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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 FAC Filed: March 14, 2024 Judge: Hon. Tony L. Richardson Hrng Date: July 26, 2024 Time: 8:30 AM Dept.: 39

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I. INTRODUCTION

Initially, Plaintiffs wish to thank the Court for issuing its tentative order several days early and giving Plaintiffs leave to amend under the guidance of that opinion. That lead time obviated the need to travel from Maine, which was appreciated. The Court granted "leave to amend with respect to the second, third, fourth, fifth and seventh causes of action." Court Order, 2024-02-13, p. 4. Plaintiffs did so, filing their Verified First Amended Complaint ("FAC") on March 14, 2024.

Try as it might to raise factual challenges to Plaintiffs verified allegations, ICANN's arguments amount to nothing more than summary judgment type factual disputes. The paramount issue before the Court is whether, assuming all of Plaintiffs allegations are true, and reading those allegations broadly and in favor of Plaintiffs, the Plaintiffs sufficiently alleged claims upon which relief may be granted. The demurrer fails to apply that standard and instead attacks Plaintiff's verified allegations with unsupported facts. Such attacks are impermissible at this stage and wrongly attempt to impose on Plaintiffs a higher burden than is required to survive a demurrer.

One example highlights this point. In consumer cases like this one, when a plaintiff alleges the defendant violated Bus. & Prof. Code § 17200 by engaging in unfair acts, controlling precedent in this appellate district is that such claims are inherently factual disputes that should not be resolved by a demurrer. *Sepanossian v. Nat'l Ready Mix Co., Inc.*, 97 Cal. App. 5th 192, 201 (2023) (internal citation omitted) ("Whether a practice is ... unfair is generally a question of fact ... which usually cannot be [decided] on demurrer."), accord *Salazar v. Target Corp.*, 83 Cal. App. 5th 571, 579 (2022), *review denied* (Jan. 11, 2023) ("Thus, whether a reasonable consumer is likely to be deceived as a matter of law may be decided "only in 'rare situation[s].;").

ICANN's effort to factually challenge Plaintiffs' verified allegations is premature and impermissible. Under controlling demurrer standards, Plaintiffs have alleged claims with sufficient factual support to state claims that survive the demurrer. ICANN's demurrer should be overruled.

II. FACTUAL SUPPORT ALLEGED IN FAC SATISFIES DEMURRER STANDARD

The FAC immediately resolved the Court's core concern, which was Plaintiffs' apparent failure to quote one of the ICANN policies Plaintiffs were challenging. FAC ¶ 1 meets that obligation by quoting ICANN adopting a working group *recommendation* as ICANN's own *policy*. FAC ¶ 1.

On June 26, 2008, in Paris, France, ICANN adopted the following recommendation as ICANN Policy, which approved single-character domain names:

> **Single** and two-**character** U-labels on the top level and second level of a domain name **should not be restricted in general**. At the top level, requested strings should be analyzed on a case-by-case basis in the new gTLD process depending on the script and language used in order to determine whether the string should be granted for allocation in the DNS with particular caution applied to U-labels in Latin script (see Recommendation 10 below). **Single** and two character labels at the second level and the third level if applicable **should be available for registration**, provided they are consistent with the IDN Guidelines. <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

FAC ¶ 1 (bold emphasis added).

The specific language ICANN used in adopting the *recommendation* as its own *policy* was:

> Resolved (2008.06.26.02), 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 <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.[1]

FAC ¶ 1.

In response, ICANN argues that ICANN adopted the recommendation as ICANN's own recommendation to itself. Demr. at 12. ICANN argues without any support that it was a policy to be worked on in the future. *Id.* This is plainly a premature fact dispute issue that the Court cannot resolve at this stage. Because to adopt ICANN's version of the facts, the Court must suspend credulity and believe that ICANN, which claims to operate with full transparency, FAC ¶¶ 23, 51, 88, adopted this

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[1] https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-icanns-paris-meeting-26-06-2008-en#_Toc76113171 (first block quote) and https://www.icann.org/en/board-activities-and-meetings/materials/approved-resolutions-icanns-paris-meeting-26-06-2008-en#_Toc76113171 (second block quote). NOTE: The web addresses in the block quotes are part of the original quotations, and were not added by Plaintiffs.

recommendation to itself in 2008 and did nothing whatsoever related to it for the last 16 years. Has this continuing implementation been taking place in secret at the supposedly transparent ICANN? Yet, ICANN's effort to create an impermissible factual dispute is at war with itself. For ICANN's version to be true then there cannot be any single character domain names in existence, yet X.com fully operates Twitter and Z.com is also fully functional. Either ICANN has no policy permitting single character domain names as ICANN argues or the policy exists - as it clearly does for some single-character domain names - yet it is so opaque that ICANN refuses to cite even or acknowledge that one of the largest social media sites in the world, X.com, is built entirely on a single character domain name. That alone underscores Plaintiffs UCL claim for the unfair application of its single character domain name policy.

