

1 Jeffrey A. LeVee (State Bar No. 125863)
Amanda Pushinsky (State Bar No. 267950)
2 JONES DAY
555 South Flower Street
3 Fiftieth Floor
Los Angeles, CA 90071.2300
4 Telephone: (213) 489-3939
Facsimile: (213) 243-2539
5 Email: apushinsky@jonesday.com

6 Attorneys for Defendant
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
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO PLAINTIFF'S
SECOND AMENDED COMPLAINT**

[Notice of Demurrer and Demurrer,
Request for Judicial Notice, Declaration
of Amanda Pushinsky, and [Proposed]
Order filed concurrently herewith]

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

Complaint Filed: October 6, 2016

RESERVATION ID: 05250629-06

1 There is no basis whatsoever for including the Internet Corporation for Assigned Names
2 and Numbers ("ICANN") in this litigation. Plaintiff Suraj Rajwani ("Plaintiff") does not claim
3 ICANN committed any wrongdoing, but rather joins ICANN to his lawsuit as an alleged
4 "necessary party" in the event that Plaintiff wins specific performance or injunctive relief that
5 would entitle him to obtain the domain name "funding.com" from defendant B52 Media.
6 Plaintiff believes that ICANN is somehow required to participate in the transfer of a disputed
7 domain name, but Plaintiff is wrong. As ICANN has repeatedly advised Plaintiff, and as the
8 materials accompanying this Demurrer (over which the Court can take judicial notice)
9 demonstrate beyond a doubt, ICANN has no power to effectuate a transfer of an individual
10 domain name, nor could ICANN do anything to interfere with such a transfer. The entity that *is*
11 able to effectuate that transfer is eNOM, Inc. ("eNOM") – eNOM is the registrar of funding.com
12 and is already a defendant in this litigation. Moreover, eNOM has *stipulated* that it will transfer
13 "funding.com" to Plaintiff if so ordered by the Court.

14 ICANN is an unnecessary and inappropriate party to this case, and the Court should
15 sustain this demurrer and dismiss ICANN from the litigation with prejudice.

16 **I. FACTUAL BACKGROUND**

17 **A. PLAINTIFF'S CLAIMS**

18 On or around July 11, 2014, Plaintiff entered into a contract ("Contract") with defendant
19 B52 Media to purchase the domain name "funding.com." (Second Amended Complaint ("SAC")
20 ¶ 18; SAC Ex. A.) The named parties to the Contract are B52 Media, as "seller," and Plaintiff as
21 "buyer." *Id.* ICANN is not a party to the Contract. (SAC Ex. A.)

22 Plaintiff alleges that B52 Media breached the Contract, by leaving Plaintiff without access
23 to or use of the domain name, and failing to transfer the domain name to Plaintiff. (SAC ¶ 14,
24 15.) Plaintiff seeks the following relief as to all defendants: damages; fees and costs; restitution;
25 specific performance; an order quieting title to funding.com in Plaintiff; and injunctive relief
26 enforcing the terms of the Contract. (SAC at 16.)

27 Plaintiff names ICANN as a "necessary party" in the event that Plaintiff obtains injunctive
28 relief or specific performance of the Contract, and the Court orders the domain name transferred

1 to him. (SAC ¶ 59.) The SAC alleges (incorrectly) that ICANN is "the registering agent and
2 agent for transfer of ownership of the subject Domain Name,"¹ and asks that ICANN be made to
3 transfer the domain name by court order if Plaintiff succeeds. (SAC ¶¶ 4, 59, 68.) As described
4 below, not only does ICANN have no authority over the transfer of the "funding.com" domain
5 name, but the relevant defendant (eNOM) has already stipulated that it will transfer
6 "funding.com" to Plaintiff if so ordered by the Court.

