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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. Tony L. Richardson

DEFENDANT ICANN'S REPLY IN SUPPORT OF DEMURRER TO PLAINTIFFS' VERIFIED FIRST AMENDED COMPLAINT

Date: October 3, 2024
Time: 8:30 a.m.
Dept: 39

Complaint Filed: August 16, 2023

Reservation ID: 379209426336

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INTRODUCTION

Plaintiffs' Opposition to ICANN's Demurrer makes clear that the First Amended Complaint ("FAC") should be dismissed in its entirety with prejudice. The Court sustained ICANN's demurrer to the initial complaint, and Plaintiffs have failed to cure ***any*** of the fatal defects that caused the Court to sustain the demurrer. Plaintiffs' fundamental theory of the case—that they somehow have the automatic right to register the same second-level domains in .COM as they have registered in other top-level domains (FAC ¶ 3)—fails because ICANN has never made any statement or issued any "policy" that entitles Plaintiffs to that relief. Plaintiffs will never be able to allege otherwise, which is why this Demurrer should be sustained without leave to amend.

Plaintiffs still cannot point to any contract or agreement between Plaintiffs and ICANN or any ICANN policy on which Plaintiffs relied for their ludicrous assumption. Putting aside Plaintiffs' vague references to ICANN's Bylaws or ICANN's alleged fiduciary obligations—none of which address the issue that is the focus of the FAC—the totality of Plaintiffs' alleged support for its allegations in the FAC is a letter from Verisign to ICANN in 2013 that ICANN posted on its website, along with thousands of other letters from the Internet community that ICANN posts in accordance with its transparency efforts under its Bylaws. It would be preposterous to interpret every statement in every one of the thousands of letters posted on ICANN's website as "ICANN policy" on which the entire Internet community could justifiably rely. Nor do Plaintiffs offer any other explanation as to why Verisign's statements in a letter from over ten years ago constitutes ICANN policy.

In an attempt to save their deficient FAC, Plaintiffs claim that ICANN's arguments in its Demurrer raise a number of "factual disputes" that should persuade the Court to overrule the demurrer. But Plaintiffs cannot simply cry "factual dispute" as a way to relieve them of their obligation to sufficiently plead their allegations. The law is 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). Such is the case here.

Moreover, Plaintiffs flagrantly disregarded Court rules by filing their Opposition late and ***ten pages*** too long, leaving ICANN just three court days to respond to the oversized brief. The Court should exercise its discretion to disregard Plaintiffs' Opposition.

ARGUMENT

I. PLAINTIFFS FAILED TO COMPLY WITH THE CALIFORNIA CODE OF CIVIL PROCEDURE AND LOCAL RULES.

Plaintiffs' Opposition failed to comply with the applicable rules in two key respects, both of which resulted in prejudice to ICANN. First, despite having ***five months*** to prepare their Opposition, Plaintiffs filed the Opposition late. According to California Code of Civil Procedure section 1005, Plaintiffs' Opposition was due September 19, nine court days before the October 3 hearing, taking into account the September 27 Court holiday. Yet Plaintiffs did not file their Opposition until after the close of business on September 20. As a result, Plaintiffs had over 100 court days to prepare their Opposition, while ICANN had just three court days for its Reply.

Second, California Rule of Court 3.1113(d) is clear that any motion and opposition cannot exceed 15 pages. Yet Plaintiffs' Opposition is 25 pages.[1] As a result, ICANN requests that the Court exercise its discretion and refuse to consider Plaintiffs' Opposition. *See* California Rule of Court 3.1300(d) (authorizing the Court to use its discretion to refuse to consider a late-filed paper); *id*. at Rule 3.1113(g) ("A memorandum that exceeds the page limits of these rules must be filed and considered in the same manner as a late-filed paper"); *Jack v. Ring LLC*, 91 Cal. App. 5th 1186, 1210 (2023) (upholding trial court's decision to refuse to consider late filings).

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER CALIFORNIA'S BUSINESS AND PROFESSIONS CODE.

