Jeffrey A. LeVee (State Bar No. 125863)
Eric P. Enson (State Bar No. 204447)
Kelsey A. Lobisser (State Bar No. 346618)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, California 90071.2452
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539
Email: jlevee@JonesDay.com

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

Plaintiffs,

v.

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

Defendants.

Case No. 23STCV19554

Assigned to Hon. Stephen I. Goorvitch

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

[[Proposed] Order and Declaration of Kelsey A. Lobisser Filed Concurrently Herewith]

Date: December 7, 2023
Time: 8:30 A.M.
Dept: 39

Complaint Filed: August 16, 2023

Reservation ID: 476305661011

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 7, 2023, at 8:30 A.M., in Department 39 of this Court, located at 111 North Hill Street, Los Angeles, CA 90012, Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does demur to Plaintiffs VerandaGlobal.com d/b/a First Place Internet, Inc. ("FPI") and Bryan Tallman's (collectively, "Plaintiffs") Verified Complaint ("Complaint") in its entirety pursuant to California Code of Civil Procedure ("CCP") § 430.30. Plaintiffs' entire Complaint fails to state a claim for any of the seven causes of action asserted, and Plaintiffs lack standing to pursue their claims. Accordingly, the Complaint should be dismissed with prejudice.

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

Dated: September 18, 2023

JONES DAY

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

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

DEMURRER

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

DEMURRER TO FIRST CAUSE OF ACTION

1. The first cause of action for declaratory relief fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SECOND CAUSE OF ACTION

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

DEMURRER TO THIRD CAUSE OF ACTION

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

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

DEMURRER TO FOURTH CAUSE OF ACTION

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

DEMURRER TO FIFTH CAUSE OF ACTION

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

DEMURRER TO SIXTH CAUSE OF ACTION

7. The sixth cause of action for negligence fails to state facts sufficient to constitute a cause of action against ICANN. Cal. Civ. Proc. Code § 430.10.

DEMURRER TO SEVENTH CAUSE OF ACTION

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

DEMURRER TO ALL CAUSES OF ACTION

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

Dated: September 18, 2023

JONES DAY

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

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

STATUTES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs and Defendant the Internet Corporation for Assigned Names and Numbers ("ICANN") have no relationship whatsoever such that Plaintiffs cannot properly state ***any*** cause of action against ICANN and, no matter how many times Plaintiffs amend their Complaint, Plaintiffs will not be able to change this reality.

ICANN is a nonprofit public benefit corporation that oversees the technical coordination of the Internet's domain name system ("DNS"), which converts numeric Internet Protocol ("IP") addresses recognized by computers into easily remembered Internet domain names, such as lacourt.org. Plaintiffs, VerandaGlobal.com d/b/a First Place Internet ("FPI") and Brian Tallman, are individual registrants of various single-character second-level domain names in the Katakana, Hangul, and Hebrew language script (i.e., the non-ASCII[1]) versions of .COM and .NET (referred to as Internationalized Domain Names ("IDN")). (Compl. ¶ 6.) Plaintiffs allege that, because they are registrants of select domains in certain IDNs for .COM and .NET, they are somehow entitled to the "sole right" to operate those same domains in the ".com" and ".net" ASCII versions—apparently based on a letter that ICANN received from a third party in 2013. (Compl. ¶¶ 8, 58.) Plaintiffs, however, fail to allege any action ***taken by ICANN*** that entitles Plaintiffs to operate the ASCII versions of the domain names listed in Exhibits A1 and A2 of Plaintiffs' Complaint, nor could they, since no such action took place.

There is no relationship between Plaintiffs and ICANN, much less a relationship that could support any of the causes of action in Plaintiffs' Complaint. The Complaint is filled with vague and conclusory statements, none of which can amount to properly stated claims against ICANN. Rather, Plaintiffs' Complaint references certain public documents that do not involve interactions between ICANN and Plaintiffs, including some that were not even created by ICANN.

