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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **FOR THE COUNTY OF SAN FRANCISCO**

13 **UNLIMITED CIVIL CASE**

14 SURAJ KUMAR RAJWANI,

15 Plaintiff(s),

16 vs.

17 B52 MEDIA LLC, a Limited Liability
18 Company; LONNIE BORCK, an individual;
19 ICANN, a Corporation;

20 Defendant(s).

21 PAYMENTS IP PTY LTD, a limited
22 company,

23 Intervenor.

Case No. CGC-16-554684

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
INTERNET COMPANY FOR
ASSIGNED NAMES AND NUMBERS
(ICANN)'S DEMURRER TO
SECOND AMENDED COMPLAINT**

24 Date: June 29, 2017

25 Time: 9:30 AM

26 Dept. 302

27 Plaintiff, Suraj Kumar Rajwani, here with submits its opposition to Internet Company
28 for Assigned Names and Numbers (ICANN's) demurrer to plaintiff's Second Amended
Complaint ("SAC").

The demurrer is essentially attempting to argue questions of fact, not demonstrate how
the complaint on its face, or by matters which can be *properly* judicially noticed, how the

1 pleading is legally deficient.

2 Plaintiff submits that the SAC shows that ICANN is a proper necessary party and that
3 therefore the demurrer should be overruled.

4 **I. Summary of the Second Amended Complaint.**

5 Plaintiff alleges in the SAC that it entered into a contract, and a series of addenda, with
6 B52 Media LLC and Lonnie Borck to purchase the “funding.com” domain name. Although
7 plaintiff paid the initial deposit of \$250,000 which entitled him to the use of the domain name,
8 he was never given access to the name.

9 ICANN was named as a necessary party to transfer the domain name to plaintiff if the
10 court found that plaintiff was so entitled.

11 ICANN disputes that it has the power to transfer the domain name to plaintiff, that it is
12 not a necessary party, and therefore its demurrer should be sustained.

13 Plaintiff submits that ICANN’s position that plaintiff and the other parties to the
14 agreement were mistaken is a factual matter that is not resolvable on demurrer.

15 **II. Applicable Law & Argument.**

16 Code of Civil Procedure section 430.10 states that the “party against whom a complaint
17 or cross-complaint has been filed may object, by demurrer . . . as provided in section 430.30, to
18 the pleading on any one or more of the following grounds . . . (e) The pleading does not state
19 facts sufficient to constitute a cause of action. If there is a reasonable possibility that a pleading
20 defect can be cured, leave to amend must be granted. (*Platt v. Coldwell Banker Residential Real*
21 *Estate Servs.* (1990) 217 Cal.App.3d 1439, 1444.) The grounds for a demurrer or a motion to
22 strike must appear on the face of the pleading under attack, or from matter which the court may
23 judicially notice. (Cal. Code Civ. Proc. § 437.) No other evidence extrinsic to the pleading can
24 be considered by the Court. (*Id.*; *Ion Equip. Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 881.)
25 On a demurrer, the Court must consider the complaint’s allegations in context and presume
26 them to be true. (*Clauson v. Sup. Ct. (Pedus Services, Inc.)* (1998) 67 Cal.App.4th 1253, 1255;
27

1 *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The pleadings and the facts contained therein must
2 be “liberally construed, with a view to substantial justice between the parties.” (Cal. Code Civ.
3 Proc. § 452.)

4 With these legal standards in mind, we now turn to the plaintiff’s second amended
5 complaint.

6 With respect to ICANN, plaintiff alleges:

7
8 4. On information and belief, Defendant INTERNET
9 CORPORATION FOR ASSIGNED NAMES AND NUMBERS
10 (“ICANN”) is a corporation organized and existing under the laws
11 of the State of California. Defendant ICANN is here named as a
12 necessary party in the event that the remedy of specific
13 performance is obtained as a result of this Complaint, because
14 ICANN is specified in the subject Agreement as the registering
15 agent and agent for transfer of ownership of the subject Domain
16 Name. ICANN is in the business of monitoring and controlling
17 the registration of Domain Names, and also of facilitating the
18 resolution of disputed Domain Names.

19 (SAC ¶ 4)

20 20. The purpose of the Agreement was the sale of the Domain
21 Name “funding.com,” also referred to as the “Domain Name,” a
22 name registered with Defendant ICANN, here joined as a
23 necessary party for transfer.

24 21. In Paragraph 3 of the Agreement, Defendants, as “Seller,”
25 agreed, upon final payment, to prepare and transmit the necessary
26 documents and/or to correspond with ICANN directly or through
27 a domain registrar to authorize transfer of the Domain Name as
28 specified. Accordingly, in order to achieve specific enforcement
of this Agreement, ICANN is a necessary party hereto.

(SAC ¶¶ 20, 21).

58. Under this Agreement, transfer of ownership is to be
effectuated by request of Defendants to ICANN to transfer
ownership through appropriate registry, and Plaintiff Rajwani
here names ICANN as an additional Defendant and necessary
party to enable specific performance of the obligations of
Defendants Borck and B52.

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59. Plaintiff Rajwani here prays as an alternative to damages, specific performance of the Agreement, whereby Defendants are ordered to request ICANN, and ICANN is ordered to transfer ownership of the Domain Name to Plaintiff.

(SAC ¶¶ 58, 59).

68. In the event that specific performance is ordered, Plaintiff seeks an order of this Court ordering that Defendant ICANN cooperate in the transfer of the subject Domain Name to Plaintiff Rajwani.

(SAC ¶ 68).

Attached to the SAC as Exhibit A was a DOMAIN NAME PURCHASE AND ASSIGNMENT AGREEMENT (“Agreement”). The Agreement provided in part:

RECITALS

WHEREAS, Seller, a limited liability company having its principal place of business at 17 Warren Rd., 8 A, Baltimore, MD 21208, has adopted, used and registered with ICANN the domain name: “Funding.com” (the “Domain Name”)

The Agreement goes on to state in part at paragraph 3:

Specifically, Seller agrees to prepare and transmit the necessary documents and/or to correspond with ICANN directly or through a domain registrar to authorize transfer the Domain Name as specified above in section 2.

ICANN argues that it is not a necessary party because plaintiff, and the parties to the Agreement, misperceive its role in the transaction. It states that it has no power to transfer a specific domain name, such as the one at issue here, “funding.com”.

To support this argument, ICANN requests that the court take judicial notice of a number of documents most of which consist of references to its own website. ICANN also requests that the court take judicial notice of an unfiled stipulation between plaintiff and eNOM and WHOIS Privacy Protection Services Inc.

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1 Plaintiff submits that, whatever the ultimate merits of ICANN's position, it is improper
2 to utilize a demurrer to dispute factual allegations in a complaint, and is particularly
3 inappropriate to take judicial notice of a parties' statements or explanations on its own website
4 and/or an unfiled stipulation to buttress its arguments. (See attached objection to Judicial
5 Notice).

6 The SAC properly alleges that ICANN is named as an essential party to effectuate
7 transfer of a domain name. ICANN's claim that it is improperly named as a party because it has
8 no such power to transfer a domain name is a factual dispute that is not resolvable on a
9 demurrer.

10 **III. Conclusion.**

11 For the reasons set forth herein, ICANN's demurrer to the second amended complaint
12 should be overruled and it held to answer within 30 days.

14 Dated: June 16, 2017

O'CONNOR & ASSOCIATES

17 _____
18 By Jeffrey D. Kirk, Esq.
19 Attorney for Plaintiff
20 SURAJ KUMAR RAJWANI