7 **B. ICANN AND THE DOMAIN NAME SYSTEM**

8 In order to reserve a domain name, a person or entity must register that domain name with
9 an entity known as an Internet "registrar." (May 31, 2017 Declaration of Amanda Pushinsky
10 ("Pushinsky Decl.") Ex. A ("Domain Name Registration Process").)² The person or entity
11 registering that domain name is called a "registrant." *Id.* Registrars are the entities responsible
12 for processing the registration of domain names. *Id.* They are also the entities responsible for
13 processing the transfer of domain names. (Pushinsky Decl. Ex. B ("About Change of Registrant")
14 (stating "... [to] transfer your domain name ... please contact the registrar with which the domain
15 is registered."))

16 ICANN is a non-profit public benefit corporation that is responsible for coordinating the
17 Domain Name System generally. (Pushinsky Decl. Ex. C ("What Does ICANN Do?").) ICANN
18 performs numerous functions, including accrediting the domain name registrars. (Pushinsky
19 Decl. Ex. D ("ICANN FAQs").) ICANN does not, however, act as a registrar in competition with
20 those registrars it has accredited, nor does it register domain names or transfer them between
21 registrants. (Pushinsky Decl. Ex. E (ICANN's Bylaws, section 2.2 ("ICANN shall not act as a
22 Domain Name System Registry or Registrar...").) Only the registrar can effect a change from
23 one registrant to another. ICANN does not have the power or authority to transfer individual
24 domain names. (Pushinsky Decl. Ex. F ("About Unauthorized Transfers and Changes of

25 ¹ Plaintiff's assertion is apparently based on language in the Contract, which inexplicably
26 and incorrectly states that B52 Media had "used and registered with ICANN the domain name:
27 'Funding.com'," and that upon payment by Plaintiff, B52 Media would "prepare and transmit the
28 necessary documents and/or to correspond with ICANN directly or through a domain registrar to
authorize transfer of the Domain Name[.]" (SAC ¶ 4; Ex. A at 1 ¶ 3.)

² ICANN seeks judicial notice of Exhibits A – G to the Pushinsky Declaration. *See*
ICANN's Request for Judicial Notice, filed concurrently herewith.

1 Registrant") (ICANN does not have contractual authority to require a registrar to transfer a
2 domain name).)

3 C. ICANN'S COMMUNICATIONS WITH PLAINTIFF

4 ICANN has made numerous attempts to resolve this issue without involving the Court.
5 ICANN provided Plaintiff with the materials cited in this demurrer – portions of ICANN's
6 Bylaws and pages from ICANN's website – and explained that ICANN does not, and cannot,
7 provide the relief Plaintiff seeks from ICANN. ICANN also provided documents showing that
8 eNOM, not ICANN, is the registrar for "funding.com." ICANN even provided Plaintiff a
9 declaration from Akram Atallah, the President of the Global Domains division of ICANN, stating
10 that ICANN had no authority to transfer, or interfere with the transfer, of "funding.com." At each
11 juncture, Plaintiff's counsel promised to review the materials but never definitively stated whether
12 Plaintiff intended to dismiss ICANN from the case.³

13 On January 30, 2017, defendants eNOM, Inc. and WHOIS Privacy entered into a
14 stipulation with Plaintiff declaring that eNOM is the registrar of "funding.com," and that eNOM
15 would "observe and honor any court ruling regarding the ownership of the 'funding.com' domain
16 name by arranging a transfer of that domain name to the person entitled hereto[.]" (Pushinsky
17 Decl. Ex. G (1/30/17 "Stipulation re: Disclaimer of Interest by eNOM, Inc. and WHOIS Privacy
18 Protection Service, Inc.") ("Stipulation").) Thereafter, ICANN again contacted Plaintiff's
19 counsel, asking that ICANN be dismissed from the case, since Plaintiff's *own Stipulation*
20 provided that ICANN is *not* the registrar for "funding.com," and that ICANN is *not* the entity that
21 would transfer the domain name in the event Plaintiff obtained specific performance. When
22 Plaintiff's counsel once again failed to provide a definitive response, ICANN filed this demurrer.