Most importantly, despite Plaintiffs' repeated accusations relating to an alleged contract

[1] "ASCII" stands for American Standard Code for Information Interchange. As Plaintiffs note, ASCII colloquially refers to the English language. (Compl. ¶ 8.)

between ICANN and Plaintiffs, Plaintiffs do not attach a copy of this "contract" and are unable to state the specific terms or performance of any contract. Indeed, ICANN has never interacted with Plaintiffs such that it could enter into any implied or actual contract with Plaintiffs. Although Plaintiffs refer to sending a letter to ICANN, ICANN receives thousands of pieces of correspondence each week. It cannot feasibly be said that ICANN establishes a relationship, much less a contractual relationship, with every entity that sends a letter to ICANN.

Plaintiffs' other claims are similarly baseless. In the absence of any contract or relationship between Plaintiffs and ICANN, it is unfathomable how ICANN could owe Plaintiffs a duty of care or could have committed fraud and unfair business practices with the intention to deceive Plaintiffs. Plaintiffs' Complaint fails to allege any facts supporting these claims: Plaintiffs are unable to point to any statement made by ICANN that affirmatively entitles Plaintiffs to operate the ASCII versions of the domain names listed in Exhibits A1 and A2 because ICANN took no such action.

Finally, Plaintiffs seek a declaration that ICANN breached its own Bylaws and policies. Not only do Plaintiffs lack standing to sue ICANN for breach of its Bylaws, but Plaintiffs' Complaint demonstrates an erroneous and fundamental misunderstanding of how ICANN makes policy. Plaintiffs make a convoluted argument that ICANN somehow ratified and/or adopted the contents of a third-party letter that ICANN received in 2013 simply by posting it on ICANN's Correspondence webpage. Yet, Plaintiffs' Complaint neglects to mention that this letter was posted on ICANN's website along with the *thousands* of other letters ICANN has received, which is ICANN's standard practice in order to be open and transparent with the public. Posting a letter from a third party on its website cannot possibly result in ICANN adopting a "policy" or being in a contractual relationship with some other entity or even agreeing with the content of the letter.

In sum, even if Plaintiffs were permitted to amend their Complaint, they will never be able to state a cause of action against ICANN because ICANN has no relationship with Plaintiffs.

SUMMARY OF PLAINTIFFS' ALLEGATIONS

ICANN is a California nonprofit public benefit corporation that oversees the technical coordination of the Internet's DNS. (Compl. ¶ 24.) Prior to ICANN's formation in 1998, the

U.S. Government operated the DNS through contractual agreements with third parties. ICANN was created as part of a federal initiative to privatize the Internet so that no one group or government would have a right to, or responsibility over, the DNS. (Compl. ¶ 24.)

The Internet is succinctly described as "an international network of interconnected computers[.]" *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997); (Compl. ¶ 24.) Each computer and server has a unique identity, known as an IP address, consisting of a series of numbers. Because a series of numbers can be hard to remember, the founders of the Internet created the DNS, which converts numeric IP addresses into easily remembered domain names such as "weather.com" or "uscourts.gov." (Compl. ¶ 24.) In these examples, .COM and .GOV are each known as a generic "top-level domain" or "gTLD", and the portion immediately to the left of the period, such as "uscourts" is known as the "second-level domain." (Compl. ¶ 24.)

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

Initially, second-level domains and gTLDs were only available in ASCII script. In 2009, ICANN implemented IDNs, which allows registry operators to operate gTLDs in the native scripts of certain languages and also allows registrants to register domain names in the native scripts of certain languages, at either the second-level or the top-level or both. (*See* Compl. ¶ 38.) For example, users can register domains that could be in the following script combinations: ASCII.ASCII, ASCII.IDN, IDN.IDN, or IDN.ASCII, each of which is a separate and distinct registration. (*See* Comp. ¶ 38.) From 2015 through 2020, Plaintiffs registered various second-level ASCII domains in the Katakana, Hangul, and Hebrew language (IDN) versions of .COM and .NET (e.g., 1.コム (Katakana ".com")). (Compl. ¶¶ 6–8.) Inexplicably, Plaintiffs believe

that they have the "sole right" to these same domains in the ASCII version of .COM and .NET (e.g., 1.com). (Compl. ¶ 7.) Based on this mistaken belief, Plaintiff FPI wrote to ICANN and demanded these registrations in .COM and .NET. (Compl. ¶ 80.) Plaintiffs allege that ICANN violated its Bylaws and policies, as well as agreements with Verisign Inc. (the registry operator of .COM and .NET) and the Department of Commerce, by not providing these domain names to Plaintiffs. (Compl. ¶¶ 82–86.)

