quoting Cal. Civ. Proc. Code § 430.10(e)) (internal quotations marks omitted). A proper complaint "must set forth the essential facts of his or her case with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent of the plaintiff's claim." *Prakashpalan v. Engstrom, Lipscomb*

& Lack, 223 Cal. App. 4th 1105, 1120 (2014) (internal quotation marks omitted) (citing *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 551 (2007)). The court "accept[s] as true all the material allegations of the complaint, but do[es] not assume the truth of contentions, deductions or conclusions of fact or law." *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 512 (internal quotation marks and citations omitted). A demurrer should be granted without leave to amend where "no amendment could cure the defect in the complaint[.]" *See Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014).

ARGUMENT

All five of Plaintiffs' claims fail for the same fundamental reason—there simply is no policy, statement, contract, or representation made by ICANN that could support any of the causes of action.

II. EACH OF PLAINTIFFS' CAUSES OF ACTION FAIL TO STATE A CLAIM.

A. Plaintiffs Fail to State a Claim for Breach of Contract, Quasi-Contract, and Breach of Duty of Good Faith and Fair Dealing (Counts Two Through Four).

1. Plaintiffs Cannot State a Claim for Breach of Contract (Count Two).

Plaintiffs cannot cure the deficiencies identified in this Court's Order because there is no contract between ICANN and Plaintiffs. The elements of a claim for breach of contract are: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damage to plaintiff. *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008). To state a claim for breach of contract, Plaintiffs' complaint must identify the contract at issue as well as the specific provisions that ICANN allegedly breached. *See Holcomb v. Wells Fargo Bank, N.A.*, 155 Cal. App. 4th 490, 501 (2007) ("Without specifying the nature of the contract, nor the specific terms Holcomb claims the bank had breached, the complaint fails to adequately state a cause of action for breach of contract."). As this Court noted in its Order, "[i]f the action is based on an alleged breach of a written contract, the terms ***must*** be set out verbatim in the body of the complaint or a copy of the written instrument ***must*** be attached or incorporated by reference." (Order at 2) (quoting *Harris v. Ruden, Richmond & Appel*, 74 Cal. App. 4th 299, 307 (1999) (emphasis added).

Despite this Court's clear direction, the FAC does not contain any allegations of the parties' "contract." Plaintiffs again allege that they "entered into a binding agreement with ICANN and/or through its agents that was governed by ICANN's policies and procedures." (FAC ¶ 142.) The FAC is filled with vague references to ICANN's "policies," Bylaws, and information posted on ICANN's website, none of which could be alleged to constitute a "***binding agreement***" between ICANN and Plaintiffs. Most importantly, Plaintiffs do not identify, attach, or quote from any contract between ICANN and Plaintiffs, much less the terms of said contract, where and when it was entered into, or who at ICANN was involved in the alleged contract formation.[3] (*See* FAC ¶¶ 140–151) (Order at 2.) Indeed, the FAC does not allege any interaction between ICANN and Plaintiffs that could give rise to a written, oral, or implied by conduct contract.[4]

Even if there was a contract between Plaintiffs and ICANN "governed by ICANN's policies and procedures"—and to be clear, there is no such contract—Plaintiffs still do not adequately identify a "policy" or Bylaws provision that ICANN is allegedly violating in breach of said contract. (FAC ¶ 142.) The ***only*** statement that touches upon, but does not actually support, the relief sought is a ***letter from Verisign to ICANN***. (FAC ¶ 3, 35–36.) That is obviously not a contract between Plaintiffs and ICANN, nor is it any kind of contract, nor is it an ICANN policy. Instead, Plaintiffs try to muddy the issue by mislabeling *dozens* of statements as "ICANN Policy." (*See* FAC ¶18–33; Exhibits A1, A2.) For example, Plaintiffs claim that that ICANN has a policy that it cannot "engage in or benefit from a commercial transaction related to a domain name" based on alleged representations in a prior lawsuit which this Court explicitly stated ***did***