23 II. LEGAL STANDARD

24 The function of a demurrer is to test the sufficiency of the allegations of the complaint.
25 Code Civ. Proc., § 589; *Schmidt v. Found. Health*, 35 Cal. App. 4th 1702, 1706 (1995). A court

26 ³ ICANN provides this information for background purposes and to explain why ICANN
27 waited to file this demurrer. The communications between ICANN and Plaintiff leading up to
28 this demurrer, as well as the materials provided to Plaintiff during those communications, are
described in greater detail in paragraphs 8-19 of the concurrently filed Pushinsky Declaration.

1 is to “treat the demurrer as admitting all material facts properly pleaded, but not contentions,
2 deductions, or conclusions of fact or law.” *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985).
3 “Furthermore, any allegations that are contrary to the law or to a fact of which judicial notice may
4 be taken will be treated as a nullity.” *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 824–25 (2002).
5 A party may not avoid demurrer by suppressing facts, including those that are judicially
6 noticeable, which prove the pleaded facts false. *Id.*

7 **III. ARGUMENT**

8 **A. ICANN IS NOT A NECESSARY PARTY TO THIS ACTION** 9 **AND CANNOT AFFORD PLAINTIFF THE RELIEF SOUGHT.**

10 Plaintiff’s *sole* basis for naming ICANN as a defendant in this action is that ICANN is
11 allegedly a “necessary party.” However, ICANN is not a necessary party: not only can Plaintiff
12 obtain a fair adjudication in ICANN’s absence, but ICANN is *unable* to grant Plaintiff the relief
13 he seeks.

14 Plaintiff is not required to join a party if the Court can render a fair adjudication in that
15 party’s absence. *Olszewski v. Scripps Health*, 30 Cal. 4th 798, 808-809 (2003). If complete relief
16 can be rendered in a party’s absence, the party is not considered “indispensable” or otherwise
17 necessary to the action. *Olszewski*, 30 Cal. 4th at 808 (“a person is an indispensable party [only]
18 when the judgment to be rendered necessarily affects his rights”) (citations omitted); *see also*
19 *Hayes v. State Dept. of Developmental Health Servs.*, 138 Cal. App. 4th 1523, 1530 (2006) (the
20 Office of Administrative Hearings was not a necessary party, let alone an indispensable one,
21 because the plaintiff could be accorded complete relief among those already parties to the action).

22 Here, this Court can grant the relief requested by Plaintiff without ICANN being a party to
23 this lawsuit. If Plaintiff obtains specific performance, that court order can be implemented by
24 defendant eNOM, who is the registrar for “funding.com.” eNOM (not ICANN) is the one that
25 can effectuate the transfer of the domain name. In fact, eNOM has already stipulated that it will
26 follow any such court order. (Pushinsky Decl. Ex. G (Stipulation ¶ 3).)

27 Moreover, ICANN has *no ability* to grant Plaintiff the relief he seeks. The transfer of an
28 individual domain name such as “funding.com” from one registrant to another is not a function

1 ICANN can perform. The language contained in the Contract suggesting that the domain name
2 was registered to ICANN, or that ICANN is the party to whom any transfer paperwork may be
3 submitted, is an error. Indeed, the language in the Contract appears to concede that ICANN may
4 not be involved, and allows for the possibility that the transfer would be effected by a registrar,
5 rather than ICANN. (SAC Ex. A, § 3 (suggesting that the transfer communications take place
6 either between ICANN or a registrar).)