A. Plaintiffs lack standing to pursue a claim under the UCL.

In order to have standing 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.

[1] Plaintiffs use their lengthy 25 pages to raise extraneous issues. Given the limited space for its Reply, ICANN focuses on the issues relevant to this Demurrer and does not attempt to respond to Plaintiffs' every argument, but will respond to any questions the Court may have at the hearing.

4th 310, 322 (2011). It is impossible for ICANN to cause the economic injury Plaintiffs allege when ***ICANN did not make any statement*** that entitles Plaintiffs to register the domain names they seek. *See Ivie v. Kraft Foods Glob., Inc*., 961 F. Supp. 2d 1033, 1046–47 (N.D. Cal. 2013) (plaintiffs lacked standing to bring UCL claim relating to statements on defendant's webpage).

B. Plaintiffs do not properly allege unfair conduct under the UCL.

Under the unfair prong of the UCL, Plaintiffs have the burden to show why ICANN is not permitted to take certain action. *Berryman v. Merit Prop. Mgmt., Inc.,* 152 Cal. App. 4th 1544, 155 (2007) (finding plaintiff's allegations insufficient and 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 service."). The same logic applies here: ICANN is not required to point to a statute or case that allows it to act. Rather, ***Plaintiffs*** must identify a statute or case that prohibits the conduct. But Plaintiffs cannot do so because, no matter how many times Plaintiffs cite ICANN's Bylaws or other disparate sources, Plaintiffs cannot point to any ***ICANN*** statement or policy that entitles Plaintiffs to the "sole right" to register and operate the domain names they seek.

Plaintiffs claim that they could not reasonably have avoided the alleged injury because they "had no notice or indication that ICANN would not comply with its own policies." (Opp. at 11.) This argument, however, incorrectly assumes an ICANN policy on the issue, but Plaintiffs cannot point to ***any*** statement by ICANN—much less an ICANN policy—suggesting that Plaintiffs have the "sole right" to operate the ASCII gTLD versions of the domain names at issue. Plaintiffs' mistaken assumption does not equate to unfair action on ICANN's part.

The only thing that is clear from the FAC is that Plaintiffs chose to use their own unreasonable judgment to rely on a letter from 2013 that was ***not*** directly on point, ***not*** written by ICANN, ***not*** intended to form binding policy, and ***not*** intended for Plaintiffs. Indeed, Verisign's letter explicitly notes that the letter was intended to "provide ICANN with more detail about [Verisign's] IDN.IDN ***plans***," which Plaintiffs conspicuously omit in the FAC. (FAC ¶ 35, n.3 (emphasis added).) Any alleged "substantial consumer injury" (Opp. at 10) is of Plaintiffs' own making.

Plaintiffs claim that, because they allegedly met with Verisign's General Counsel (the person who signed the letter to ICANN), then that means Plaintiffs' belief that the Verisign letter formed an ICANN policy was "reasonable." (Opp. at 14.) How a meeting with a third party equates to confirmation of ICANN policy is still unclear. Plaintiffs do not allege that ICANN was in this meeting, knew about the meeting, or in any way stated that it had created any such policy. Plaintiffs also argue that Elon Musk's ability to operate "X.com" somehow renders Plaintiffs' beliefs reasonable. This argument is non-sensical: Plaintiffs fail to explain how another registrant's (Musk) operation of a single-character domain (X.COM) gives Plaintiffs the unfettered and sole right to operate the single character domain names they seek simply because they registered a name in a foreign language (which they do not even allege that Musk did). Nor do they explain how ICANN is responsible for Musk's operation of X.COM, as they have admitted that ICANN is neither a registry operator nor a registrar. (FAC ¶ 22.) Plaintiffs then vaguely cite to a number of what Plaintiffs call "ICANN policies," none of which actually comprise an ICANN policy upon which Plaintiffs were "reasonable" to rely for their belief that they magically were entitled to certain domain names.