In addition, ICANN's argument, revealed for the first time in this latest demurer, will come as a surprise to the Internet community, as ICANN's Board adopted "the GNSO policy **recommendations**". FAC ¶ 1. The Working Group recommendation that "[s]ingle and two-character labels … should be available for registration" is recommendation #5 of 30 recommendations, spanning subjects going well beyond single-character domain names. FAC ¶ 1.[2] Until the latest demurrer, the internet community believed all 30 recommendations had been adopted as ICANN policies.

Further, as noted above, ICANN's latest litigation inspired argument is demonstrably false in practice: Single-character domain names have been registered or renewed every year. FAC ¶ 42. ICANN may dispute that factual allegation, but not at this stage of the litigation. More specifically, the FAC alleges the following:

a. This policy's existence is demonstrated by the fact that **X.com** was registered on 1993-04-02 and renewed on 2024-01-12.

b. This policy's existence is demonstrated by the fact that **Z.com** was registered on 1997-12-19 and renewed on 2023-12-02.

c. This policy's existence is demonstrated by the fact that **Q.com** was registered on 1999-03-30 and renewed on 2023-03-26.

[2] https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm. (link in FAC ¶ 1 leads to lengthy document containing multiple recommendations by the Working Group).

> d. This policy's existence is demonstrated by the fact that the domain names listed on Exhibits B1 and B2 were registered and renewed on the dates set forth on the Exhibits.

FAC ¶ 19. Plainly, ICANN has a policy permitting single-character domain names, which Plaintiffs have cited and are alleging that ICANN is applying in an unfair and discriminatory manner. See generally, FAC ¶¶ 1, 3-4, 20, 34, 40-48.

ICANN further "approved an amendment to its .com Registry Agreement to auction and sell the existing English script O.com domain name", FAC ¶ 62, which it logically would not have done unless ICANN policy allowed the use of single-character domain names. Discovery will reveal why ICANN abandoned the auction, but one logical inference – to which Plaintiffs are entitled at this stage – is that Plaintiffs' claims placed a cloud on O.com's title, making an auction unprofitable or impossible. *Stettner v. Mercedes-Benz Fin. Servs. USA, LLC*, 98 Cal. App. 5th 45, 51 (2023) (on a demurrer, the court is to "treat all material facts properly pleaded and all reasonable inferences which can be drawn therefrom as true.").

With respect to ICANN's policy concerning the transliteration of domain names, e.g., the policy that if a registrant owns a domain name in Hebrew that registrant also owns it in English, ICANN's arguments respecting ICANN's direction to registrants – in the absence of any policy posted by its "function" IANA – to look to the policies posted by the registries such as Verisign respecting the ownership of domain names across different languages, such as Hebrew and English, similarly raise fact issues and also lack credibility. Demr. at 12. ICANN's instructions to its customers were very clear: "If [Implementation] material fundamental to the understanding of a registry's IDN policies does not appear in the IANA Repository, it ["Implementation material"] will otherwise be made readily available online by the registry [VeriSign]". FAC ¶ 35. No such Implementation material appeared in the IANA Repository, so Plaintiffs were entitled to look to the registry, in this case VeriSign. That policy posted by VeriSign was also clear:

> Through this approach, a registrant of an IDN.com or IDN.net or registrant in one of our new IDN TLDs *will have the sole right*, subject to applicable rights protection mechanisms, but not be required *to register the same second level name across all or any of our IDN TLDS, including .com or .net TLD* as applicable…

> Use Case No. 2: John Doe does not have a registration for an IDN.com second-level domain name. John Doe registers a second level domain name in our Thai transliteration of .com but in no other TLD. *That second level domain name will be unavailable* in all other transliterations of .com IDN TLDs and *in the .com registry unless and until John Doe (and only John Doe) registers it* in another .com IDN TLD or *in the .com registry*.

FAC ¶ 36 (emphasis added).

VeriSign posted this policy on its website, *id.*, and also sent the policy in a letter to ICANN. FAC ¶35. ICANN also posted the letter on its website, *id.*, so Plaintiffs reasonably understood that ICANN was aware of the policy.

ICANN argues that the letter was essentially random correspondence and "was intended to 'provide ICANN with more detail about [VeriSign's] IDN.IDN ***plans***.'" Demr. at 21 (emphasis in original). But ICANN's attempt to create a factual dispute ignores FAC ¶ 36, in which Plaintiffs alleged "Plaintiffs further trusted ICANN Policy because, on July 12, 2013, VeriSign readily advertised fundamental material online". AC footnote 4 cited to that online material, specifically a document titled "Update on VeriSign's IDN Implementation Plans" that contains both Use Case #1 and Use Case #2 and states that "further details can be found in ***our notification letter to ICANN***". FAC n.4 (https://circleid.com/posts/20130712_update_on_verisigns_idn_implementation_plans/). **So according to VeriSign,** the letter was not random correspondence **but a "notification letter" setting forth a new policy.** *Id.* It is unfair for ICANN to now claim that a "notification letter" was random correspondence. Further, ICANN cannot argue at this stage of the proceedings that the letter was random correspondence because Plaintiffs allege that ICANN *solicited* the VeriSign letter. FAC ¶ 83.