[3] Plaintiffs also misrepresent their relationship with ICANN. Despite multiple claims that "ICANN takes Plaintiffs' money[,]" Plaintiffs do not allege a fact supporting this conclusory allegation because they cannot. (*See e.g.*, FAC ¶ 40.); *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 512 (noting that on demurrer, the court does "do[es] not assume the truth of contentions, deductions or conclusions of fact or law.") (internal quotation marks omitted). ICANN ***does not*** receive money from registrants, like Plaintiffs, nor can Plaintiffs allege that they have paid money to ICANN. Plaintiffs concede this in footnote 11, which notes that fees ICANN receives are *registrar* fees.

[4] Whether the contract is written, oral, or implied by conduct ***must*** be ascertainable in Plaintiffs' complaint in order to properly state an action for breach of contract. CCP § 430.10(g). By failing to identify the specific contract, the nature of the contract, the terms of the contract, and when it was formed, Plaintiffs fail to state a claim.

not constitute a policy in Plaintiffs' original Complaint.[5] (FAC ¶¶ 26, 53) (Order at 3.) This modification by Plaintiffs further highlights Plaintiffs' extensive attempts to reword and re-label the same statements from their original Complaint as "ICANN policy" in the FAC. Such efforts are not only misleading, but also show that Plaintiffs remain unable to point to any policy that establishes their "uncontested sole right" to register and operate the ASCII versions of the domains that they seek (as listed in exhibits B1 and B2). (FAC ¶ 3.) In sum, because Plaintiffs cannot allege there is an ICANN policy granting Plaintiffs the "uncontested sole right" to certain domain names, Plaintiffs also cannot allege there is a "binding agreement" between ICANN and Plaintiffs "governed" by such policies. (FAC ¶ 142.)

2. Plaintiffs Cannot State a Claim for Quasi-Contract (Count Four).

Plaintiffs' quasi-contract claim fails for the same reasons their breach of contract claim does: there is no interaction, statement, or conduct between ICANN and Plaintiffs to warrant any implied or actual contractual relationship. "The elements of a claim of quasi-contract or unjust enrichment are (1) a defendant's receipt of a benefit and (2) unjust retention of that benefit at the plaintiff's expense." *MH Pillars Ltd. v. Realini*, 277 F. Supp. 3d 1077, 1094 (N.D. Cal. 2017) (citing *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593 (2008)). Plaintiffs' FAC does not allege facts supporting that ICANN "unjustly" retained a benefit because there is no benefit for ICANN to unjustly retain. Moreover, even if Plaintiffs had sufficiently stated breach of contract and breach of quasi-contract claims, which they have not, Plaintiffs are not permitted to maintain an action for both claims. *See Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc*., 94 Cal. App. 4th 151, 172–73 (2001) (holding that Plaintiff *could not* proceed under its quasi-contract claim because the claim was based on the express terms of an actual contract); *Lloyd v. Williams*, 227 Cal. App. 2d 646, 649 (1964) ("A party cannot retain substantial benefits under an

[5] Notably, this Court already held that many of the general statements Plaintiffs cite as "policy" do not advance or support Plaintiffs' contentions. (Order at 2-3) ("Even accepting these representations for pleading purposes, none of the quoted language evidences a policy of allowing single character domain names. Plaintiffs' counsel focuses on certain language as follows…None of these sections (or any language quoted from ICANN's motion to dismiss) establishes a policy that ICANN will approve a single character domain name.").

express contract and recover under the theory of an implied contract.").[6] As such, Plaintiffs' claim for quasi-contract fails for several reasons.

