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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, INC., a California corporation, and DOES 1-10,

Defendants.

Case No.: 23STCV19554

PLAINTIFFS' OPPOSITION TO DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, INC.'S DEMURRER

Complaint Filed:	August 16, 2023
Judge:	Hon. Stephen I. Goorvitch
Hrng Date:	December 7, 2023
Time:	8:30 AM
Dept.:	39

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I. INTRODUCTION

ICANN's demurer states that "All seven of Plaintiffs' claims fail for the same fundamental reason—there simply is no relationship between ICANN and Plaintiffs that could support any of the causes of action." Thus, ICANN acknowledges that its entire demurer is based on a single repetitive argument.

But that argument fails for many reasons, including an important fact ICANN fails to acknowledge: Each and every year, in violation of its own policies and corporate bylaws, ICANN renews the single-character domain names at issue, thus depriving Plaintiffs of the ability to utilize those domain names. For example, each time ICANN renews its registration for 1.com, that prevents Plaintiff FPI from registering 1.com, even though under ICANN policy, FPI is entitled to register 1.com and ICANN is prohibited from registering any domain names, including 1.com. ICANN is essentially parking in Plaintiffs' parking spaces.

Further, under the contractual regime that ICANN set up for every domain name it authorizes, renews, or transfers, ICANN receives a portion of Plaintiffs' and other registrants' payments,[1] and has incorporated ICANN's policies and procedures into that regime.[2] Thus, a relationship exists where ICANN takes Plaintiffs' money and subjects Plaintiffs to its policies, while simultaneously interfering with Plaintiffs receiving the full value of their expenditure in violation of those same policies. ICANN's remaining protestations go to the credibility of Plaintiffs' claims, and that issue is for a jury to determine.[3]

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[1] https://www.icann.org/resources/pages/registrar-fees-2018-08-10-en ("**Transaction-based fees** are assessed on each annual increment of an add, renew or a transfer transaction that has survived a related add or auto-renew grace period. This fee will be billed at US$0.18 per transaction for registrars operating under the 2009 or 2013 RAA."); Cmplt. n.14 (linking to section 7.2 "Fees to be Paid to ICANN").

[2] https://www.icann.org/resources/pages/benefits-2013-09-16-en (stating that registrants "must comply with the terms and conditions posted by your Registrar, *including applicable policies from* your Registrar, *the Registry and ICANN*.").

[3] See *Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, (1983) 35 Cal. 3d 197, 213–14 ("It is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations or the accuracy with which he describes the defendant's conduct. A demurrer tests only the legal sufficiency of the pleading. It 'admits the truth of all material factual allegations in the complaint.; the question of plaintiff's ability to prove these allegations, or the possible difficulty in making such proof does not concern the reviewing court.' … Defendants' contention that the words and images used do not constitute such misrepresentations, and did not conceal material facts, frames an issue for trial, not demurrer.").

Under ICANN's view, it can act with complete impunity, arbitrarily depriving any domain name registrant of its rights and interests. For example, under the position advocated in the demurer, ICANN could take control of X.com, and there is nothing Twitter or Elon Musk could do about it.

As it stands, ICANN allows Twitter to use X.com as well as ICANN allowed Elon Musk Priority Access to register the same Hebrew .com equivalent (X.קום) and allowed X.com to register the Hangul .com equivalent (X.닷컴), but ICANN unfairly disallows Plaintiffs the same access to register and use their single character domain names, like A.com. Similarly, ICANN allows all registrants of .コム, .닷컴, and .קום – for Katakana, Hangul, and Hebrew – to use the equivalent English .com top-level domains, except for Plaintiffs, whom ICANN blocks each year from using their .com and .net versions.

ICANN's demurer sets up a variety of red herrings and cites many cases with no relevance to the claims at issue. Adding to the confusion, ICANN inexplicably addresses Plaintiffs' causes of action out of order. This Court should not grant a demurer based on ICANN's effort to confuse the issues.

One of ICANN's main points of induced confusion involves the letter ICANN posted from Verisign. ICANN falsely infers that this letter was sent and posted at random. The facts alleged in the Complaint are as follows:

- ICANN solicited from its Registries, including Verisign, a policy concerning how registrations in Hangul, Hebrew, and Katakana would be transliterated into English. *See,* Cmplt., ¶ 42 and ¶ 43.
- Verisign in response to that request wrote the letter. *Id.*, ¶¶ 54-55.
- ICANN stated that, with respect to that transliteration policy ("ICANN-adopted policy"), registrants could rely on policies created by the Registries. *Id.*, ¶¶ 48, 56, 58, 62.[4]

[4] *See also*: "ICANN-adopted policy (and references to ICANN "adopt[ing]" a policy or policies) refers to a Consensus Policy adopted by ICANN (i) in conformity with applicable provisions of its articles of incorporation and bylaws and Section II.C of this Agreement and (ii) of which Registrar has been given notice and a reasonable period in which to comply.
b) The gaining Registrar shall retain a record of reliable evidence of the authorization.
2) In those instances when the Registrar of record is being changed simultaneously with a transfer of a domain name from one party to another, the gaining Registrar shall also obtain appropriate authorization for the transfer. Such authorization shall include, but not be limited to, one of the following:
a) A bilateral agreement between the parties.
b) The final determination of a binding dispute resolution body.
c) A court order.

- ICANN posted the letter on its website and did not further disclaim that registrants could rely on that letter or other policies by the Registries. *Id.*, ¶¶ 58-59, 63.

- Plaintiffs independently relied on these representations to reach the same conclusion: that registering the single-character domain names in Hebrew, Hangul, and Katakana entitled them to register the single-character domain names in English for .com and .net. *Id.*, ¶ 60.

- Plaintiffs clearly did rely on these representations, as they registered and own between them at least 33 single character .com/.net domain names in Hebrew, Hangul, or Katakana. *Id.,* ¶ 6 and Exhibits A1 and A2.