Plaintiffs' claims are based on the allegation that ICANN adopted a "policy" simply by posting a letter from Verisign on ICANN's website that, according to Plaintiffs, gave Plaintiffs the "sole right" to obtain these domains in the English ASCII versions of .COM and .NET simply because Plaintiffs had registered these domains in certain IDN versions of .COM and .NET. (*See* Compl. ¶¶ 55–60.) Plaintiffs allege that, because the IDN Guidelines, which guide registry operators who manage IDNs, state that "[a]ny information fundamental to the understanding of a registry's IDN policies that is not published by the IANA will be made directly available online by the registry[,]" ICANN somehow adopted as a "policy" the Verisign letter it received and posted in 2013. (Compl. ¶¶ 48, 58.) Plaintiffs allege that they were entitled to rely on Verisign's letter as an "ICANN-Adopted Policy" and that "[a]ny visitor, including Plaintiffs, to the ICANN webpage, would reasonably conclude VeriSign's IDN implementation strategy of ICANN-Adopted Policy and illustrations therein had full ICANN approval and sanction." (Compl. ¶ 60.)

It is difficult to comprehend how any visitor to ICANN's website would (or reasonably could) conclude that ICANN has somehow "adopted" as "policy" the contents of the thousands of letters posted on ICANN's Correspondence webpage. As seen from Plaintiffs' Complaint, Plaintiffs pulled Verisign's July 2013 letter from an ICANN webpage containing copies of much of the correspondence ICANN receives. (Compl. ¶ 54 & n.36.) Moreover, Plaintiffs' conclusory allegations do not come anywhere close to reflecting an accurate or even logical understanding of how ICANN makes policy, nor do Plaintiffs provide any facts to support their allegation that ICANN's posting of a letter written by a third party somehow creates ICANN policy (which it does not). Further, Plaintiffs' entire Complaint alleges only one instance where Plaintiff FPI attempted to communicate with ICANN. (Comp. ¶ 80.) There are no allegations that Plaintiff

Tallman ever attempted to initiate contact with ICANN. (*See generally*, Complaint.) In sum, Plaintiffs do not allege any communications between ICANN and Plaintiffs that would give rise to any of their seven causes of action, nor do Plaintiffs allege any statement ***made by ICANN*** that entitles Plaintiffs to register the second-level domain names at issue. (*See generally*, Complaint.)

LEGAL STANDARD

The function of a demurrer is to test the sufficiency of the allegations of a complaint. *Schmidt v. Found. Health*, 35 Cal. App. 4th 1702, 1706 (1995) (citing Cal. Civ. Proc. Code § 589(a)). A demurrer should be sustained "when [t]he pleading does not state facts sufficient to constitute a cause of action." *Roy Allan Slurry Seal, Inc. v. Am. Asphalt S., Inc.*, 2 Cal. 5th 505, 512 (2017) (quoting Cal. Civ. Proc. Code § 431.10(e)) (internal quotations marks omitted). "A general demurrer searches the complaint for all defects going to the existence of a cause of action and places at issue the legal merits of the action on assumed facts." *Carman v. Alvord*, 31 Cal. 3d 318, 324 (1982) (citing *Banerian v. O'Malley*, 42 Cal. App. 3d 604, 610–11 (1974)). The court "accept[s] as true all the material allegations of the complaint, but do[es] not assume the truth of contentions, deductions or conclusions of fact or law." *Roy Allan Slurry Seal, Inc.*, 2 Cal. 5th at 512 (internal quotation marks and citations omitted). A demurrer should be granted without leave to amend where "no amendment could cure the defect in the complaint[.]" *See Cansino v. Bank of Am.*, 224 Cal. App. 4th 1462, 1468 (2014).