3. Plaintiffs Cannot State a Claim for Breach of Covenant of Good Faith and Fair Dealing (Count Three).

Plaintiffs' inability to plead the existence of a contract also causes their third cause of action for breach of good faith and fair dealing to be defective. "The implied covenant of good faith and fair dealing ***rests upon the existence of some specific contractual obligation*** . . . . [t]here is no obligation to deal fairly or in good faith absent an existing contract." *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031–32 (1993); *see also Kim v. Regents of Univ. of Cal.*, 80 Cal. App. 4th 160, 164 (2000) ("Since the good faith covenant is an implied term of a contract, the existence of a contractual relationship is thus a prerequisite for any action for breach of the covenant."). For the reasons explained above, since Plaintiffs' FAC does not sufficiently allege the existence of any contract between Plaintiffs and ICANN, Plaintiffs' claim for breach of the covenant of good faith and fair dealing must fail.[7]

A demurrer should be granted without leave to amend where "no amendment could cure the defect in the complaint[.]" *See Cansino v. Bank of Am.,* 224 Cal. App. 4th at 1468. Given that Plaintiffs have already had the opportunity to amend their complaint once and have not cured any of the deficiencies identified in this Court's Order, there is no basis for granting Plaintiffs leave to amend.

B. Plaintiffs Fail to State a Claim for Fraudulent Inducement (Count Five).

Plaintiffs again fail to plead a cause of action for fraudulent inducement with specificity because there are no facts to support a claim of fraud. "As with all fraud claims, the necessary elements of a concealment/suppression claim consist of (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to

[6] In their breach of contract action, Plaintiffs allege entry into a "binding agreement" with ICANN. (FAC ¶142.) Then in their quasi-contract claim, Plaintiffs allege that "an implied contract at law is [] presumed to exist" for their quasi-contract claim. (FAC ¶ 162.) Yet, Plaintiffs' quasi-contract claim still alleges entry into "an *implied or actual contract* with ICANN and/or its agents that is specified or governed by ICANN's policies and procedures." (Compl. ¶ 152; FAC ¶ 163) (emphasis added). Plaintiffs cannot have it both ways, and neither is accurate.

[7] Furthermore, even if there was a contract between ICANN and Plaintiffs, Plaintiffs do not allege facts to support allegations that ICANN acted unfairly and in bad faith. (*See* FAC ¶ 158).

defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage." *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1185–86 (2014) (internal quotation marks and citations omitted). "In civil actions for fraud [i]t is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." *People v. Croft*, 134 Cal. App. 2d 800, 802 (1955) (internal quotation marks and citations omitted). This standard is heightened for fraud actions against a corporation, which requires a plaintiff to plead, among other things, "the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

This Court's Order correctly noted that, in the original Complaint, Plaintiffs did not plead this claim with specificity or "clearly allege that ***ICANN promised*** Plaintiffs that they could, in fact register single character domain names." (Order at 4) (emphasis added). Plaintiffs have not cured this deficiency because Plaintiffs cannot allege that ICANN made a promise or representation about Plaintiffs' "right" to automatically register the ASCII gTLD versions of certain second-level single-character domain names. Indeed, the only statement Plaintiffs try to point to is a statement ***by Verisign*** that was not even directed to Plaintiffs. Moreover, Plaintiffs misrepresent Verisign's letter by excerpting only a portion in Exhibit A2, with no identifying information, and mislabeling it as an "ICANN Policy." (FAC ¶ 19; Exhibit A2.)

Plaintiffs' FAC also fails to contain ***any*** factual allegations supporting that ICANN had knowledge of the alleged falsity or the intent to defraud Plaintiffs. Instead, Plaintiffs' FAC is filled with vague statements like "ICANN intentionally concealed or ratified the concealment of an important fact from Plaintiffs, namely that ICANN did not intend to follow its published policies and procedures[.]" (*See* FAC ¶¶ 171–173.) Such conclusory allegations cannot salvage this claim. The fact is that ICANN had no such interaction with Plaintiffs. And, regardless, Plaintiffs' FAC still fails to allege ***who*** at ICANN made the allegedly fraudulent representations and ***when*** such representations were made, which is required for a fraud action against a

corporation. (*See* FAC ¶¶ 170–178); *see Archuleta v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 262 Cal. App. 2d 202, 208–209 (1968) (sustaining plaintiffs' demurrer without leave to amend in part because plaintiffs failed to allege who at the corporation made the alleged fraudulent representations).