In addition, Plaintiff FPI was invited in 2016 to VeriSign's headquarters to discuss the policy. FAC ¶ 38. In response to the invitation, FPI's representatives met with Pat Kane, who signed the VeriSign letter to ICANN, and VeriSign's General Counsel, as well as members of the Internet Commerce Association. *Id.* ICANN, meanwhile, had posted nothing in the IANA Repository contradicting the policy.

Plaintiffs therefore had every reason to believe that the policy of both ICANN and VeriSign was as stated on VeriSign's website and in the letter to ICANN. Plaintiff FPI believed and relied on this so strongly that it paid a "$25,285 premium price for the Hangul IDN 1.닷넷 with reasonable

expectation FPI had the sole right to register the same English script 1.net second-level domain name under ICANN Policy." FAC ¶ 39. To be clear, ICANN received a portion of Plaintiffs' registration fees each time Plaintiffs registered or renewed a registration. FAC ¶¶ 3, 40, footnotes 11-12, 47.

ICANN, however, argues without any support that the policy Plaintiffs relied upon was not a policy, but yet another recommendation to be implemented in the future. Demr. at 21. Yet, similar to the single-digit domain name policy, *for the past 11 years* no additional policies have been issued. And, in fact, in 2017, Elon Musk, holder of X.com, was given priority access to register x.com in other languages, just as set forth in Use Case No. 1. FAC ¶ 41. ICANN's position that Use Case No. 1 and No. 2 are not a "policy" lacks all credibility particularly in light of the single character domain names currently in use (as of today, for example, twitter.com redirects to X.com).

It is notable that ICANN scrupulously avoids explaining how Elon Musk can own and operate X.com when at the same time it argues in its demurrer that ICANN has no policy permitting the use of single character domain names. Plaintiffs also argue that ICANN cannot – by its own non-discrimination policy, FAC ¶ 55 – treat Elon Musk's X.com more favorably than Plaintiffs. That too is plainly "unfair" and violates Bus & Prof Code § 17200. FAC ¶¶ 40-48; 125, 134.

ICANN argues that "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>", Demr. at 21, but that is factually inaccurate. In fact, under ICANN's policy, the first registrant "will have the sole right … to register the same second level name across all or any of our IDN TLDS." FAC ¶¶ 35-36. So, different registrants may NOT "register <A. 닷컴> and <A. コム>". Regardless, the Court cannot entertain factual disputes in order to adjudicate a demurrer. ICANN's continued effort to argue unsupported facts is impermissible at this stage and underscores its meritless position.

III. 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. This proved difficult in the Original Complaint because ICANN communicates in jargon and unusual abbreviations. The FAC

remedied this problem through a section identifying ICANN's policies in plain English, with a reference to the paragraph setting forth the complete policy quotation as well as a link to the entire written instrument containing the policy (incorporated by reference). FAC ¶¶ 18-34.

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 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.

IV. ARGUMENT

As ICANN has explained, "ICANN is a unique model and therefore ICANN accountability structures do not fit into any one traditional definition." FAC ¶ 12. **This fact renders every case**

ICANN cites distinguishable because ICANN admits that it is held to entirely different accountability standards than any other entity. However, 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. As noted in Plaintiffs' prior Opposition, no necessity for departure exists here. ICANN merely mocked that assertion in its original reply to Plaintiff's opposition, but never provided any justification. [Reply at 15-16].

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).

A. Plaintiffs State a Claim Under California's Unfair Competition Law (UCL) (Count One).

At the outset, Plaintiffs' FAC clarifies that its UCL claim is not solely tied to its fraudulent inducement claim. *Compare* Court Order at 5 (sustaining the demurrer to the UCL because it "appears derivative of the fraudulent inducement claim"), *with* FAC ¶¶ 132 (alleging Defendant's practices are unlawful, unfair, *or* fraudulent). ICANN argues that Plaintiffs fail to sufficiently allege facts supporting all three prongs. "Because the statute is framed in the disjunctive, a business practice need only meet one of the three criteria to be considered unfair competition, and a cause of action under the UCL may be established independent of any contractual relationship between the parties." *Sepanossian*, 97 Cal. App. 5th at 200 (internal quotations omitted). In other words, Plaintiffs' UCL claim can survive under any – or each – of the three prongs and regardless of whether Plaintiffs and ICANN had a contractual relationship.