The credibility of these claims is entirely for the jury to decide, and ICANN invites the Court to commit reversible error by asserting otherwise.[5]

II. LEGAL STANDARD

A complaint must contain "a statement of the facts constituting the cause of action, in ordinary and concise language." Code Civ. Proc.§ 425.10. The "facts" to be pleaded are those upon which liability depends - i.e., "the facts constituting the cause of action." *Doe v. City of Los Angeles* (2007) 42 Cal. 4th 531, 550. "(T)he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal. 4th 861, 872. Thus, a plaintiff need only plead such facts as are necessary "to acquaint a defendant [or cross-defendant] with the nature, source and extent of his claims." *Doe,* 42 Cal. 4th at 550.

A general demurrer challenges the legal sufficiency of a pleading. *Johnson for Johnson v.Los Angeles County* (1983) 143 Cal. App. 3d 298, 306. This challenge to the pleadings may not rely on any extrinsic evidence and may be sustained only if the complaint is incomplete or discloses a defense that would bar recovery. *Jon Equip. Corp. v. Nelson* (1980) 110 Cal. App. 3d 868, 881 (trial court erred in considering extrinsic facts asserted in demurrer papers).

Notably, in ruling on a general demurrer, the Court must accept ***all of the material facts***

...In all cases, the losing Registrar shall respond to the email notice regarding the "transfer" request within five (5) days. Failure to respond will result in a default "approval" of the "transfer."
https://www.ntia.doc.gov/files/ntia/publications/doc_nsi_icann_19990928.pdf

[5] *See* note 3.

alleged in the complaint as true. *Smiley v. Citibank* (1995) 11 Cal.4th 138, 145, 146; *see also, Colberg v. California* (1967) 67 Cal.2d 408, 412. Indeed, the sole issue raised in this context is whether the facts pleaded give rise to a cause of action, not whether the contentions themselves ultimately prove to be true. *Cundiff v. GTE California* (2002) 101 Cal. App. 4th 1395, 1405 (in reviewing the sufficiency of the complaint on demurrer, the Court accepts alleged facts as true: "[w]e do not concern ourselves with whether the plaintiffs will be able to prove the facts which they allege in their complaint"); *see also, Del. E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. Applying these principles here, the subject Demurrer must be overruled in its entirety.

III. ARGUMENT

As ICANN has explained, "ICANN is a unique model and therefore ICANN accountability structures do not fit into any one traditional definition."[6] Irrespective of ICANN's accountability structures, California Courts have made clear that:

> Fundamental in our jurisprudence is the principle that for every wrong there is a remedy and that an injured party should be compensated for all damage proximately caused by the wrongdoer. Although we recognize exceptions from these fundamental principles, no departure should be sanctioned unless there is a strong necessity therefor.

Crisci v. Sec. Ins. Co. of New Haven, Conn., (1967) 66 Cal. 2d 425, 433.

What necessity for departure exists here? That ICANN, in violation of its own policies, wants to keep the domain names at issue for itself? These are the justifications of the domain name warehousing miser and the hoarder, an anathema to the free and fair competition ICANN agreed to uphold.[7] ICANN is like Aesop's miser who buried his gold only to have it stolen, whereupon his friend

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[6] https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf

[7] "NSI [VeriSign & Public Interest Registry] and ICANN agree as follows:...(ii) prohibitions on warehousing of **or speculation in** domain names by registries or registrars;". See Domain Name Agreements between the U.S. Department of Commerce, Network Solutions, Inc., and the Internet Corporation for Assigned Names and Numbers (ICANN) (September 28, 1999);
..."For the adjudication of disputes concerning or arising from use of the SLD name, the SLD holder shall submit, without prejudice to other potentially applicable jurisdictions, to the jurisdiction of the courts (1) of the SLD holder's domicile and (2) where Registrar is located."
..."In all litigation involving ICANN concerning this Agreement (whether in a case where arbitration has not been elected or to enforce an arbitration award), jurisdiction and exclusive venue for such litigation shall be in a court located in Los Angeles, California, USA"..."Resolution of Disputes Under This Agreement. Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved in a court of competent jurisdiction"

consoled him with "Bury a stone there instead. It will be as much use to you as the gold was, and you won't have to worry about anyone stealing it."[8] While deploying hyperbole, ICANN feigns that accountability here will open ICANN to liability to "billions of internet users", but this is a unique situation, where ICANN is warehousing less than 40 subject domain names within a specific category, which it cannot do, is acting as a registrar, which it cannot do, and tried to sponsor a speculation scheme to auction and transfer one of the subject domain names, Q.com, which it also cannot do.

Furthermore, domain names have inherent value. As the Ninth Circuit explained while applying California law:

> Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name—whether by typing it into their web browsers, by following a hyperlink, or by other means—are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars and they are now even subject to in rem jurisdiction *see* 15 U.S.C. § 1125(d)(2).
>
> Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall. Kremen therefore had an intangible property right in his domain name.

Kremen v. Cohen (9th Cir. 2003) 337 F.3d 1024, 1030 (holding that a registrant could allege a claim of conversion against a registry that improperly transferred the domain name to another); *accord Off. Depot, Inc. v. Zuccarini*, (N.D. Cal. 2007) 621 F.Supp.2d 773, 777, *aff'd,* (9th Cir. 2010) 596 F.3d 696 (holding domain names are subject to levy under a writ of execution).

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.."Resolution of Disputes Under This Agreement. Disputes arising under or in connection with this Agreement, including requests for specific performance, shall be resolved in a court of competent jurisdiction"
See Domain Name Agreements between the U.S. Department of Commerce, Network Solutions, Inc., and the Internet Corporation for Assigned Names and Numbers (ICANN) (September 28, 1999)
https://www.ntia.doc.gov/files/ntia/publications/doc_nsi_icann_19990928.pdf

[8] https://aesopsfables.org/F72_The-Miser.html. For a citation more apropos to the Holiday season, *see* Charles Dickens, A Christmas Carol 73 (1843) ("[Scrooge's] wealth is of no use to him. He don't do any good with it. He don't make himself comfortable with it. He hasn't the satisfaction of thinking—ha, ha, ha!—that he is ever going to benefit US with it.").