ARGUMENT

All 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. A proper complaint "must set forth the essential facts of his or her case with reasonable precision and with particularity sufficient to acquaint [the] defendant with the nature, source and extent of the plaintiff's claim." *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1120 (2014) (internal quotation marks omitted) (citing *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 551 (2007)). As explained below, Plaintiffs' Complaint is nothing more than a handful of vague legal conclusions that fail to allege any affirmative statement, action, or contract made by ICANN.

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

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

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

There is no contract between ICANN and Plaintiffs. The elements of a claim for breach of contract are: (1) the existence of a contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) damage to plaintiff. *Wall St. Network, Ltd. v. N.Y. Times Co.*, 164 Cal. App. 4th 1171, 1178 (2008). Thus, to state a claim for breach of contract, Plaintiffs' Complaint must identify the contract at issue as well as the specific provisions that ICANN allegedly breached. *See Holcomb v. Wells Fargo Bank, N.A.*, 155 Cal. App. 4th 490, 501 (2007) ("Without specifying the nature of the contract, nor the specific terms Holcomb claims the bank had breached, the complaint fails to adequately state a cause of action for breach of contract.").

Plaintiffs' contractual allegations are nowhere near sufficient. While the Complaint is filled with vague references to ICANN's Bylaws and information posted on ICANN's website (much of which was not even written by ICANN), Plaintiffs do not identify any specific 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. (*See* Compl. ¶¶ 129–140.) There has simply been no interaction between ICANN and Plaintiffs that could give rise to ***any*** written, oral, or implied by conduct contract. Moreover, whether the contract is written, oral, or implied by conduct must be ascertainable in Plaintiffs' Complaint in order to properly state an action for breach of contract. Cal. Civ. Proc. Code § 430.10(g). By failing to identify the specific contract, the terms of the contract, and when it was formed, Plaintiffs fail to state a claim for this cause of action.

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

Plaintiffs' action for quasi-contract fails for the same reasons their breach of contract action does: there is no interaction between ICANN and Plaintiffs to warrant any implied or actual contractual relationship. "The elements of a claim of quasi-contract or unjust enrichment

are (1) a defendant's receipt of a benefit and (2) unjust retention of that benefit at the plaintiff's expense." *MH Pillars Ltd. v. Realini*, 277 F. Supp. 3d 1077, 1094 (N.D. Cal. 2017) (citing *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593 (2008)). Plaintiffs' Complaint does not and cannot allege that ICANN unjustly retained a benefit because there is no benefit for ICANN to unjustly retain. Indeed, Plaintiffs' Complaint does not allege any statement ***made by ICANN*** that entitles Plaintiffs to operate the domain names they seek.[2]

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

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

In addition, and importantly, there is no basis for granting Plaintiffs leave to amend counts three through five. No amount of time or amendment will sufficiently plead a contract that does not exist. A demurrer should be granted without leave to amend where "no amendment could cure the defect in the complaint[.]" *See Cansino*, 224 Cal. App. 4th at 1468. Here, because of the

[2] Moreover, even if Plaintiffs had sufficiently stated breach of contract and breach quasi-contract claims, which they have not and cannot, Plaintiffs are not permitted to maintain an action for both claims. *See Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc*., 94 Cal. App. 4th 151, 172–73 (2001) (holding that Plaintiff could not proceed under its quasi-contract claim because the claim was based on the express terms of an actual contract); *Lloyd v. Williams*, 227 Cal. App. 2d 646, 649 (1964) ("A party cannot retain substantial benefits under an express contract and recover under the theory of an implied contract."). Indeed, 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." (Compl. ¶ 152.) (emphasis added).

complete absence of any relationship between ICANN and Plaintiffs that could give rise to any written, oral, or implied contractual relationship, any potential amendments Plaintiffs might make could not cure their inability to state a cause of action based on a nonexistent contract.