Notably, ICANN did not file a motion to strike. Thus, to prevail on its demurrer, ICANN 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. However, Plaintiffs clearly allege facts supporting each of the three prongs: unfair, unlawful, and fraudulent.

1. Plaintiffs Allege *Unfair* Acts.

Several months ago, the Second District Court of Appeal in *Sepanossian* confirmed the applicable test for consumers, such as Plaintiffs, to allege a UCL claim. For the unfair prong, the *Sepanossian Court* held: "a business practice is 'unfair' if (1) the consumer injury is substantial; (2) the injury is not outweighed by any countervailing benefits to consumers or competition; and (3) the injury could not reasonably have been avoided by consumers themselves." *Sepanossian*, 97 Cal. App. 5th at 201 (collecting authorities, internal quotations and citations omitted).

The unfair prong is not a claim that must be derivative of another unlawful act. Indeed, a claim under the unfair prong can survive demurrer in the absence of other unlawful conduct. "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.").

Finally, the controlling legal authority in this judicial district is that claims for unfair conduct should not be resolved at the demurrer stage. "Whether a practice is … unfair is generally a question of fact … which usually cannot be [decided] on demurrer." *Sepanossian*, 97 Cal. App. 5th at 201 (internal citation omitted).

Plaintiffs have adequately alleged each of the three unfair prongs. First, Plaintiffs alleged they purchased each of the single-character domain names in reliance on ICANN's policies and that ICANN receives a portion of all registration and renewal fees. FAC ¶¶ 3, 4, 40, 47. Plaintiff FPI paid a premium of $25,285 to register certain domain names, yet ICANN has not returned that money or released the domain names to FPI. FAC ¶ 39. Plaintiffs also alleged that this injury is substantial. FAC ¶¶ 117 (Plaintiffs deprived of the full value of their domain names), 135 (caused Plaintiffs to expend money in reliance on ICANN policies), 136 (Plaintiffs injured through "the 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 property interests."); *see also Kremen*, 337 F.3d at 1030 (recognizing the substantial value of and property interest in domain names).

Second, Plaintiffs' injury is not outweighed by a countervailing benefit to consumers. First, ICANN never explained any such benefit to its other customers by its discrimination against Plaintiffs, and ICANN cannot proffer any such arguments for the first time in its Reply. Regardless, the FAC explains that ICANN's conduct in releasing single character domain names such as X.com and Z.com, while denying Plaintiffs of the same benefits violates ICANN's non-discrimination policy and thus inherently injures all ICANN customers. FAC ¶¶ 40-48. ICANN's discriminatory conduct toward Plaintiffs cannot possibly have any countervailing benefit to other consumers. *Kremen*, 337 F.3d at 1030 ("Ensuring that [plaintiffs] reap the benefits of their investments [in domain names] reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall."). Finally, this inherently fact-based balancing test cannot be resolved at this stage in the proceedings. "Whether Defendants' public policy violation is outweighed by the utility of their conduct under the

balancing test is a question to be resolved at a later stage in this litigation." *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *33 (N.D. Cal. May 27, 2016).

Third, Plaintiffs could not reasonably have avoided the injury. Plaintiffs had no notice or indication that ICANN would not comply with its own policies, such as its non-discrimination policy. Elon Musk acquired X.com for the first time in 2000 and then reacquired that domain name in 2017. FAC ¶ 41. All Plaintiffs' domain names were purchased after 2000, and the majority after 2017. *See* FAC Exhs. B1 and B2. The reasonableness of Plaintiffs' conduct and their reliance on ICANN's policies and the manner in which ICANN released and authorized the use of other single character domain names are fact disputes that should be left to a jury. Plaintiffs had no way of knowing that ICANN would discriminate against them by not releasing the single character domain names they purchased after ICANN released X.com to Musk in 2000. Moreover, ICANN never explains – if it was not going to release the single character domain names to Plaintiffs – why ICANN took Plaintiffs' registration fees in the first instance. This is not one of the "rare" cases where the court can make this determination as a matter of law. *Salazar*, 83 Cal. App. 5th at 579 ("Thus, whether a reasonable consumer is likely to be deceived as a matter of law may be decided "only in 'rare situation[s].").

The FAC contains numerous allegations of ICANN's unfair practices. Specifically, Plaintiffs allege that "**It is ICANN Policy** that ICANN must treat all registrants the same and not discriminate against a registrant on any basis." FAC ¶ 20. Despite this policy to treat all registrants the same, Plaintiffs allege that the holders of x.com, z.com, and q.com are treated differently than Plaintiffs, as those holders can register their single-character domain names in both English and the foreign equivalents, while Plaintiffs are only allowed to use foreign ".com" and ".net" equivalents for their single-character domain names. FAC ¶¶ 41-42. By its very nature, that is unfair.