A. Plaintiffs Have Sufficiently Stated a Claim for Declaratory Relief (Count One).

The existence of an actual controversy relating to the legal rights and duties of the respective parties, as Plaintiffs have alleged here, suffices to maintain an action for declaratory relief. Code of Civil Procedure section 1060 is clear:

> Any person interested under a written instrument, … or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, … may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court … for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract.

Plaintiffs have indisputably alleged an interest in their Single-Character domain names and their rights and ICANN's obligations under ICANN's own written policies which, by the way and as alleged by Plaintiffs, are intended by ICANN itself to determine how ICANN governs internet domain names. *See*, Cmplt., ¶¶ 101-103, 108.

ICANN's argument that the Complaint fails to allege a "recognized or cognizable legal theor[y]" is grounded on the baseless assertion that "ICANN did not take any action that violated Plaintiffs' legal rights" (Demr., ¶ 21:16-18), which is belied by the analysis in *Kremen* and the facts alleged in the Complaint. As alleged, ICANN "controls the worldwide issuance or release of the relevant domain names" and publishes its own policies and Bylaws which affirmatively represent the manner "in which it will issue or release internet domain names" (Cmplt., ¶ 100), but then refuses to abide by such policies and procedures. Plaintiffs' interests—in the form of their right to use their Single-Character domain names and the diminution of value of their Single-Character domain names—are at risk and the justiciable controversy is ripe. This is not the type of unripe claim that was at issue in ICANN's cited authority of *Otay Land Co. v. Royal Indem. Co.*, (2008) 169 Cal.App.556, where the plaintiff was seeking a declaratory judgment on "*anticipated* insurance coverage" of an alleged tortfeasor. *Id.* at 558-59. Rather, here Plaintiffs have a legally cognizable interest in their Single-Character domain names that ICANN is unilaterally controlling at its whim, and contrary to its own published policies, procedures, and agreements. The factual allegations alleged in the Complaint reveal that an actual controversy exists

between the parties one that is "definite and concrete, touching the legal relations of parties having adverse legal interests," and "sustaining a demurrer when the complaint reveals such a controversy constitutes error." *Id.*

B. Plaintiffs State a Claim Under the Unfair Competition Law (Count Two).

Plaintiffs have asserted one UCL cause of action, alleging that Defendant's practices are unlawful under all three prongs: unlawful, fraudulent, and unfair. ICANN argues that Plaintiffs fail on all three prongs. Because ICANN did not file a motion to strike, to prevail on its demurrer it must win on all three because a general demurrer may not be sustained as to a portion of a cause of action. *See Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal. App. 4th 1150, 1167.

1. Plaintiffs have standing to allege UCL violations.

"Standing under the UCL is ... limited to those who have 'suffered injury in fact and [have] lost money or property as a result of ... unfair competition.' Bus. & Prof. Code, § 17204. Accordingly, to bring a UCL action, a plaintiff must be able to show economic injury caused by unfair competition." *Prager Univ. v. Google LLC*, 85 Cal. App. 5th 1022, 1041 (2022), *review denied* (Mar. 15, 2023) (quoting *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326).

Here, Plaintiffs have alleged both forms of standing. They lost money in that they paid ICANN $0.18 for each domain name they registered or renewed each year and ICANN is denying them the ability to fully exercise their property rights in the domain names.

In *Kremen*, the Ninth Circuit addressed the issue of "whether registrants have property rights in their domain names," under California law. *Kremen*, 337 F.3d at 1030. The court answered in the affirmative, concluding that a registrant has "an intangible property right in his [or her] domain name . . .." *Id.* Moreover, the Court explained the value of domain names "like other forms of property, domain names are valued, bought and sold, often for millions of dollars . . .." *Id.* at 1024. ICANN is actively depriving Plaintiffs of their property rights to utilize, if not sell, domain names that have true value, which ICANN proved when it began the process of auctioning O.com, which Plaintiff First Place owns.

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2. Plaintiffs Allege *Unlawful* Acts.

ICANN argues Plaintiffs failed to allege the unlawful prong while focusing on only Complaint ¶ 112, which alleges violations of the unfair prong. *See*, Demr., 19. Plaintiffs do not allege a violation of the California Evidence Code to meet the "unlawful" prong of their UCL claim, as ICANN incorrectly asserts. *Id.* Rather, Plaintiffs argue the Evidence Code, which ICANN concedes applies to this action (*id.*, at 19:21-26) results in ICANN being presumed to have failed to exercise due care because it violated the UCL § 17200. *See* Cmplt., ¶¶ 111-113.

"A claim made under section 17200 'is not confined to anticompetitive business practices, but is also directed toward the public's right to protection from fraud, deceit, and unlawful conduct. Thus, California courts have consistently interpreted the language of section 17200 broadly.'" *Wilson v. Hynek* (2012) 207 Cal. App. 4th 999, 1007. "Nonetheless, '[w]hether any particular conduct is a business practice within the meaning of section 17200 is a question of fact dependent on the circumstances of each case.'" *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.* (C.D. Cal 1998) 12 F. Supp. 2d 1035, 1048 (quoting *People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 322). ICANN ignores that the Complaint is replete with unlawful conduct including fraudulently inducing Plaintiffs to rely on ICANN's policies regarding single-character domain names and purchasing such domain names. *See*, Cmplt., ¶¶ 114-115, 120-125.