B. Plaintiffs Fail to State a Claim for Negligence (Count Six).

Plaintiffs do not allege a duty that could give rise to any negligence claim. "To succeed in a negligence action, the plaintiff must show that (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach proximately or legally caused (4) the plaintiff's damages or injuries." *Thomas v. Stenberg*, 206 Cal. App. 4th 654, 662 (2012). "In ruling on general demurrers the dispositive issue ordinarily is that of duty . . . [i]f the plaintiff does not and cannot show a duty owed directly to him, the action is subject to dismissal." *Banerian*, 42 Cal. App. 3d at 612; *see also Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 820 (1976) ("According to the familiar California formula, the allegations requisite to a cause of action for negligence are (1) *facts showing a duty of care in the defendant*, (2) negligence constituting a breach of the duty, and (3) injury to the plaintiff as a proximate result.") (emphasis added).

Plaintiffs' cause of action for negligence fails for two reasons. First, Plaintiffs do not adequately allege ICANN owes Plaintiffs a duty of care—because it does not. Rather, Plaintiffs state, in an entirely conclusory manner, that "[a]s the authority that controls and is responsible for the worldwide Internet DNS, ICANN has a duty of care to Plaintiffs, each a consumer-registrant of [I]nternet domain names, to fairly and impartially apply its governing policies and procedures regarding the registration and release of domain names including the Single-Character domain names[.]" (Compl. ¶ 161.) Plaintiffs' Complaint contains no other allegations to support their claim that ICANN owes a duty directly to Plaintiffs (which, read literally, would apply to the billions of Internet users across the globe) and, therefore, the action must be dismissed. *Banerian*, 42 Cal. App. 3d at 612; *see Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1559 (2007) (finding an allegation that "[i]n doing the acts of imposing and collecting Transfer Fees, MERIT owed a duty of care to Plaintiffs and other members of the class [and] breached that duty by charging and collecting illegal Transfer Fees" was conclusory and insufficient to state a cause

of action for negligence).

Second, Plaintiffs fail to allege any "special relationship" that could give rise to a negligence claim for purely economic harm. "In general, there is no recovery in tort for negligently inflicted 'purely economic losses,' meaning financial harm unaccompanied by physical or property damage." *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905, 922 (2022) (internal quotation marks and citations omitted) (describing the contours of the "economic loss rule"). Instead, the existence of a duty is determined by the presence of a special relationship between the parties when the parties are not in privity of contract.[3] *See J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 804 (1979) (citing *Biakanja v. Irving*, 49 Cal. 2d 647, 650 (1958)) (finding that the defendant owed a duty to the third-party plaintiff when the plaintiff was clearly contemplated in the alleged negligent actions); *see also S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 400 (2019) ("What we mean by special relationship is that the plaintiff was an intended beneficiary of a particular transaction but was harmed by the defendant's negligence in carrying it out."). Here, Plaintiffs only allege economic harm. (Compl. ¶ 165.) Further, Plaintiffs make no allegation that ICANN and Plaintiffs are in a special relationship, nor could they, because there is no connection between Plaintiffs and ICANN. Indeed, ICANN's relationship with Plaintiffs is no stronger than with any other Internet user or registrant such 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. Thus, such policy factors could never weigh in favor of finding a duty owed by ICANN.