Plaintiffs also allege that "With each domain registration ICANN earns $0.18, which the registrants, including Plaintiffs pay annually and ICANN has incorporated ICANN's Policies and procedures into that regime in consideration for registered Internationalized Domain Names (IDNs) at the second-level in New gTLDs. 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." FAC ¶ 40. "Rules for thee but none for me" is also fundamentally unfair.

Plaintiffs also allege that "**It is ICANN Policy** that ICANN may not compete against those seeking to register domain names by holding domain names at ICANN." FAC ¶¶ 21. Yet despite this policy, ICANN is competing against Plaintiffs by holding Plaintiffs' single-character domain names at ICANN. FAC ¶¶ 99, 102, 167. In addition to stifling competition, that is also unfair, particularly because, as Plaintiffs allege, ICANN is supposed to *promote* competition. FAC ¶¶ 9, 10.

Plaintiffs also allege that "**It is ICANN Policy** that ICANN may not act as a registry or a registrar." FAC ¶ 22; *see also* Demurer at 9 (admitting to this policy). Yet by holding the single-character domain names, ICANN *is* acting as a registry and a registrar. FAC ¶ 4, 22, 43, 53, 54, 57.

Plaintiffs also allege that "**It is ICANN Policy** that ICANN be transparent in dealing with all registrants." FAC ¶ 23. Yet ICANN was not transparent in dealing with Plaintiffs. ICANN failed to respond to the Plaintiffs' letter requesting the single-character domain names, FAC ¶ 99, and then tried to auction one of those domain names away, FAC ¶¶ 99-100, and hide the names of the entities that would receive the auction proceeds. FAC ¶ 110. ICANN also failed to disclose until filing the first demurrer that, even though it directed internet users to the Registry for the policy over ownership of domain names across .com and .net in various languages, FAC ¶ 73, it did not view those policies established by VeriSign as valid. FAC ¶ 85. ICANN further failed to disclose until the filing of the latest demurrer that when it adopted over 30 Working Group recommendations, it was adopting those not as policy, but as recommendations to itself. Opp. 1-2. Further, despite claiming over and over again that it publishes every letter it receives on its website, ICANN did not include FPI's April 19, 2021 letter[3] on its website under 2021 correspondence.[4] All of this demonstrates a lack of transparency.

Plaintiffs also allege that "**It is ICANN Policy** that ICANN cannot speculate in or warehouse domain names." FAC ¶ 24. Yet ICANN is warehousing the single-character domain names and attempted to speculate through the O.com auction. FAC ¶ 62.

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[3] https://www.firstplace.com/ICANNformalrequestwithreceipts.pdf
[4] https://www.icann.org/resources/pages/correspondence-2021

Plaintiffs also allege that "**It is ICANN Policy** that ICANN cannot auction or sell domain names." FAC ¶ 25. As noted previously, ICANN attempted to sell O.com in an auction. FAC ¶ 62.

Plaintiffs also allege that "**It is ICANN Policy** that ICANN cannot engage in or benefit from a commercial transaction related to a domain name." FAC ¶ 26. Yet ICANN attempted to engage in the O.com auction. FAC ¶ 62.

Making matters worse, all of this unfair treatment takes place at the same time that ICANN claims to be a fiduciary. 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 history and subsequent statements.

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

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*."[5] FAC ¶ 10. ICANN was set up to have fiduciary responsibilities to the Internet community. Indeed, ICANN attorney Kathryn Kleiman, in "[h]elping set up ICANN 20 years ago"

[5] 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).

candidly confessed that she "applied principles of fiduciary duty she'd learned from [her professor], 'running the internet for the benefit of the world.'" FAC ¶ 11.

Despite being a fiduciary, ICANN is treating Plaintiffs unfairly and differently than other registrants, including the holders of x.com, q.com, and z.com, who can obtain and renew their registrations for those single-character domain names and/or have the same priority access that Plaintiffs seek for corresponding transliterated domains. FAC ¶¶ 41-48.

ICANN also argues that Plaintiffs could have avoided their injury by not relying on the VeriSign letter ICANN policy directed them to follow. Demr. at 21. But as set forth previously, FPI even took the additional step of meeting with the very person who signed the letter and VeriSign's General Counsel. FAC ¶ 38; Opp. p. 19, 21. Based on this, their reading of the policy, VeriSigns' publication of an "Update on VeriSign's IDN Implementation Plans" that contained both Use Case #1 and Use Case #2 and stated that "further details can be found in our notification letter to ICANN", AC 36 & n.4, and the use by other registrants of single-character domain names, FAC ¶¶2-3, Plaintiffs have alleged that their reliance was reasonable, FAC ¶¶ 2, 98, and it is for the jury to determine Plaintiffs' credibility on this issue.