At the very least, ICANN has aided and abetted its agents in refusing to issue the single-character domain names Plaintiffs purchased. *Decarlo v. Costco Wholesale Corp.*, No. 14CV00202 JAH-BLM, 2020 WL 1332539, at *5 (S.D. Cal. Mar. 23, 2020) ("Liability may be imposed on those who aid and abet another's violation of the UCL if the individual knows the other's conduct constitutes a violation and gives substantial assistance or encouragement to the other to so act.") (citing *People ex rel. Harris v. Sarpas* (2014) 225 Cal. App. 4th 1539, 1563). Here, ICANN knows that Plaintiffs purchased the single-character domain names and that either it or its agent is refusing to release the domain names to Plaintiffs in violation of ICANN's policies.

3. Plaintiffs Allege *Fraudulent* Acts.

ICANN argues that Plaintiffs have not plead a fraudulent violation of the UCL with reasonable

particularity. *See*, Demr., 20. Plaintiffs here ***do*** allege that ICANN engaged in fraud that violates the UCL. Specifically, Plaintiffs alleged the following facts:

- ICANN's publication of VeriSign's July 11, 2013 Letter explicitly instructs, or reasonably intends that, the general public can rely upon VeriSign's [registry] IDN implementation strategy ("ICANN-Adopted Policy") in its entirety." *See*, Cmplt., ¶ 58.
- Each year ICANN improperly acts as a registrar for the Single-Character domain names, contrary to prohibitions that "ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN." *Id.* at ¶ 85.
- ICANN "tried to conceal the identity of its chosen non-profits that would reap the auction proceeds from selling O.com, which conduct violated its supposed policy of conducting its business in an 'open and transparent' manner." *Id.* at ¶ 91.
- ICANN is "knowingly and willfully making false and misleading claims regarding its promise to comply with its own policies and procedures regarding the issuance of Single-Character domain names listed in Exhibits A1 and A2." *See*, *Id.* at ¶¶ 111-119.

These ultimate facts alleged in the Complaint establish ICANN's violation of the UCL in that they show ICANN's actual deception. Plaintiffs have also alleged that such deception misled Plaintiffs and induced Plaintiffs "to purchase the Single-Character domain names," *Id.* at ¶ 116, "caused Plaintiffs to expend money in reliance on ICANN's policies, contractual promises and governing mandates," *Id.* at ¶ 124, and resulted in Plaintiffs' "loss of money, the loss of use of their Single-Character domain names, the diminution of value of their Single-Character domain names, and the loss of use of their personal rights and interests." *Id.* at ¶ 125.

ICANN's By-Law 2.3 states that ICANN will apply its policies fairly and not "inequitably or single out any particular party for disparate treatment." *See*, Cmplt., note 11. Yet, Plaintiffs have demonstrated that ICANN has released X.com in both English (ASCII) as well as the Hangul .com equivalent (X.닷컴) while preventing Plaintiffs from enjoying the same rights.

ICANN presents no additional basis for demurrer on the fraud prong of the UCL claim. "[T]he 'fraud' contemplated by section 17200's [fraudulent] prong bears little resemblance to common law fraud or deception. The test is whether the public is likely to be deceived …. This means that a section

17200 violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage." *Prata v. Superior Ct.* (2001) 91 Cal. App. 4th 1128, 1146. "Likely to be deceived" and "reasonable person" standards are fact-based inquiries. "The question whether consumers are likely to be deceived is a question of fact that can be decided on a demurrer only if the facts alleged in the complaint, and facts judicially noticed, compel the conclusion as a matter of law that consumers are not likely to be deceived." *Chapman v. Skype Inc.* (2013) 220 Cal. App. 4th 217, 226–27 ("We also need not decide whether Skype's use of the word "Unlimited" in this context is deceptive as a matter of law, but only whether the trier of fact reasonably could conclude that consumers are likely to be deceived."). Plaintiffs have pleaded that they were in fact deceived by ICANN's publications and in reliance thereon paid money to ICANN – and have continued to do so each year - for their single-character domain names. At this stage of the proceedings, the Court is required to accept as true Plaintiffs allegations and those reasonable inferences drawn from the allegations. It is up to the jury to determine whether ICANN's statements were deceptive and if Plaintiffs' reliance on them was reasonable.

4. Plaintiffs Allege Unfair Acts.

"The 'unfair' prong of the UCL creates a cause of action for a business practice that is unfair even if not proscribed by some other law." *In re Anthem, Inc. Data Breach Litig.* (N.D. Cal. May 27, 2016) No. 15-MD-02617-LHK, 2016 WL 3029783, at *33; *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 181 ("[I]t would be impossible to draft in advance detailed plans and specifications of all acts and conduct to be prohibited [citations], since unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery.").

ICANN argues Plaintiffs allegations of unfair conduct are conclusory and Plaintiffs cannot show that ICANN granted Plaintiffs the right to operate the domain names they purchased. *See,* Demr., 20. However, Plaintiffs have alleged in detail that they relied on ICANN's specific policies and purchased domain names that would allow them to own the ASCII version. It is patently unfair for ICANN to release for use X.com and its Hangul version while depriving Plaintiffs of that same benefit. It is also unfair for ICANN's By-Laws to require it to act fairly as to all its customers and not

discriminate against any of them when ICANN has released transliterated domain names to others except for the Plaintiffs. Plaintiffs have pleaded sufficient facts to establish that ICANN's conduct has been unfair and it should be left to the jury to determine if that conduct violates the UCL.

Finally, unlike the complaint at issue in *Berryman* that ICANN cites, Plaintiffs have also alleged that ICANN's conduct is unfair, unlawful, fraudulent, and harmful to the general public. *See*, Cmplt., ¶ 117. Plaintiffs' allegations are thus more than sufficient to withstand the demurrer.

C. Plaintiffs State a Claim for Breach of Contract, Quasi-Contract, and Breach of the Duty of Good Faith and Fair Dealing (Counts Three through Five).

