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INTERNET CORPORATION FOR ASSIGNED
7 NAMES AND NUMBERS

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11 SURAJ KUMAR RAJWANI, an individual,
12
13 Plaintiff,

14 v.

15 B52 MEDIA LLC, a Limited Liability
Company; JONATHAN W. BIERER as
16 personal representative of the Estate of
Lonnie Borck; INTERNET CORPORATION
FOR ASSIGNED NAMES AND
17 NUMBERS, a Corporation; eNOM, Inc., a
Corporation; WHOIS PRIVACY
18 PROTECTION SERVICE, INC., a
corporation and DOES 1 THROUGH 100,

19
20 Defendant.

CASE NO. CGC-16-554684

**DEFENDANT ICANN'S REPLY IN
SUPPORT OF DEMURRER TO
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

[Response to Plaintiff's Objections To
Request For Judicial Notice filed
concurrently herewith]

Date: June 29, 2017
Time: 9:30 a.m.
Dept: 302

Complaint Filed: October 6, 2016

RESERVATION ID: 05250629-06

1 **I. INTRODUCTION**

2 Plaintiff's position is that, because Plaintiff signed a contract with another party that
3 erroneously states that the Internet Corporation for Assigned Names and Numbers ("ICANN") is
4 relevant to the transfer of a particular domain name, ICANN must remain a party to this litigation
5 even though the contract is demonstrably wrong. Apparently, if the contract had named the man
6 in the moon as relevant to the transfer of the domain name, then the man in the moon would also
7 be a necessary party – even if he had no connection to the domain name; and even if an existing
8 party to the litigation had already stipulated that it was the entity capable of transferring the
9 domain name and would do so if presented with a Court order to that effect.

10 Plaintiff's view that he can name anyone as a "necessary party" defendant, and subject
11 that party to litigation costs even if Plaintiff is wrong is contrary to the law. ICANN has
12 submitted to the Court multiple documents incontrovertibly demonstrating that ICANN is not a
13 necessary party to this litigation and that ICANN cannot provide the relief that Plaintiff seeks
14 because ICANN has no capability to transfer the "funding.com" domain name. Moreover,
15 Plaintiff already knows the entity that *can* transfer the domain name – namely, defendant eNOM,
16 Inc. Furthermore, Plaintiff and eNOM have signed a formal stipulation that guarantees that
17 eNOM will transfer "funding.com" to Plaintiff if so ordered by the Court.

18 Plaintiff does not actually dispute that ICANN is powerless to effect a domain name
19 transfer, nor does Plaintiff attempt to explain why ICANN is a necessary party when eNOM
20 (which does have the power to effect the transfer of "funding.com") has already agreed in writing
21 to transfer the domain name upon issuance of a Court order to do so. Rather, Plaintiff tries to
22 sidestep the fact that ICANN has no place in this litigation by (somewhat halfheartedly) arguing
23 that the Court cannot take judicial notice of the documents that establish definitively that ICANN
24 cannot transfer "funding.com" in the event Plaintiff prevails. The judicially noticeable facts
25 presented in ICANN's demurrer not only establish that ICANN cannot provide the relief Plaintiff
26 seeks, but directly contradict the basis asserted in Plaintiff's Second Amended Complaint ("SAC")
27 for joining ICANN as a necessary party to this litigation. Accordingly, ICANN respectfully
28 requests that the Court sustain ICANN's demurrer and dismiss it from this case.

1 **II. ARGUMENT**

2 While Plaintiff is correct that a court presumes a complaint's allegations to be true when
3 assessing the merits of a demurrer, those allegations may be disregarded where they are
4 contradicted by judicially noticeable facts. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 824–25
5 (2002) “...any allegations that are contrary to the law or to a fact of which judicial notice may be
6 taken will be treated as a nullity”); *Globe Int’l, Inc. v. Superior Court*, 9 Cal. App. 4th 393, 398
7 (1992), modified (Sept. 9, 1992) (“When the allegations of the complaint contradict or are
8 inconsistent with facts which may be judicially noticed, we accept the facts and reject the
9 allegations.”). Here, it is undisputed that the sole basis for naming ICANN as a defendant is
10 Plaintiff’s allegation that ICANN is necessary, or “essential,” to effectuate the transfer of
11 “funding.com” in the event Plaintiff obtains specific performance. (*See* Opp’n at 3-4, 5.)
12 However, as described below and in ICANN’s demurrer, this allegation is not only patently
13 wrong, but is also directly contradicted by judicially noticeable facts.