2. Plaintiffs allege *unlawful* acts.

ICANN argues that Plaintiffs must plead facts "to support allegations that the defendant violated" laws in addition to the UCL. Demr. at 20. Plaintiffs did that: "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." Cal. 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 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 results in ICANN being presumed to have failed to exercise due care because it violated UCL § 17200. FAC ¶ 123.

3. Plaintiffs allege *fraudulent* acts.

"[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. In other words, a UCL claim under the fraud prong can exist without alleging any common law fraud. "The UCL's "prescriptions are aimed at unlawful or unfair [or fraudulent] business practices (wherein a violation may be found even if conduct violates no specific law [or contract]). *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *32 (N.D. Cal. May 27, 2016)

"California courts ... have recognized that whether a business practice is deceptive will usually be a question of fact not appropriate for decision on demurrer." *Salazar*, 83 Cal. App. 5th at 579. "Thus, whether a reasonable consumer is likely to be deceived as a matter of law may be decided only in 'rare situation[s].' This is because "[w]hat matters ... is how consumers actually behave—how they perceive advertising and how they make decisions. These are matters of fact, subject to proof that can be tested at trial, even if as judges we might be tempted to debate and speculate further about them." *Id.* (internal citations and quotations omitted).

"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 go well beyond the section 17200 standard by alleging that they *were in fact* deceived by ICANN's publications and policies and Plaintiffs actually relied upon those representations by paying money to ICANN – and have continued to do so each year - for their single-character domain names. FAC ¶¶ 3, 30, 35-40, 94, footnote 46, 97, 133, 135, 145, 162. At this stage of the proceedings, the Court is required to accept as true Plaintiffs allegations and those reasonable inferences drawn from the allegations. *Stettner*, 98 Cal. App. 5th at 51. It is up to the jury to determine whether ICANN's statements were deceptive and if Plaintiffs' reliance on them was reasonable.

In addition to the policies that caused Plaintiffs to purchase their single-character domain names, the FAC sets forth other ICANN policies that are likely to deceive. 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." FAC ¶ 53 Section 2.3. This is likely to mislead because, despite this pledge, ICANN is treating the owners of x.com, q.com, and z.com differently than other registrants.

ICANN also has a foundational mandate and policy for transparency. FAC ¶ 34. The public should reasonably expect that ICANN will be transparent. FAC ¶¶ 23, 35, 53, 55, Section 3.1. Yet time and again, ICANN has failed to be transparent with respect to the single-character domain names and transliterations.

For example, VeriSign says it sent a "notification letter". Opp. pp. 13-14. ICANN claims the letter is essentially meaningless random correspondence. *Id.* What appeared to the public to be ICANN adopting a Working Group recommendation as a policy, is according to ICANN just adopting the recommendation as a recommendation to itself that it then ceased to work on for 16 years. Opp. pp. 1-2. ICANN suppressed the names of the organizations that would benefit from the o.com auction. FAC ¶ 110. None of this is transparent. If ICANN did not expect its customers to rely on the statements from its registries that ICANN posted on its own website then it should have included a disclaimer to that effect, but ICANN did the opposite and told consumers that consumers COULD rely on statements from the registries. FAC ¶ 89.

4. 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*, (2002) 85 Cal. App. 5th 1022, 1041, *review denied* (Mar. 15, 2023) (quoting *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326).

The California Supreme Court in *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 327-328 summarized UCL standing as: "a plaintiff must plead and prove actual reliance to satisfy the standing requirement of [the UCL] but, consistent with the principles set forth above, is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where...those misrepresentations and false statements were part of an extensive and long-term advertising campaign." *In re Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at *36 quoting Tobacco II 46 Cal. 4th at 327-328.

Here, Plaintiffs have alleged both forms of standing. They paid and lost money in that ICANN received $0.18 for each domain name Plaintiffs registered or renewed each year and ICANN is denying them the ability to fully exercise their property rights in the domain names. FAC ¶¶ 3, 30, 35-40, 47, 94, footnote 46, 97, 133, 135, 145, 162. Indeed, FPI paid $25,285 to register a particular domain name in the Hangul language in reliance on ICANN's representations to the public. FAC ¶ 39. Plaintiffs have established their actual reliance on ICANN's representations.

Additionally, UCL case law teaches it is irrelevant if ICANN directly received any of the fees Plaintiffs paid to the registrars, ICANN can still be liable under the UCL. "Accordingly, case law does not support [the defendants'] argument that they cannot be liable for restitution under the UCL because [the billing company], rather than [the defendants], was the direct recipient of the service charges…Nothing in *Korea Supply* conditions the recovery of restitution on the plaintiff having made direct payments to a defendant who is alleged to have engaged in false advertising or unlawful practices

under the UCL." *People ex rel. Harris v. Sarpas*, (2014) 225 Cal. App. 4th 1539, 1561 (internal citations and quotations omitted).