C. Plaintiffs do not properly allege unlawful acts under the UCL.

As the California Supreme Court stated in *Berryman v. Merit Prop. Mgmt., Inc.,* 152 Cal. App. 4th 1544 (2007), "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." *Id.* at 1554. But the FAC does not reference any statute that ICANN has allegedly violated.[2] Instead, in their Opposition, Plaintiffs argue for the first time that their UCL claim is predicated on ICANN's purported violation of Cal. Civ. Code § 1708. A demurrer, however, "tests the legal sufficiency of factual allegations in a complaint," not Plaintiffs' after-the-fact arguments in opposition to a demurrer. *Rakestraw v. Cal. Physicians' Serv.*, 81 Cal. App. 4th 39, 42–43 (2000) (citing *Title Ins. Co. v. Comerica Bank-California*, 27 Cal. App. 4th 800,

[2] Plaintiffs reference Evidence Code § 669 in the FAC, but then state that "Plaintiffs do not allege a violation of the California Evidence Code to meet the 'unlawful' prong of their UCL claim," which further highlights the unintelligible nature of their FAC. (Opp at 14–15). Indeed, despite directly referring to Evidence Code § 669, with no explanation for its reference, Plaintiffs now admit this is not a statute ICANN violated, and the FAC offers no additional basis for their claim under the unlawful prong of the UCL. (*See* FAC ¶ 123.)

807 (1994) (emphasis added); *see also Rodas v. Spiegel*, 87 Cal. App. 4th 513, 517–518 (2001) (finding that the court could only consider facts pleaded in plaintiff's complaint, facts capable of judicial notice, and admissions in plaintiff's opposition to demurrer). Even so, Plaintiffs would still be required to plead facts to support their allegations, which Plaintiffs have not done, nor could they, for all of the reasons set forth in ICANN's Demurrer and this Reply. *See Berryman,* 152 Cal. App. 4th at 1554 ("While purporting to incorporate its factual allegations by reference, the [complaint] nonetheless fails to plead facts to support its allegations that [the defendant] has violated each of these statutes.").

D. Plaintiffs do not properly allege fraudulent acts under the UCL.

In the Opposition, Plaintiffs claim that because they alleged that they "were in fact deceived by ICANN's publications," this claim should survive. (Opp. at 16.) Plaintiffs, however, ignore their burden to plead this claim with specificity or particularity, just as they did in the original complaint. *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[.]"); Order at 4.

Moreover, as Plaintiffs concede (Opp. at 15), the standard is whether members of the public are likely to be deceived, not whether Plaintiffs unreasonably were deceived. *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 838 (2006); *Bardin v. DaimlerChrysler Corp*., 136 Cal. App. 4th 1255, 1275 (2006) (holding that plaintiff's complaint "merely conclude[d] the public would likely be deceived, without pleading any facts showing the basis for that conclusion"). Here, the Court can and should find Plaintiffs' allegations insufficient and their "expectations" unreasonable at the demurrer stage, as Plaintiffs have failed to sufficiently allege that "members of the *public* are likely to be deceived" by ICANN's publications. *Daugherty*, 144 Cal. App. 4th at 838 (emphasis added). The far more likely scenario is that no members of the public would mistakenly believe that a third-party letter posted on ICANN's correspondence webpage somehow constitutes a "resolved ICANN policy[.]" (*See* FAC ¶¶ 74–

75.)[3]

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF CONTRACT.

Plaintiffs' Opposition does not advance any arguments and Plaintiffs' FAC does not allege any new allegations that are sufficient to overcome the shortcomings previously identified by this Court, which warranted dismissal of the original complaint. (*See* Order at 2–3.) Once again, Plaintiffs argue that they entered into a contract with ICANN based on ICANN's policies, but the Court, in its order dismissing the original complaint, identified the many reasons why Plaintiffs' theory did not state a claim. (Order at 1–3.) The Court's reasoning still applies.