14 **A. The Stipulation Between Plaintiff And eNOM Directly Contradicts Plaintiff’s**
15 **Claim That ICANN Is Necessary To Transfer “Funding.com.”**

16 On January 30, 2017, Plaintiff entered into a stipulation with defendants WHOIS Privacy
17 Protection Service, Inc. and eNOM, Inc. (“Stipulation”) (Attached as Exhibit G to the Declaration
18 of Amanda Pushinsky filed in support of ICANN’s Demurrer to Plaintiff’s Second Amended
19 Complaint (“Pushinsky Decl.”).) Under the Stipulation’s “Recitals of Fact,” eNOM, Inc. is
20 identified as the registrar for “funding.com.” (*Id.* at 1.) The “Recitals of Fact” also state that
21 eNOM has “represented to Plaintiff’s counsel that it has locked the 'funding.com' domain name
22 and **will not allow the transfer of the domain name** until the parties have settled the dispute or
23 the court has ruled as to who is entitled to the domain name.” (*Id.* at 2) (emphasis added.) eNOM
24 is again identified as the registrar for “funding.com” in the “Agreements and Stipulations” section
25 of the Stipulation, where it also promises to “**observe and honor any court ruling regarding**
26 **the ownership of the “funding.com” domain name by a transfer of that domain name** to the
27 person determined by stipulation or court order to be entitled thereto[.]” (*Id.* at 2-3) (emphasis
28 added.) These statements, contained in a stipulation Plaintiff negotiated, signed, and **filed** with

1 this Court, directly contradict the SAC's claimed basis for ICANN's involvement in this lawsuit.

2 Plaintiff's opposition does not attempt to explain why ICANN remains necessary to this
3 litigation in view of the fact that Plaintiff has a signed stipulation from the entity able to transfer
4 the domain name promising to do so if so required. Nor does Plaintiff dispute the content,
5 validity, or impact of the Stipulation. Rather, Plaintiff makes the bizarre argument that the
6 Stipulation is not part of the court record and therefore not subject to judicial notice because it
7 was "not filed" but merely attached to a case management statement (which was filed). (Opp'n at
8 4; Obj. to Request for Judicial Notice at 3.) Plaintiff cites no authority to support his theory that
9 attachments to case management statements do not become part of the court record, or that the
10 filing of a document as an attachment does not make the attachment part of the official court
11 record. To the contrary, a trial court may properly take judicial notice of the records of any court
12 of record of California or any other state of the United States. Cal. Evid. Code § 452(d). The
13 statute makes no exceptions for documents filed as an attachment.

14 Moreover, a court may take judicial notice of the fact of the existence and legal effect of
15 legally operative documents, whether or not those documents are filed with a court. *Scott v.*
16 *JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 743, 754 (2013) ("Where, as here, judicial notice
17 is requested of a *legally* operative document—like a contract—the court may take notice not only
18 of the fact of the document and its recording or publication, but also facts that clearly derive from
19 its legal effect"); *Intengan v. BAC Home Loans Servicing LP*, 214 Cal. App. 4th 1047, 1054
20 (2013). Even if the Stipulation had not been filed with the Court (which it was), the Stipulation is
21 a legally operative document that has the legal effect of requiring eNOM to transfer
22 "funding.com" upon presentation of a Court order directing it to do so. Thus, there is no question
23 that the Court may take judicial notice of these facts – the existence of the Stipulation, as well as
24 its legal effect (eNOM is responsible for transferring the domain name) – both of which directly
25 contradict any claim that ICANN is a "necessary" party to the litigation.¹ *Hayes v. State Dep't of*
26 *Developmental Health Servs.*, 138 Cal. App. 4th 1523, 1530 (2006) (a party is not necessary to

27 ¹ As ICANN noted in its demurrer, even eNOM, Inc. is not a necessary party to this
28 litigation. Naming the registrar as a necessary party to effect transfer of a domain name is akin to
naming the Department of Motor Vehicles as a defendant in a dispute over a car title.

1 the litigation where plaintiff could be accorded complete relief among those already parties to the
2 action).