1. Breach of Contract (Count Three).

Given ICANN's lack of relevant citations, whether ICANN's policies create a contract with Plaintiffs seems to be an issue of first impression. *See*, Demr., 14. According to ICANN, "Consumers do not contact registries directly in order to purchase a domain name registration. Instead, consumers (or 'registrants') **may obtain the contractual right to use second-level domain names** through companies known as 'registrars.'" *See,* Cmplt., ¶ 24. So, ICANN has conceded that Plaintiffs and other registrants have contractual rights to use second-level domain names. Further, according to ICANN, a "Domain Name Registrants' Responsibilities" include that "You must comply with the terms and conditions posted by your Registrar, *including applicable policies from* your Registrar, *the Registry and ICANN*."[9] So ICANN views its and Verisign's policies as binding on Plaintiffs. But not the other way around, apparently.

As ICANN states, "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)." *See*, Demr., 14.

ICANN then argues that the Complaint fails to identify any contract or specific provisions ICANN breached. That is simply false. The Complaint identifies numerous policies and Bylaws that

[9] https://www.icann.org/resources/pages/benefits-2013-09-16-en

ICANN breached. Further, ICANN received payment from Plaintiffs for each domain name registered, and continues to receive payment for each renewal,[10] so ICANN's claim that "[t]here has simply been no interaction between ICANN and Plaintiffs that could give rise to ***any*** written, oral, or implied by conduct contract" (Demr., 14) is false.

Plaintiffs are performing on that contract in the form of payment, and ICANN is failing to perform by following the policies ICANN and its Registry created. Given that Plaintiff did allege facts showing a breach of contract and no controlling legal authority exists stating that the ICANN policies and receipt of payment cannot form a contract between a registrant and ICANN, it should be for the jury to determine this issue.

2. Plaintiffs State a Claim for Breach of the Duty of Good Faith and Fair Dealing (Count Four).

ICANN claims that without a contract, this claim must fail. As shown above, Plaintiffs have pleaded the elements of a contract. ICANN challenges no other aspect of this claim, so if the contract claim survives, this claim must as well.

3. Plaintiffs State a Claim for Quasi-Contract (Count Five).

ICANN argues that Plaintiffs cannot maintain both an action in contract and quasi-contract. The issue of whether Plaintiffs have a contract or quasi-contract, however, is for the jury to determine if both are sufficiently alleged in the complaint. As held in *Fremont Indemnity Co. v. Fremont General Corp.*:

> On a demurrer a court's function is limited to testing the legal sufficiency of the complaint. 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable. *Joslin,* at page 375 stated further, "'judicial notice of matters upon demurrer will be dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed.'"

Fremont Indemnity Co. v. Fremont General Corp., (2007) 148 Cal. App. 4th 97, 113-114.

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[10] https://www.icann.org/resources/pages/registrar-fees-2018-08-10-en ("**Transaction-based fees** are assessed on each annual increment of an add, renew or a transfer transaction that has survived a related add or auto-renew grace period. This fee will be billed at US$0.18 per transaction for registrars operating under the 2009 or 2013 RAA.").

ICANN correctly states that "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*, (N.D. Cal. 2017) 277 F.Supp.3d 1077, 1094 (citing *Peterson v. Cellco P'ship*, (2008) 164 Cal. App. 4th 1583, 1593). Plaintiffs plead both elements: (1) ICANN receives a benefit each and every year that ICANN and Plaintiffs renew the domain names listed on Exhibits A1 and A2 (ICANN gets money from Plaintiffs and also gets to keep the domain names); and (2) ICANN unjustly retains those funds and domain names at Plaintiffs' expense, because Plaintiffs cannot use those domain names so long as ICANN keeps renewing them.

Further, ICANN's retention is unjust because each time it renews those domain names in its own name, ICANN is violating its own bylaw to "not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities [like Plaintiffs] affected by the policies of ICANN." *See*, Cmplt., ¶¶ 27, 77. The retention is also unjust because in renewing those domain names (as opposed to X.com), ICANN is discriminating against Plaintiffs in favor of Elon Musk in violation of its non-discrimination policy, which says that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment". *Id.*

D. Plaintiffs State a Claim for Negligence (Count Six).

Plaintiffs make numerous allegations, based on ICANN's own words, that ICANN owes a duty of care to Plaintiffs. For example:

> **ICANN does not sell anything or make anything; its functions are noncommercial and in support of the public interest**. *See*, Cmplt., ¶ 24.

> ICANN … **does not participate in any market**, and **its Bylaws expressly forbid it from participating in any of the markets**... *Id.*

> ICANN has signed numerous subsequent contracts with the DoC [Department of Commerce] which have conferred upon **ICANN the authority and responsibility to** coordinate the DNS **in the public interest** by, among other things, **promoting competition and consumer choice in the DNS marketplace**. *Id.*

> The **Corporation shall operate for the benefit of the Internet community** as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent

> appropriate and consistent with these Articles and its Bylaws, **through open and transparent processes that enable competition and open entry in Internet-related markets**. *Id.*
>
> As noted above, **one of ICANN's core values in support of its mission is to create competition within the DNS**. *Id.*
>
> ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. *Id.* at ¶ 27.
>
> ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN. *Id.* at ¶ 27.

So, yes, by its own hand, ICANN did assume duties to Plaintiffs, as well as every other member of the internet community. Having ignored these key allegations in the demurer, ICANN will reassert that it has no duty to "billions of internet users across the globe" (Demr., 16),[11] but despite this hyperbole, ICANN *chose* to assume a duty to Plaintiffs through its bylaws and policies.

Indeed, ICANN would not exist but for its agreement to take on this duty, as the foundational conceptual document for ICANN required that it "operate as a private entity for the benefit of the Internet community as a whole." 63 Fed. Reg. 31749 (June 10, 1998). In that document, the Department of Commerce further stated that:

> The new corporation's processes should be fair, open and pro-competitive, protecting against capture by a narrow group of stakeholders. Typically, this means that decision-making processes should be sound and transparent; the basis for corporate decisions should be recorded and made publicly available.