[3] The California Supreme Court has noted that "[d]iscerning whether there is a special relationship justifying liability of this sort can nonetheless be a subtle enterprise. In both *Biakanja* and *J'Aire* we emphasized that our duty determination rested not just on (i) the extent to which the transaction was intended to affect the plaintiff, but also on a subset of the *Rowland* factors relevant to the circumstances before us in those cases: (ii) the foreseeability of harm to the plaintiff, (iii) the degree of certainty that the plaintiff suffered injury, (iv) the closeness of the connection between the defendant's conduct and the injury suffered, (v) the moral blame attached to the defendant's conduct, and (vi) the policy of preventing future harm." *S. Cal. Gas Leak Cases*, 7 Cal. 5th 391, 401 (2019) (quoting *J'Aire Corp.*, 24 Cal. 3d at 804 (internal quotations marks omitted), citing *Biakanja*, 49 Cal. 2d at 650). Moreover, determining whether a duty is imposed "turns on a careful consideration of [] 'the sum total' of the *policy considerations* at play, not a mere tallying of some finite, one-size-fits-all set of factors." *S. California Gas Leak Cases*, 7 Cal. 5th at 401 (citing *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 397, (1992)) (emphasis added).

C. Plaintiffs Fail to State a Claim for Fraudulent Inducement (Count Seven).

Plaintiffs fail to plead their seventh cause of action for fraudulent inducement with specificity because there are no facts to support a claim of fraud against ICANN. "As with all fraud claims, the necessary elements of a concealment/suppression claim consist of (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting damage*."* *Hoffman v. 162 N. Wolfe LLC*, 228 Cal. App. 4th 1178, 1185–86 (2014) (internal quotation marks and citations omitted). "In civil actions for fraud [i]t is a cardinal rule of pleading that fraud must be pleaded in specific language descriptive of the acts which are relied upon to constitute fraud. It is not sufficient to allege it in general terms, or in terms which amount to mere conclusions." *People v. Croft*, 134 Cal. App. 2d 800, 802 (1955) (internal quotation marks and citations omitted). This standard is heightened for fraud actions against a corporation, which requires a plaintiff to plead, among other things, "the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991).

Plaintiffs' Complaint fails to contain ***any*** allegations that ICANN had knowledge of falsity or the intent to defraud Plaintiffs. Instead, Plaintiffs' Complaint makes vague statements that "ICANN intentionally concealed or ratified the concealment of an important fact from Plaintiffs, namely that ICANN did not intend to follow its published policies and procedures[.]" (*See* Compl. ¶¶ 167–169.) Such conclusions are unsupported by allegations showing that ICANN had any intent to defraud Plaintiffs. Moreover, Plaintiffs' Complaint fails to state *who* at ICANN made the allegedly fraudulent representations and *when* such representations were made, which is required for a fraud action against a corporation. (*See* Compl. ¶¶ 166–174); *see Archuleta v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 262 Cal. App. 2d 202, 208–209 (1968) (sustaining plaintiffs' demurrer without leave to amend in part because plaintiffs failed to allege who at the corporation made the alleged fraudulent representations).

Additionally, "[a] fraud claim based upon the suppression or concealment of a material fact must involve a defendant who had a legal duty to disclose the fact." *Hoffman*, 228 Cal. App. 4th at 1186 (citing Cal. Civ. Code § 1710(3), defining deceit); *see also Lingsch v. Savage*, 213 Cal. App. 2d 729, 735 (1963). For the same reasons Plaintiffs' negligence claim fails, Plaintiffs have not and cannot allege that ICANN had any legal duty to disclose information to them, so their fraudulent inducement claim similarly fails. Like with Plaintiffs' other claims, leave to amend is not warranted because Plaintiffs cannot cure their inability to state a claim because ICANN did not commit fraud and Plaintiffs cannot allege any facts showing it did.

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

In order to prevail under California Business and Professions Code § 17200 ("UCL"), a plaintiff must establish that the business practice or act is either unlawful, unfair, or fraudulent. *Berryman,* 152 Cal. App. 4th at 1554. Plaintiffs do not, and cannot, adequately plead conduct that is unlawful, unfair or fraudulent.