First and foremost, Plaintiffs have not alleged an actual contract between Plaintiffs and ICANN, as this Court previously found. (Order at 2–3.) Indeed, the Court noted in its Order that "[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 the Court's admonition, Plaintiffs still 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 (nor could they).[4] (*See* FAC ¶¶ 140–151; Order at 2.) Plaintiffs merely allege in conclusory fashion 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.) Plaintiffs then quote in the FAC from various disparate (and often irrelevant) sources and claim that they form part of an imaginary contract with ICANN, apparently taking the position that verbatim quotes from random sources equate to a contract (which they obviously do not). Absent an actual binding contract between ICANN and Plaintiffs, there can be no breach.

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[3] Plaintiffs also identify a number of purported "ICANN policies" about which the public could be deceived (Opp. at 16) but, again, these allegations lack any sort of specificity or particularity.

[4] Plaintiffs also misrepresent their relationship with ICANN. Despite multiple claims that "ICANN takes Plaintiffs' money[,]" Plaintiffs do not allege any facts 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 "do[es] not assume the truth of contentions, deductions or conclusions of fact or law.") (internal quotation marks omitted). ICANN does ***not*** directly receive money from registrants such as Plaintiffs, nor can Plaintiffs allege that they have paid money to ICANN. Plaintiffs actually concede this in footnote 11 of the FAC. (FAC ¶ 40, n.11.)

Plaintiffs claim that the FAC "set[s] forth in plain English the specific policies that would constitute such a contract" and "explain in detail how ICANN receives funds from Plaintiffs." (Opp. at 19.) Not so. Plaintiffs do not identify the terms of any alleged contract with ICANN and do not attach the contract to the FAC.

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. The ***only*** statement that touches upon, but does not actually support, the relief sought is the letter from Verisign to ICANN, which obviously is not a contract between Plaintiffs and ICANN, no matter how many times Plaintiffs suggest otherwise. (FAC ¶¶ 3, 35–36.)

IV. PLAINTIFFS FAIL TO STATE A CLAIM FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING.

Plaintiffs' third claim for breach of the covenant of good faith and fair dealing further highlights the deficiencies with all of Plaintiffs' contract actions. Plaintiffs cannot identify any contract provisions tasking ICANN with a specific duty to deal fairly with Plaintiffs because there is no contract, which is required for any duty of good faith and fair dealing claim. *Racine & Laramie, Ltd. v. Dep't of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031-32 (1992). Simply alleging that ICANN violated its Bylaws or what Plaintiffs call "ICANN policies" does not create a contractual obligation on behalf of ICANN on which Plaintiffs could file suit.

V. PLAINTIFFS FAIL TO STATE A CLAIM FOR QUASI-CONTRACT.

Plaintiffs do not respond to ICANN's argument that the Court of Appeal's decision in *Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc*., 94 Cal. App. 4th 151 (2001) is on point. Plaintiffs want to maintain both an action for breach of contract *and* an action for breach of quasi-contract, but they cannot recover on both claims in the same suit, and they cannot sufficiently state either claim. Plaintiffs' quasi-contract claim 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." (FAC ¶ 163) (emphasis added). Yet, the law is clear that Plaintiffs cannot maintain a quasi-contract action for unjust enrichment based on an actual contract. *Lloyd v.*

Williams, 227 Cal. App. 2d 646, 649 (1964).

As for Plaintiffs' contention that ICANN retained an unjust benefit, *Cal. Med.* also held that any benefit conferred on defendants that was simply incident to their own obligations is not the basis for a quasi-contract action. *Cal. Med. Ass'n, Inc.*, 94 Cal. App. 4th at 174. Plaintiffs do not allege a specific benefit ICANN gets from allegedly holding certain domain names.