63 Fed. Reg. 31750 (June 10, 1998). These foundational requirements were thereafter stated in ICANN's Bylaws and policies and widely publicized to those registering domain names.

It is plain that in this instance ICANN violated these duties by: scheming to auction and transfer the O.com domain name; operating in its own interest by warehousing the domain names for itself; not being open or transparent by providing no rationale for holding the domain names and

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[11] Neither *Banerian v. O'Malley*, (1974) 42 Cal. App. 3d 604, 612, nor *Berryman v. Merit Prop. Mgmt., Inc.*, (2007) 152 Cal. App. 4th 1544, 1559, cited by ICANN, even remotely imply that an action must be dismissed if it imposes a duty to billions of internet users across the globe or some similarly situated large class of persons, particularly where a defendant chose to assume such an obligation.

hiding the proposed recipient of funds in the O.com auction; not enabling competition, but rather suppressing its duties and policies for a portion of a specific category of domain names; discriminating against Plaintiffs by allowing some registrants to use single character domain names but not Plaintiffs and by allowing some registrants to use the English transliterations for their domain names but not Plaintiffs; acting as a registrar; and competing with Plaintiffs who are entities affected by the policies of ICANN. *See*, Cmplt., ¶ 85.

Further, ICANN admits it has taken on duties to the Department of Commerce respecting domain name registration. *See*, Cmplt., ¶ 24, ¶ 25 and ¶ 26. It is black-letter law that:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered …
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Rest. 2d of Torts, § 552.

The California Supreme Court in *Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 409-10, *as modified* (Nov. 12, 1992) ratified the applicability of Section 552 and held that all persons in a "position as suppliers of information and evaluations for the use and benefit of others…may also face suits by third persons claiming reliance on information and opinions generated in a professional capacity."

There can be little genuine dispute that ICANN issued its policies and expected that people, like Plaintiffs, would rely on ICANN's policies in purchasing domain names. ICANN has clear liability for its published policy statements particularly because relies on its policies to derive a pecuniary interest in that it charges $0.18 for each registered or renewed domain name. Further, the duties undertaken for the Department of Commerce are clearly for the protection of internet registrants like Plaintiffs, and

ICANN is, therefore, subject to liability for damage to Plaintiffs' rights and interests for increasing the risk of such harm and because Plaintiffs relied on ICANN to follow its policies.

Moreover, "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." Civ. Code § 1708. Plaintiffs suffer injuries arising from being prevented from fully using and enjoying all rights associated with their property. *Kremen*, 337 F.3d at 1030. Like the plaintiff in *Kremen*, Plaintiffs have spent a considerable amount of money and effort to acquire the unique single-character domain names and ICANN's refusal to follow its own policies is preventing Plaintiffs from fully accessing and using them. *Id.* ("Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall.").

Plaintiffs disagree that this claim involves "purely economic losses", meaning financial harm unaccompanied by physical or property damage. *Sheen v. Wells Fargo Bank, N.A.,* (2022) 12 Cal. 5th 905, 922. This claim also concerns ICANN depriving Plaintiffs of their rightful interests. *See*, Cmplt., ¶ 164 ("ICANN's breach of its duty of care proximately caused injury to Plaintiffs, who cannot register and use the Single-Character domain names in accordance with ICANN policies."). Damages for the inability and inconvenience of not being able to operate websites under the domain names are clearly non-economic. *See* Cal. Civ. Code § 1431.2.[12] The fact that this complaint involves both economic and non-economic loss completely negates ICANN's remaining argument.

But even if this is a solely economic loss case, the *Biakanja* and *J'Aire* factors as set forth in *S. California Gas Leak Cases*, (2019) 7 Cal. 5th 391, 401, justify imposing a special relationship:

(i) "the extent to which the transaction was intended to affect the plaintiff".

FPI is the only entity that purchased the domain names listed in Exhibit A1, and Tallman is the

[12] ("(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities. (2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.").

only person that purchased the domain names listed in Exhibit A2. ICANN's yearly registration of the domain names was only intended to affect these Plaintiffs.

(ii) "the foreseeability of harm to the plaintiff".

It is obviously foreseeable that by not releasing the domain names, each Plaintiff would suffer harm, as each Plaintiff is being deprived of the opportunity to utilize their domain names.

(iii) "the degree of certainty that the plaintiff suffered injury".

No doubt exists that each Plaintiff is suffering injury by not being able to use the domain names, and ICANN makes no argument that they are not.

(iv) "the closeness of the connection between the defendant's conduct and the injury suffered".

Because ICANN is holding the domain names and re-registering them each year in violation of its own policies, there is a direct connection between ICANN's conduct and Plaintiffs' injuries associated with not being able to use the domain names.

(v) "the moral blame attached to the defendant's conduct".

As set forth above, ICANN is violating its policies of non-discrimination, transparency, promoting competition, not acting as a registry, not selling anything, not participating in any markets, and not competing with domain name registrants.

(vi) "the policy of preventing future harm".

If ICANN is allowed to treat Plaintiffs differently, what is to stop ICANN from doing something similar in the future? If ICANN decided, for example, to register X.com for itself as it does each year with Plaintiffs' single-character domain names, it would cause a massive disruption to not only Elon Musk's business but to millions of X.com f/k/a Twitter users.

Further, ICANN has assumed fiduciary duties to Plaintiffs and other registrants. As California courts acknowledge:

> It is difficult to define that additional element [imposing a fiduciary duty] precisely, and courts have traditionally refrained from definitions that would place strict limits on this equitable concept. It would appear, however, that before a person can be charged with a fiduciary obligation, he must either knowingly undertake to act

> on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law.