7 Because ICANN cannot provide the relief that Plaintiff seeks, and because Plaintiff does
8 not assert any claims against ICANN, ICANN should be dismissed from this case with prejudice.
9 *See e.g. Mills v. Bartenders Int'l Union Local 41*, No. C-74-0927 RFP, 1975 U.S. Dist. Lexis
10 11320,) at *7-9 (N.D. Cal. July 23,1975) (hotel association, for the purposes of relief, is not a
11 necessary party and should be dismissed because the association did not have the authority to act
12 independently, the necessary defendants were already parties to the lawsuit, and the plaintiffs did
13 not allege facts sufficient to demonstrate a connection between the association and the alleged
14 unlawful act); *Equal Employment Opportunity Comm'n v. Lilja*, No. C-92-1492 MHP, 1992 U.S.
15 Dist. LEXIS 23075, at *5-6 (N.D. Cal. Dec. 16, 1992) (union is not a necessary party where
16 complete relief could be accorded without the union, any relief granted would not affect rights of
17 union or its membership, and union would have an opportunity to intervene if it appeared union
18 might be affected by relief). Dismissing ICANN from this action will not prejudice any party,
19 expose any party in this lawsuit to additional liability, or expose any party to inconsistent
20 obligations. If forced to stay in the case, ICANN will be harmed in both time and expense,
21 incurring costs associated with the lawsuit, discovery costs, and an inevitable motion for
22 summary judgment.

23 **B. IN THE ALTERNATIVE, ICANN SHOULD BE DISMISSED FROM**
24 **PLAINTIFF'S FIRST AND FOURTH CAUSES OF ACTION.**

25 Plaintiff's SAC makes clear that ICANN is only joined as a necessary party in the event
26 Plaintiff succeeds in obtaining specific performance of the transfer of "funding.com." (SAC ¶¶ 4
27 ("Defendant ICANN is here named as a necessary party under the laws of the state of
28 California."), 59.) However, Plaintiff's first cause of action for breach of contract and fourth

1 cause of action for violation of California's Unfair Competition law are against all defendants.
2 Further, Plaintiff's prayer for damages, including general damages, punitive damages, restitution,
3 and fees and costs, is likewise against all defendants. Even if the Court does not find that ICANN
4 should be dismissed from the entire action, Plaintiff's own statements make clear ICANN should
5 not be included in first and fourth causes of action, nor potentially held liable for any damages
6 should Plaintiff succeed in his lawsuit.

7 **C. PLAINTIFF SHOULD NOT BE GRANTED LEAVE TO AMEND.**

8 In order for the Court to permit leave to amend in the wake of a defendant's successful
9 demurrer, the burden is on the plaintiff to demonstrate the manner in which the complaint can be
10 amended to state a cause of action. *Goodman v. Kennedy*, 18 Cal. 3d 335, 349-50 (1976); *Hendy*
11 *v. Loose*, 54 Cal. 3d 723, 742 (1991). To meet that burden, a plaintiff must show: (1) the way in
12 which the complaint can be amended; and (2) how that amendment will change the legal
13 sufficiency of the complaint. *Cnty. Assisting Recovery, Inc. v. Aegis Sec. Ins. Co.*, 92 Cal. App.
14 4th 886, 895 (2001). Because nothing can alter the fact that ICANN cannot provide the relief
15 Plaintiff seeks, the Court should not grant Plaintiff leave to file a third amended complaint in this
16 case, particularly inasmuch as ICANN has already provided extensive information to Plaintiff, yet
17 Plaintiff has never amended its claims as against ICANN.

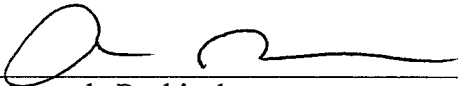
18 **IV. CONCLUSION**

19 ICANN is named as a defendant as a "necessary party" to accomplish an act ICANN is
20 incapable of doing. The entity that can perform that act – eNOM – is already a party to this case
21 and has signed a Stipulation stating that it will abide by any court order to transfer the
22 "funding.com" domain name. Not only can Plaintiff obtain complete relief in ICANN's absence,
23 but ICANN's presence brings Plaintiff no closer to any of the relief requested. ICANN therefore
24 respectfully requests that the Court grant its demurrer and dismiss ICANN from the case with
25 prejudice.

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Dated: June 2, 2017

JONES DAY

By: 
Amanda Pushinsky

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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