3 **B. ICANN Not A Necessary Party To This Litigation Because ICANN Is Unable**
4 **To Provide The Relief Plaintiff Seeks.**

5 As the Stipulation makes clear, ICANN is not the registrar for “funding.com,” nor is it the
6 entity that (pursuant to Stipulation) will be responsible for transferring the domain name upon
7 favorable (to Plaintiff) resolution of this case. (Pushinsky Decl. Ex. G (Stipulation at 2, 3).)
8 Further, ICANN does not register domain names or have the capability to transfer individual
9 domain names. (Pushinsky Decl. Ex. E (ICANN's Bylaws, section 2.2 (“ICANN shall not act as
10 a Domain Name System Registry or Registrar...”)); Pushinsky Decl. Ex. F (“About Unauthorized
11 Transfers and Changes of Registrant”) (ICANN does not have contractual authority to require a
12 registrar to transfer a domain name).) Only registrars like eNOM can effect a change from one
13 registrant to another. Thus, contrary to Plaintiff's assertion, ICANN has no “independent
14 authority” to transfer “funding.com.” (Pl.'s Obj. to Request for Judicial Notice at 3.)

15 Plaintiff contests the Court's ability to take judicial notice of ICANN's Bylaws and web
16 pages, but courts routinely take judicial notice of such documents, and Plaintiff does not argue
17 that those documents are in any way inaccurate or subject to challenge. As detailed in ICANN's
18 Request for Judicial Notice and Response to Plaintiff's Objections, the content of ICANN's web
19 pages are judicially noticeable under section 452(h) of the California Evidence code because they
20 contain “[f]acts and propositions that are not reasonably subject to dispute and are capable of
21 immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”
22 Cal. Evid. Code § 452(h). ICANN's Bylaws are similarly not subject to reasonable dispute. *See*
23 *El-Attar v. Hollywood Presbyterian Med. Ctr.*, 56 Cal. 4th 976, 989-90 (2013) (taking judicial
24 notice of the model bylaws of the California medical association); *People v. Lofchie*, 229 Cal.
25 App. 4th 240, 260 n.9 (2014) (“We granted the Regents’ request that we take judicial notice of
26 the University’s conflict of interest code, faculty code of conduct, code of ethics, and its policies,
27 guidelines, and personnel manuals implementing those codes.”) Indeed, a federal court has
28 previously taken judicial notice of ICANN’s Bylaws. *Verisign, Inc. v. Internet Corp. for*

1 *Assigned Names & Nos.*, No. CV 04-1292 AHM (CTx), 2004 U.S. Dist. LEXIS 17330 (C.D. Cal.
2 Aug. 26, 2004) (taking judicial notice of earlier version of Bylaws when granting Rule 12(b)(6)
3 motion).

4 The contract between Plaintiff and B52 media regarding “funding.com,” attached to the
5 SAC and on which Plaintiff bases his allegation as to ICANN, does not alter the result. For one
6 thing, even the contract appears unsure of whether ICANN would have a role in the transfer of
7 “funding.com,” stating that the seller “agrees to prepare and transmit the necessary documents
8 and/or to correspond with ICANN directly or through a domain registrar to authorize transfer[.]”
9 (Second Am. Compl., Ex. A.) Thus, the contract itself acknowledges the possibility that ICANN
10 is not the correct entity to effect transfer of the domain name. In all events, merely because
11 Plaintiff thought ICANN might be relevant to a domain name transfer does not overcome the fact
12 that Plaintiff is 100% wrong. ICANN should not remain a defendant in this litigation on the basis
13 of a provably incorrect clause in a private contract to which ICANN was not a party.

14 **C. Plaintiff Should Not Be Granted Leave To Amend.**

15 Because Plaintiff cannot meet its burden to demonstrate the manner in which the SAC can
16 be amended to state a cause of action, Plaintiff should not be granted leave to amend the SAC.
17 *Goodman v. Kennedy*, 18 Cal. 3d 335, 349-50 (1976); *Hendy v. Loose*, 54 Cal. 3d 723, 742
18 (1991). Notably, Plaintiff does not even request leave to amend, presumably because he knows
19 that there are no new facts that would make ICANN relevant to this lawsuit.

20 **III. CONCLUSION**

21 Plaintiff's insistence on keeping ICANN in this case makes no sense. Documents filed
22 with ICANN's demurrer (in addition to the multiple documents provided to Plaintiff outside of
23 this pleading) indisputably demonstrate that the contract attached to the SAC was drafted in error;
24 that ICANN is not a necessary party to this litigation; and that ICANN is incapable of providing
25 the relief Plaintiff seeks. Plaintiff has already named as a defendant the entity that has
26 acknowledged that it *will* be able to provide the relief Plaintiff is seeking, and a Stipulation
27 promising to provide that relief has been signed by both parties and filed with the Court.
28 Plaintiff's attempt to obscure these facts by arguing against judicial notice is unavailing. ICANN

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is not a necessary party to this litigation, and should be dismissed from this case with prejudice.

Dated: June 22, 2017

Jones Day

By: 
Amanda Pushinsky

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

NAI-1502793358