Comm. On Children's Television, Inc. v. Gen. Foods Corp., (1983) 35 Cal. 3d 197, 221. Here, the fiduciary obligation is clear, as demonstrated above by ICANN's own statements. ICANN knowingly undertook to act on behalf and for the benefit of the internet community as a whole. ICANN even acknowledges it is a fiduciary, stating that "*At all times*, the Board will continue to make all decisions in furtherance of ICANN's mission, *under consideration of its duty of care and its fiduciary responsibility*."[13] ICANN was set up to have fiduciary responsibilities to the internet community. Indeed, attorney Kathryn Kleiman, in "[h]elping set up ICANN 20 years ago" candidly confessed that she "applied principles of fiduciary duty she'd learned from [her professor], 'running the internet for the benefit of the world.'"[14]

ICANN's only policy argument is that "If Plaintiffs are in a special relationship with ICANN, it would follow that all other registrants and billions of individual Internet users are as well." ICANN then adds the conclusory statement that "such policy factors could never weigh in favor of finding a duty owed by ICANN." *See*, Demr., 17. First, there is a difference between other registrants, whose domain names ICANN controls, and "billions of individual Internet users" who are accessing those domains. Second, violating the very policies designed to protect domain name registrants "should be discouraged and not protected by immunity from civil liability, as would be the case if plaintiff[s], the only person[s] who suffered a loss, were denied a right of action." *Biakanja v. Irving*, (1958) 49 Cal. 2d 647, 651.

E. Fraudulent Inducement (Count Seven).

ICANN asserts that because the Complaint "fails to contain ***any*** allegations that ICANN knew of the falsity or the intent to defraud Plaintiffs" and that it "fails to state *who* at ICANN made the allegedly fraudulent representations and *when* such representations were made," Plaintiffs' fraudulent inducement claim must fail as a matter of law. *See*, Demr., 18:17-28, citing *Tarmann v. State Farm Mut.*

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[13] https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-25-10-2018-en#2.f (emphasis added).

[14] https://www.bu.edu/articles/2018/tamar-frankel-retiring-from-law-faculty/

Auto. Inc. Co., (1991) 2 Cal.App.4th 153, 157. As the California Supreme Court has explained, however, the purpose of these specificity requirements is to provide notice to the defendant of the charges against it and to allow the court to determine whether, on the face of the complaint, there is a foundation for the charge of fraud. *Committee on Children's Television, Inc.*, 35 Cal.3d at 216. Among the recognized exceptions to such requirements is when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy," in which case "less particularity is required" because "the facts lie more in the knowledge of the opposing party." *Id.* (internal citations omitted). That is precisely the case here. As alleged by Plaintiffs, ICANN intentionally concealed the fact that it had no intention to follow its published policies and procedures governing the release of Single-Character domain names (over which it has exclusive control), it intentionally concealed the fact "that it would retain for itself or for the financial benefit of entities that it controls" the release of Single-Character domain names, and it intentionally concealed the fact "that it would release Single-Character domain names to certain limited persons or entities" at its whim and not on a fair, impartial or non-arbitrary basis. Plaintiffs alleged that these intentional concealments of important facts were "made with the intent to deceive Plaintiffs or induce Plaintiffs to rely on the concealment," that Plaintiffs "did justifiably rely" when they purchased and registered their Single-Character domain names in reliance on ICANN's published policies and procedures governing their release *and* in reliance on the omitted facts that ICANN would not follow those policies and procedures, and that Plaintiffs have been harmed by such reliance. *See*, Cmplt., ¶¶ 167-173.

As these and the Complaint's other allegations make clear, not only does ICANN "necessarily possess full information concerning the facts" it concealed from Plaintiffs (and presumably others in the general public who have relied on ICANN's published policies and procedures governing the release of Single-Character domain names), ICANN is *the only* party possessing full knowledge of those concealed facts. Thus, ICANN's demand that Plaintiffs plead the specificity that is only in the hands of ICANN is disingenuous, and the Demurrer on this ground should be overruled.

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IV. PLAINTIFFS HAVE STANDING.

A. Plaintiffs are the Real Parties in Interest to Sue ICANN for a Breach of Its Bylaws and Policies.

As ICANN acknowledges, "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.'" *See*, Demr., 22, citing *Giselman v. Starr*, (1895) 106 Cal. 651, 657. ICANN has failed to identify any claimants to this same demand for the single-character domain names listed on Exhibits A1 and A2. Indeed, no other claimants exist because Plaintiffs have secured the sole rights to register those domain names through the registration policies.

Even if the relationship between Plaintiffs and ICANN was as attenuated as ICANN says – and it is not – Plaintiffs would still have standing to protect their interest in their domain names, which are exclusive sole rights and interests. *Kremen*, 337 F.3d at 1030. As an example, if a company arbitrarily parked its bulldozer across a landowner's driveway preventing any access to the property, the company could not assert that the landowner had no standing to sue because the company and the landowner are strangers. Here, ICANN indisputably keeps renewing the single-character domain names year after year, and that repeated act prevents Plaintiffs from using those domain names year after year. Each year, ICANN blocks Plaintiffs' access to their exclusive sole rights and interests, a fact ICANN ignores in its demurer.

As another example, when one company's property rights and interests are taken by another company, the company has standing to file suit to retrieve the property interests even if the two companies have no contractual or other relationship. Here, ICANN is indisputably warehousing Plaintiffs' domain names and acting in direct competition with Plaintiffs' interests for the rights to register those single-character domain names, something ICANN's bylaws and the Department of Commerce expressly prohibit.