ICANN can even be liable under the UCL for aiding and abetting its registries' unlawful conduct, *e.g.*, Verisign: "[L]iability under the UCL may be imposed against those who aid and abet the violation … Liability may be imposed if the defendant knows the other's conduct constitutes a breach ... and gives substantial assistance or encouragement to the other to so act … if the evidence establishes defendant's participation in the unlawful practices, either directly or by aiding and abetting the principal, liability under sections 17200 and 17500 can be imposed". *Sarpas*, 225 Cal. App. 4th at 1563.

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. FAC ¶¶ 107-114.

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

1. <u>Breach of Contract (Count Two)</u>.

As stated in the prior Opposition, whether ICANN's policies create a contract with Plaintiffs is an issue of first impression. Opp., 11. ICANN claims to have *unique accountability structures*: "ICANN is a unique model and therefore ICANN accountability structures do not fit into any one traditional definition." FAC ¶ 12. What purpose do ICANN's policies serve if not to create a contract with each registrant? 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*." FAC ¶ 84. So, ICANN views its and VeriSign's policies as contractually binding on Plaintiffs. But not the other way around, apparently.

ICANN argues that Plaintiffs never identify any policies that would constitute a contract, quote such policies, or attach the specific agreements. Demr. at 15-17. That is false. Plaintiffs set forth in plain English the specific policies that would constitute such a contract. FAC ¶¶ 19-32. Each *sentence* setting forth the policy is followed by a second sentence stating, for example: "The Policy *is quoted verbatim* in Complaint ¶ 53." *See, e.g.,* FAC ¶ 24. Then, Plaintiffs allege: "For each Policy, contract, or recommendation cited above, *a link to the entire instrument* containing the Policy, contract, or recommendation appears in a footnote, *which instrument is incorporated herein by reference*." FAC ¶ 33.

ICANN also argues that Plaintiffs allege in a conclusory manner that ICANN takes Plaintiffs' money. Demr. at 16 n.3. That is also false. Plaintiffs explain in detail how ICANN receives funds from Plaintiffs: "Under that same contract with Verisign, ICANN receives a payment each time Plaintiffs registered or renewed each of the domain names set forth on Exhibits B1 and B2. That payment is entirely dependent on whether or not Plaintiffs pay money to register or renew those domain names." FAC ¶ 31. ICANN argues that those are "*registrar* fees". Demr. at 16 n.3. ICANN can call those fees whatever it wants, but at the end of the day, ICANN receives a cut of Plaintiffs' money each time Plaintiffs register or renew a domain name. *See also Sarpas*, 225 Cal. App. 4th at 1561 (rejecting argument that defendant was not a direct recipient of plaintiff's funds).

Plaintiffs have alleged a breach of contract: "(1) the existence of a contract [the ICANN policies summarized in FAC ¶¶ 19-32, subsequently quoted verbatim, FAC ¶¶ 1, 35, 36, 53, 54, 55, 57, 73, 92, with the entire instrument incorporated by reference. FAC ¶ 33 & nn.1-4, 23-26, 36, 45]; (2) plaintiff's performance … [payment made by plaintiffs, FAC ¶¶ 3-4, and ultimately received by ICANN. FAC ¶ 31]; (3) defendant's breach [ICANN's failure to follow its policies. FAC ¶¶ 4, 42, 46, 56, 57, 62, 96, 105, 106, 114]; and (4) damage to plaintiff [the inability to register the .com and .net single character domain names. FAC ¶¶ 116-117, 136]." *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008). Given that Plaintiffs 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 Three).

ICANN claims that without a contract, this claim must fail. Demr. at 18. 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 survive as well.

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

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.

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 B1 and B2 (ICANN gets money from Plaintiffs, FAC ¶ 31, and also gets to keep the domain names, FAC ¶¶ 57, 99-106, 166-67); 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

for itself. FAC ¶¶ 99-106; *see also* Opp. pp. 7, 12-13 (setting forth in detail why ICANN's retention of Plaintiffs' funds and domain names is unjust: ICANN is acting arbitrarily, discriminatorily, as a registrar or registry, to register, renew, warehouse, speculate in, a domain name, auction or sell domain names in competition with Plaintiffs violation of its Bylaws, its Agreements with the U.S. Government, or its fiduciary duties to its customers); *see* FAC ¶ 4 (summarizing same).