The "unlawful" prong of the UCL borrows from violations of other laws, and Plaintiffs must plead facts to support allegations that the defendant violated such laws. *Berryman*, 152 Cal. App. 4th at 1554 (dismissing plaintiff's UCL claim because plaintiff did not adequately state facts to support a claim that the defendant committed a statutory violation under the unlawful prong, noting that "a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong"). Plaintiffs mistakenly assert that ICANN violated California Evidence Code § 669 (Compl. ¶ 112); however, to be clear, Evidence Code § 300 establishes that the Evidence Code is (in general) applicable only to matters before a court, not to outside conduct. Cal. Evid. Code § 300 ("Except as otherwise provided by statute, [the Evidence Code] *applies in every action before the Supreme Court or a court of appeal or superior court*, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings.") (emphasis added). Indeed, Plaintiffs simply cannot identify any independent statute that ICANN has allegedly violated in order to plead unlawful activity.

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

injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006). The burden is on a plaintiff to show why the unfair conduct was not allowed. *Berryman*, 152 Cal. App. 4th at 1555–56 (sustaining a demurrer under the UCL and finding that plaintiff could not make a showing that the defendant was not permitted to engage in the alleged unfair practices). Here, again, Plaintiffs make only conclusory allegations that ICANN's conduct was somehow "unfair." These vague allegations, however, do not meet Plaintiffs' burden. Indeed, Plaintiffs cannot point to any ICANN statement even suggesting that Plaintiffs have, much less granting Plaintiffs, the "sole right" to operate the ASCII versions of the domain names at issue. (*See generally*, Complaint.) Plaintiffs' mistaken assumption does not equate to unfair action on ICANN's part.

With regard to the "fraudulent" prong, Plaintiffs also claim that ICANN acted fraudulently, but like their fraudulent inducement claim, Plaintiffs do not plead their UCL claims with any specificity or particularity and fail to state a claim on that basis. (*See generally*, 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[.]").

Additionally, Plaintiffs lack standing to bring a § 17200 claim. In order to bring a claim under the UCL, a plaintiff must: "(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, i.e., *economic injury*, and (2) show that that economic injury was the result of, i.e., *caused by*, the unfair business practice or false advertising that is the gravamen of the claim." *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011). Plaintiffs cannot meet this burden because ICANN did not make a statement that was deceptive or that caused injury to Plaintiffs. Plaintiffs' allegations that ICANN adopted a "policy" by posting a third-party letter on ICANN's website, which Plaintiffs mistakenly claim is evidence that they are owed certain domain names, cannot as a matter of law constitute facts sufficient to confer standing. *See Ivie v. Kraft Foods Glob., Inc.*, 961 F. Supp. 2d 1033, 1047 (N.D. Cal. 2013) (plaintiffs lacked standing to bring UCL claim relating to statements seen on defendant's webpage).

E. Plaintiffs' Claim for Declaratory Relief Fails as a Matter of Law (Count One).

For the same reasons Plaintiffs' six other causes of actions fail, Plaintiffs cannot state a claim for declaratory relief against ICANN because there is no actual controversy. A claim for declaratory relief has two essential elements: (1) the action presents a proper subject of declaratory relief; and (2) the action presents an actual controversy involving justiciable questions relating to the rights or obligations of a party. *Wilson & Wilson v. City Council of Redwood City*, 191 Cal. App. 4th 1559, 1582 (2011). A justiciable controversy must be ripe. "Unripe cases are 'those in which parties seek a judicial declaration on a question of law, though no actual dispute or controversy ever existed between them requiring the declaration for its determination[.]'" *Id.* at 1573 (citation omitted). Indeed, "[o]ne cannot analyze requested declaratory relief without evaluating the nature of the rights and duties that plaintiff is asserting, *which must follow some recognized or cognizable legal theories*, that are related to subjects and requests for relief that are properly before the court." *Otay Land Co. v. Royal Indem. Co.*, 169 Cal. App. 4th 556, 563 (2008) (emphasis added).

Plaintiffs' Complaint is devoid of any allegations supporting a "recognized or cognizable legal theor[y]" because ICANN did not take any action that violated Plaintiffs' legal rights. *Otay Land Co.*, 169 Cal. App. 4th at 563. Instead, Plaintiffs' legal theory is that they somehow obtained "right[s]" as a result of a third-party letter posted on ICANN's website. (*See* Compl. ¶¶ 57–58.) Moreover, Plaintiffs' vague and conclusory allegations demonstrate the complete lack of connection between Plaintiffs and ICANN. Indeed, Plaintiffs do not adequately allege that Plaintiffs have any relationship with ICANN, contractual or otherwise, or that ICANN owes Plaintiffs any duty under the law. (*See generally*, Complaint.)