Additionally, "[a] fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." *Hoffman*, 228 Cal. App. 4th at 1186 (citing Cal. Civ. Code § 1710(3), defining deceit); *see also Lingsch v. Savage*, 213 Cal. App. 2d 729, 735 (1963). Indeed, even if there was a fact for ICANN to disclose, Plaintiffs do not allege that ICANN had any legal duty to disclose information directly to Plaintiffs. Like with Plaintiffs' other claims, leave to amend is not warranted because Plaintiffs cannot allege any facts showing ICANN committed or intended to commit fraud.

C. Plaintiffs Fail to State a Claim Under California's Business and Professions Code (Count One).

As this Court noted in the Order, Plaintiffs' claim for unfair competition is derivative of its fraudulent inducement claim and therefore must also fail. (Order at 5.) In order to state a claim under California Business and Professions Code § 17200 ("UCL"), a plaintiff must establish that the business practice or act is either unlawful, unfair, or fraudulent. *Berryman v. Merit Prop. Mgmt., Inc*., 152 Cal. App. 4th 1544, 1554 (2007). Plaintiffs again do not adequately plead conduct that is unlawful, unfair or fraudulent. The "unlawful" prong of the UCL borrows from violations of other laws, and Plaintiffs ***must*** plead facts to support allegations that the defendant violated such laws. *Id.* (noting that "***a violation of another law is a predicate*** for stating a cause of action under the UCL's unlawful prong") (emphasis added). Plaintiffs do not plead or identify any *independent statute* that ICANN has allegedly violated.[8] As such, Plaintiffs assertion that ICANN engaged in "unlawful" conduct must fail as a matter of law. (FAC ¶ 127–132.)

With regard to the "unfair" prong of the UCL, an "act or practice is unfair if the consumer

[8] The only statutes Plaintiffs mention are California Evidence Code § 669, which Plaintiffs do not contend ICANN violated (Opp'n at 8), and CCP § 1021.5, which is a procedural rule. (FAC ¶¶ 123, 139.) Neither are independent statutes ICANN could violate in support of a UCL claim.

injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, ***and is not an injury the consumers themselves could reasonably have avoided***." *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006) (emphasis added). The burden is on a plaintiff to show why the unfair conduct was not allowed. *Berryman*, 152 Cal. App. 4th at 1555 (sustaining a demurrer under the UCL and finding plaintiff's allegations insufficient, noting that "we are unaware of any statutory or case law that requires a for-profit business to point to a statute or contract that allows it to charge a fee for a service."). Plaintiffs' vague and conclusory allegations do not meet the burden of showing that ICANN was *prohibited by law* from acting a certain way. Indeed, Plaintiffs cannot point to ***any*** statement by ICANN even suggesting that Plaintiffs have, much less granting Plaintiffs, the "sole right" to operate the ASCII gTLD versions of the single-character second-level domain names at issue. (*See generally* FAC.)

Even if there was an injury to Plaintiffs (which there is not in the absence of a binding "ICANN Policy"), Plaintiffs' mistaken assumption ***does not*** equate to unfair action on ICANN's part. Plaintiffs ***chose*** to use their own unreasonable judgment by relying on a letter that was ***not*** directly on point, ***not*** written by ICANN, ***not*** intended to form binding policy, and ***not*** intended for Plaintiffs. Notably, Verisign's letter explicitly notes that the letter was intended to "provide ICANN with more detail about [Verisign's] IDN.IDN ***plans***." (FAC ¶ 35, n. 3 (emphasis added).) Unsurprisingly, Plaintiffs do not quote this portion of Verisign's letter. Moreover, common sense dictates that Plaintiffs' rendering of the alleged "policy" in Verisign's letter is untenable—for instance, different registrants may register <A. 닷컴> and <A. コム>; however, both such registrants could not then be automatically entitled to register <A.com>. (FAC ¶ 37.)