C. Plaintiffs State a Fraudulent Inducement Claim (Count Five).

ICANN's Demurer actually makes out part of Plaintiffs' case for fraudulent inducement. ICANN argues that it did not adopt the Working Group recommendation as *policy*, but only as a *recommendation* to itself. Demr. at 13. ICANN then ceased working on this supposed recommendation to itself for the past 16 years, leading any reasonable person to believe that ICANN meant to adopt the Working Group recommendation as policy when it said:

> Resolved (2008.06.26.02), 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 <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.[1]

FAC ¶ 32. ICANN further allowed renewals of x.com, q.com, and z.com year after year despite a policy to treat all registrants the same. FAC ¶¶ 19, 31, 41, 42. Thereafter, ICANN attempted to auction off o.com, FAC ¶ 62, and despite a policy and a formational *mandate* of transparency, FAC ¶¶ 9, 23, attempted to secret the names of the organizations that would profit from the auction. FAC ¶ 110.

ICANN argues that it has no legal duty to disclose the facts. Demr. at 20. This is false. ICANN has a foundational mandate to be transparent. FAC ¶¶ 9, 23.

ICANN also argues that Plaintiffs have not alleged that anyone at ICANN knew of the falsity of the statements (not true, *see* FAC ¶¶ 171-74, 178), and have not set forth their claim with sufficient specificity. As the California Supreme Court has explained, 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. A recognized exception 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).

As noted previously, ICANN has a legal duty and a policy mandate to be transparent. FAC ¶¶ 9, 23. Yet ICANN has repeatedly concealed facts respecting the single-character domain names and transliteration of domain names. FAC ¶¶ 171-74, 178. Indeed, until this demurer, all available facts indicated that ICANN had adopted as policy a Working Group recommendation that single-character domain names "should be available for registration". Opp. pp. 13. Until the prior demurer, all available facts indicated that ICANN had tasked the registries, like VeriSign, to set the policies concerning transliteration of domain names and that VeriSign had done so when it posted that:

> While further details can be found in our ***notification letter to ICANN***, below are two use cases that illustrate our approach:
>
> - *Use Case No. 1:* Bob Smith already has a registration for an IDN.net second level domain name. That second level domain name will be unavailable in all of the new .net TLDs except to Bob Smith. Bob Smith may choose not to register that second level domain name in any of the new transliterations of the .net TLDs.
> - *Use Case No. 2:* John Doe does not have a registration for an IDN.com second level domain name. John Doe registers a second level domain name in our Thai transliteration of .com but in no other TLD. **That second level domain name will be unavailable in all other transliterations of .com** IDN TLDs and in the .com registry **unless and until John Doe (and only John Doe) registers it** in another .com IDN TLD or **in the .com registry**.

https://circleid.com/posts/20130712_update_on_verisigns_idn_implementation_plans/, cited in FAC ¶ 36 n.4 (emphasis added).

Despite its foundational mandate for transparency, FAC ¶¶ 9, 23, ICANN has concealed these facts from both Plaintiffs and the public. FAC ¶¶ 171-74, 178. ICANN also concealed the fact that it did not intend to be transparent on this issue. *Id.* Indeed, ICANN even tried to hide the identities of the beneficiaries of the o.com auction. FAC ¶ 110.

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), but ICANN is *the only* party possessing full knowledge of those concealed facts.

V. 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.'" 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 B1 and B2. Indeed, no other claimants exist because Plaintiffs have secured the sole rights to register those domain names through the registration policies. FAC ¶ 3, 47.

Even if the relationship between Plaintiffs and ICANN is as attenuated as ICANN says – and it is not – Plaintiffs 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 for itself the single-character domain names year after year, and that repeated act prevents Plaintiffs from using those domain names year after year. FAC ¶¶ 99-106. Each year, ICANN blocks Plaintiffs' access to their exclusive sole rights and interests, a fact ICANN ignores in its demurrer. FAC ¶¶ 3, 39, 40, 41, 42, 46, 47.

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. Demr. 23. In *Banerian v. Irving*, (1958) 49 Cal. 2d 647, 649, previously cited by ICANN in the original demurrer, Demr. 17, the Court found 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 also 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.'" Demr. at 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",[6] which deals with the *compliance of the Registry Operator*, in this case, Verisign.[7] As the public record demonstrates, ICANN – not Verisign – is the entity renewing the single-character domain names each year and holding those domain names for itself. FAC ¶ 50. 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

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

[7] *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).

is simply further evidence of ICANN's unfair and deceptive practices and yet another reason to hold ICANN accountable.

VI. 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 would deprive the respondent of an opportunity to counter the argument").

VII. CONCLUSION

Plaintiffs have uncontested sole rights and interests to register and use the same second-level .com/.net English script domain names identified in Exhibits B1 and B2 under self-explanatory ICANN Policies captured in the FAC, where Plaintiffs paid in consideration ICANN's contractual transaction-based fees. Plaintiffs repleaded their FAC in compliance with the Superior Court's earlier order. ICANN's latest demurrer should be denied. Alternatively, Plaintiffs respectfully request that the Court grant them leave to amend. *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 157; *Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043-44 ("abuse of discretion" to sustain demurrer if "the plaintiff has stated a cause of action under any possible legal theory.").

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