ICANN argues that its status as a public benefit corporation negates Plaintiffs' standing. *See*, Demr., 22. Yet public benefit corporations are not immune from suit when wrongfully possessing another's rights and interests. See, e.g., *Hagman v. Meher Mount Corp.,* (2013) 215 Cal. App. 4th 82, 85

("In this boundary dispute, one neighbor seeks to quiet title by adverse possession to an adjoining piece of his neighbor's land that he inadvertently fenced in and later improved. The unusual twist is that the neighboring land on which the adverse possession took place belongs to a nonprofit religious organization. We hold that a nonprofit religious organization's status as a "public benefit corporation" does not make it a "public entity" immune from adverse possession under Civil Code section 1007."). Indeed, even assuming that this case involves a dispute over assets subject to a charitable trust – which ICANN fails to establish – Cal. Corp. Code § 5142(a)(4) expressly states that a "person with a reversionary, *contractual*, or *property interest* in the assets subject to such charitable trust" may "bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust." Plaintiffs plainly have an exclusive sole right and interest in the domain names at issue.

ICANN's citation to *Hardman v. Feinstein* (1987) 195 Cal. App. 3d 157, 161–62, involved taxpayers suing over alleged *mismanagement* of an arts trust and has no application to this case. *Id.* at 162 ("Accordingly, appellants, who have no special interest in the trust other than as taxpayers and members of the public, do not have standing to bring an action to enjoin the alleged mismanagement of the trust."). Plaintiffs are not claiming mismanagement. Plaintiffs are claiming that ICANN is warehousing and blocking Plaintiffs from accessing Plaintiffs' rights and interests. Plaintiffs have standing to sue to obtain that access irrespective of ICANN's corporate identity. Plaintiffs are claiming ICANN collects a transaction-based fee payment, not a tax. ICANN has no taxation authority claim.

B. Plaintiffs Have Standing to Sue Under ICANN's Agreements with Commerce and Verisign.

ICANN argues that Plaintiffs lack standing to sue ICANN for violating agreements between ICANN and the Department of Commerce ("DOC") or agreements between ICANN and its Registry, Verisign. *See*, Demr., 23. As shown in the breach of contract section, that is untrue.

Further, ICANN acknowledges by citation to *Biakanja v. Irving*, (1958) 49 Cal. 2d 647, 649, that "[r]ecovery has been allowed in some cases to a third party not in privity where the only risk of harm created by the negligent performance of a contract was to an intangible interest" when the third party was, to the defendant's "knowledge, the 'end and aim' of the transaction." Here, the "end and aim" of

ICANN's contracts with DOC and Verisign are internet registrants like Plaintiffs.

ICANN then misleadingly argues that the Verisign agreements "explicitly state that such 'commitments shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN.'" *See*, Demr., 23. The full text of that selective quotation actually reads:

> **Registry Operator** agrees to perform the following specific public interest commitments, which commitments shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN (posted at http://www.icann.org/en/resources/registries/picdrp)....

Following that link takes one to the "Public Interest Commitment Dispute Resolution Procedure (PICDRP)" page, which then links to the current pdf version of the "Public Interest Commitment Dispute Resolution Procedure",[15] which deals with the *compliance of the Registry Operator*, in this case, Verisign.[16] As the public record seems to demonstrate, ICANN – not Verisign – is the entity renewing the single-character domain names each year and holding those domain names for itself. The demurrer's suggestion that ICANN has the right to be the entity that requests a determination of whether *ICANN's* registration of these domain names violates *Verisign's* public interest commitments is simply further evidence of ICANN's unfair and deceptive practices and yet another reason to hold ICANN accountable.

V. ICANN SHOULD NOT BE PERMITTED TO RAISE NEW ARGUMENTS

ICANN's Reply cannot raise for the first time any new arguments that it did not first substantively argue in its demurrer. "Any new substantive arguments raised by Watchtower in its reply brief are deemed forfeited." *Padron v. Watchtower Bible & Tract Soc'y of New York, Inc.* (2017) 16 Cal. App. 5th 1246, 1267; *American Drug Stores, Inv. v. Stroh* (1992) 10 Cal. App. 4th 1446, 1453 (noting arguments "raised for the first time in a reply brief will ordinarily not be considered because such consideration

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[15] https://newgtlds.icann.org/sites/default/files/picdrp-01feb20-en.pdf

[16] *See e.g.*, PICDRP § 1.1 ("Any person or entity that believes they have been harmed as a result of *a Registry Operator's act or omission* in connection with the operation of its gTLD that is non-compliant with its PICs may report such alleged non-compliance by the Registry Operator ("Reporter") using this procedure."), § 4.1 ("The role of the Panel will be to, upon request by ICANN, evaluate *compliance by the Registry Operator* with its obligations under Part A above.") (emphasis added).

would deprive the respondent of an opportunity to counter the argument"); *see generally*, Weil & Brown et al., Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2018) ¶ 9:106.1, p. 9(l)–91 (trial court is likely to refuse to consider new evidence or arguments first raised in reply papers); *see also id.*, ¶ 7:122.9, p. 7(l)–54 ("court may disregard arguments or grounds for demurrer first raised in a reply brief.").

VI. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND, IF NECESSARY

A general demurrer should not be sustained without leave to amend if the complaint raises the reasonable possibility that its defects can be cured by amendment. *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 157; *see also Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1044. Unless the complaint shows on its face that it is incapable of an amendment, denial of leave to amend constitutes an abuse of discretion. *Johnson*, 143 Cal.App.3d at 306; *Payne,* 91 Cal.App.4th at 1043–44 ("abuse of discretion" to sustain demurrer if "the plaintiff has stated a cause of action under any possible legal theory.").

Plaintiffs' allegations are more than sufficient to state their causes of action against ICANN. If, however, the Court disagrees, Plaintiffs respectfully request they be given leave to amend to allege the relevant additional factual detail.

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VII. CONCLUSION

Plaintiffs have uncontested sole rights and interests to register and use the same second-level .com/.net English script domain names (SLDs) identified in Exhibits A1 and A2 under ICANN-adopted policy, where Plaintiffs paid in consideration ICANN's contractual transaction-based fees.

For the reasons set forth herein, Plaintiffs respectfully request that the Court overrule Defendants' demurrer in its entirety. Alternatively, Plaintiffs respectfully request that the Court grant them leave to amend.

Dated: November 22, 2023

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