With regard to the "fraudulent" prong, Plaintiffs claim that ICANN acted fraudulently, but like their fraudulent inducement claim, Plaintiffs do not plead their UCL claims with any specificity or particularity and fail to state a claim on that basis. (*See generally*, FAC); *Gutierrez v. Carmax Auto Superstores Cal.*, 19 Cal. App. 5th 1234, 1261 (2018) ("[C]auses of action under the CLRA and UCL must be stated with reasonable particularity[.]").

Additionally, Plaintiffs lack standing to bring a § 17200 claim. In order to bring a claim

under the UCL, a plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011). Plaintiffs cannot meet this burden because ICANN did not make a statement (nor can Plaintiffs allege it did) that: (1) Plaintiffs are automatically entitled to the ASCII gTLD versions of the domains listed in Exhibits B1 or B2; or (2) was deceptive or caused injury to Plaintiffs. In other words, ***ICANN did not cause an economic injury*** to Plaintiffs such that Plaintiffs can sue under the UCL. *See Ivie v. Kraft Foods Glob., Inc*., 961 F. Supp. 2d 1033, 1047 (N.D. Cal. 2013) (plaintiffs lacked standing to bring UCL claim relating to statements on defendant's webpage).

III. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS.

A. Plaintiffs Lack Standing to Sue ICANN for a Breach of Its Bylaws and Policies.

Plaintiffs lack standing to pursue a claim that ICANN has breached its Bylaws and policies. In California, "[e]very action must be prosecuted in the name of the real party in interest except as otherwise provided by statute." CCP § 367; *see Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 175 (2007) ("In general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.'") (citation omitted). The purpose of the real party in interest requirement is to prevent "a defendant, against whom a judgment may be obtained, from further harassment or vexation at the hands of other claimants to the same demand." *Giselman v. Starr*, 106 Cal. 651, 657 (1895). "Where the complaint shows the plaintiff does not possess the substantive right or standing to prosecute the action, 'it is vulnerable to a general demurrer on the ground that it fails to state a cause of action.'" *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 955 (2005) (citation omitted). Here, for the reasons stated above, Plaintiffs—having no relationship, contract, or interaction with ICANN—do not have a legally protected interest against ICANN to assert any claim.

B. Plaintiffs Lack Standing to Challenge Agreements to Which They Are Not a Party.

Plaintiffs likewise lack standing to sue ICANN for violations of its "agreements" with the U.S. Department of Commerce and Verisign. (*See* FAC ¶ 105.) Indeed, *Kremen v. Cohen*, 337 F.3d. 1024, 1029 (2003)—a case previously cited by Plaintiffs—held that the plaintiff (a registrant) ***lacked*** the ability to sue on agreements and documents where the plaintiff was not a clear intended beneficiary. Yet, Plaintiffs allege that by "ignoring Plaintiff FPI's request to release Single-Character domain names and preventing Plaintiffs from registering and using the single-character domain names at the .com and .net TLD, ICANN is arbitrarily discriminating against Plaintiffs and in so doing is violating its policies and Bylaws and its PICs and its DoC Agreement." (FAC ¶ 105.) First, there is no such discrimination. Second, Plaintiffs are not a party to such agreements and have not pled facts to establish that they have a legal interest or were an intended beneficiary to any agreement ICANN entered into with the Department of Commerce. Similarly, Plaintiffs cannot challenge in court the Public Interest Commitments ("PICs"), which are provisions in the Registry Agreements between ICANN and Verisign. Plaintiffs are not a party to those Registry Agreements; and those Registry Agreements explicitly state that "[t]his Agreement will not be construed to create any obligation by either ICANN or Registry Operator to any non-party to this Agreement, including any registrar or registered name holder," and that "commitments shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN." (FAC ¶¶ 57, 91 & n. 45.)

CONCLUSION

For the foregoing reasons, ICANN respectfully requests that this Court sustain ICANN's demurrer and dismiss Plaintiffs' Amended Complaint with prejudice.

Dated: April 15, 2024

JONES DAY

By: */s/ Jeffrey A. LeVee*
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