VI. PLAINTIFFS FAIL TO STATE A CLAIM FOR FRAUDULENT INDUCEMENT.

"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). Plaintiffs' Opposition does not contain any allegations that meet this burden. Indeed, even the case Plaintiffs cite notes the importance of the specificity requirement. *See Comm. On Children's Television, Inc. v. Gen. Foods Corp.*, 35 Cal. 3d 197, 216 (1983). First, specificity provides "notice to the defendant, to furnish the defendant with certain definite charges which can be intelligently met[;]" and second, "a complaint should be sufficiently specific that the court can weed out nonmeritorious actions on the basis of the pleadings. Thus, the pleading should be sufficient to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud." *Id.* at 216–17 (internal quotation marks and citations and omitted). In fact, this Court previously found that 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, nor can they: ICANN has never 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 identify was made ***by Verisign***, was not on point, and was not directed to Plaintiffs. (FAC ¶ 19; Exhibit A2.)

Plaintiffs contend that less specificity is permitted for Plaintiffs' fraud allegations because ICANN supposedly knows more about the alleged fraud than Plaintiffs. (Opp at 23.) Plaintiffs are wrong: less specificity is permitted only "when it appears from the nature of the allegations

that the defendant must necessarily possess full information concerning the facts of the controversy[.]" *Comm. On Children's Television, Inc.,* 35 Cal. 3d. at 217 (internal quotation marks and citations omitted). Here, the nature of the allegations reveal that ICANN possesses no more knowledge than Plaintiffs (and, in fact, ICANN possesses even less knowledge than Plaintiffs, since Plaintiffs have made this claim up out of whole cloth). ICANN posted a letter on its website, as is ICANN's standard practice,[5] and now has been sued because Plaintiffs allege (with no other facts) that the contents of that third-party letter magically constitute "ICANN policy."

Moreover, "[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," which is not the case here. *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1186 (2014) (citing Cal. Civ. Code § 1710(3), defining deceit) (emphasis added). Plaintiffs state in conclusory fashion that ICANN "has a legal duty and a policy . . . to be transparent" (Opp. at 22), but this conclusory allegation is plainly insufficient to withstand a demurrer. ICANN owed no legal duty to disclose anything to Plaintiffs, and Plaintiffs do not cite any authority that states otherwise. (*See* FAC ¶¶ 171–178 (merely using the word "concealment" ad nauseum in Count Five does not meet the specificity requirement).)

Plaintiffs also make the argument that because ICANN has allowed renewals of x.com, q.com, and z.com, this somehow supports Plaintiffs' claim. (Opp. at 21.) Plaintiffs' allegation is truly irrelevant. To be clear, Plaintiffs' claim is that, once they registered certain single-character domain names in foreign language script versions of .COM and .NET, then they were (apparently as a result of Verisign's letter) entitled to the "sole right" to register those same domains in the ASCII versions of .COM and .NET. This is completely unrelated to x.com, q.com, and z.com. There is no allegation in the FAC that this is what happened with respect to x.com, q.com, or z.com, nor is there any indication that anyone could reasonably rely on such an alleged "ICANN policy" in this respect.

[5] *See* https://www.icann.org/resources/pages/correspondence.

VII. PLAINTIFFS LACK STANDING TO SUE ICANN.

In Paragraphs 61, 64, 91, and 107 of the FAC, Plaintiffs cite to various alleged agreements to which Plaintiffs are not a party nor a beneficiary. Yet, inexplicably, Plaintiffs continue to argue that these alleged agreements somehow confer standing on Plaintiffs. (*See* Opp. at 23–25.) Even the case cited by Plaintiffs (*Kremen*) explicitly held that the plaintiff ***lacked*** the ability to sue on agreements and documents where the plaintiff was not a clear intended beneficiary. *Kremen* noted that in contracts with government entities, "[p]arties that benefit … are generally assumed to be incidental beneficiaries, and may not enforce the contract absent a clear intent to the contrary." *Kremen v. Cohen,* 337 F.3d 1024, 1029 (2003) (citation omitted). Notably, "[t]he contract must establish not only an intent to confer a benefit, but also 'an intention ... to grant [the third party] enforceable rights.'" *Id.* (citation omitted). The same is true with regard to the agreements (between ICANN and third parties) that Plaintiffs reference in their FAC—not only is there no clear intent, there is not even room for misguided interpretation to confer enforceable rights to Plaintiffs.

CONCLUSION

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

Dated: September 25, 2024

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