Additionally, an action for declaratory relief is subject to a general demurrer where it derives from a separate claim that is invalid as a matter of law. *Ball v. FleetBoston Fin. Corp.*, 164 Cal. App. 4th 794, 800 (2008) (finding a demurrer was properly sustained when plaintiff's declaratory relief claim was "wholly derivative" from plaintiff's CLRA claim). Plaintiffs' declaratory relief claim derives from the same legal basis as Plaintiffs' other claims, all of which

assert ICANN's conduct violated its "policies and procedures." (Compl. ¶¶ 101–103.) Thus, Plaintiffs should not be able to maintain a claim for declaratory relief when all of their other claims fail as a matter of law. Accordingly, under CCP § 1061, this Court "may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Cal. Civ. Proc. Code § 1061.

II. PLAINTIFFS LACK STANDING TO PURSUE THEIR CLAIMS.

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

Plaintiffs lack standing to pursue a claim that ICANN has breached its Bylaws and policies. In California, "[e]very action must be prosecuted in the name of the real party in interest except as otherwise provided by statute." Cal. Civ. Proc. Code § 367; *see Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 175 (2007) ("In general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.'") (citation omitted). The purpose of the real party in interest requirement is to "prevent a defendant against whom a judgment may be obtained from further harassment or vexation at the hands of other claimants to the same demand." *Giselman v. Starr*, 106 Cal. 651, 657 (1895). "Where the complaint shows the plaintiff does not possess the substantive right or standing to prosecute the action, 'it is vulnerable to a general demurrer on the ground that it fails to state a cause of action.'" *Schauer v. Mandarin Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 955 (2005) (citation omitted).

Here, for the reasons stated above, Plaintiffs—having no relationship with ICANN—do not have a legally protected interest against ICANN to assert any claim. Moreover, ICANN is a public benefit corporation, and only officers, directors, the corporation or a member thereof, the attorney general, or a person with an interest in an asset the corporation holds in charitable trust have standing to sue for breach of the corporation's foundational documents. *See* Cal. Corp. Code § 5142; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161–62 (1987). Plaintiffs, as registrants of second-level domain names, do not fit into any of these categories.

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

Plaintiffs similarly lack standing to sue ICANN for violations of its "agreements" with the U.S. Department of Commerce and Verisign. (*See* Compl. ¶ 86.) Plaintiffs allege that by "ignoring Plaintiff FPI's request to release Single-Character domain names and preventing Plaintiffs from registering and using the Single-Character domain names at the .com and .net TLD, ICANN is arbitrarily discriminating against Plaintiffs and in so doing is violating its policies and Bylaws and its PICs and its DoC Agreement." (Compl. ¶ 86.) Plaintiffs are not a party to that agreement and have not pled facts to establish that they have a legal interest in any agreement ICANN entered into with the Department of Commerce. For the same reasons Plaintiffs cannot enforce alleged aspects of ICANN's agreement with the Department of Commerce, Plaintiffs similarly cannot challenge in court the Public Interest Commitments ("PICs"), which are provisions in the Registry Agreements between ICANN and Verisign. Moreover, those Registry Agreements explicitly state that such "commitments shall be enforceable by ICANN and through the Public Interest Commitment Dispute Resolution Process established by ICANN." (Compl. ¶ 70 & nn.43–46.) In short, Plaintiffs' Complaint is filled with references to agreements and statements made by Verisign and other entities that do not involve Plaintiffs or ICANN, none of which Plaintiffs have a legally cognizable interest in, much less standing to sue ICANN. (*See* Compl. ¶¶ 29–35, 39, 41–55, 70).

CONCLUSION

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

Dated: September 18, 2023

JONES DAY

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

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS