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14 Specially Appearing as Attorneys for
 15 Defendant Xiamen 35.com Technology Co., Ltd.
 16 (erroneously sued as Xiamen 35.com Internet Technology Co., Ltd.)

17 **UNITED STATES DISTRICT COURT**
 18 **NORTHERN DISTRICT OF CALIFORNIA**
 19 **SAN FRANCISCO DIVISION**

20 **FACEBOOK, INC., et al.,**

21 Plaintiffs,

22 v.

23 **ONLINENIC INC., et al.,**

24 Defendants.

Case No. 3:19-cv-07071-SI

**DEFENDANT XIAMEN 35.COM
 TECHNOLOGY CO., LTD.'S NOTICE
 OF MOTION AND MOTION TO
 DISMISS THE SECOND AMENDED
 COMPLAINT PURSUANT TO FRCP
 12(b)(6) AND 12(b)(2);
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

Date: November 5, 2021
 Time: 10:00 a.m.
 Ctrm: 1 — 17th Floor
 Before: Judge Susan Illston



1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that, on November 5, 2021 at 10:00 a.m., in the above-
3 titled Court, in Courtroom 1, 17th Floor, 450 Golden Gate Ave., San Francisco, CA 94102,
4 Defendant Xiamen 35.com Technology Co., Ltd. (“35.CN” or “Defendant”) will and hereby
5 does move this Court to dismiss the Second Amended SAC (“SAC”) of Facebook, Inc. and
6 Instagram, LLC (“Plaintiffs”) pursuant to Federal Rule of Civil Procedure (“Rule”) 12(b)(6)
7 for failure to state a claim and 12(b)(2) for lack of personal jurisdiction.

8 Years after filing this case and aggressively litigating against the original Defendants
9 OnlineNIC Inc. (“OnlineNIC”) and Domain ID Shield Service Co. Limited (“ID Shield”),
10 Plaintiffs now seek to hold 35.CN, a Chinese cloud services provider, liable for the same
11 unsupported claims involving 35 allegedly infringing domain names (“Domain Names”) that
12 were registered by third-party customers of the other Defendants. To date, Plaintiffs have
13 offered nothing more than the most conclusory allegations that OnlineNIC and ID Shield
14 registered, trafficked in, or used the Domain Names or Plaintiffs’ trademarks in commerce
15 or in bad faith. Even further removed, Plaintiffs have not adequately pled (nor could they)
16 that 35.CN is liable as an “alter ego” of OnlineNIC or ID Shield, including as Plaintiffs have
17 failed to allege (and cannot show) any fraud or injustice resulting from recognizing these
18 entities’ separate corporate identities. Thus, Plaintiffs fail to state any viable claim against
19 35.CN. Moreover, there is no basis for personal jurisdiction as to 35.CN (which is a Chinese
20 company with no connection to the Domain Names) under an alter ego theory or otherwise.

21 This motion is based on this notice of motion and motion, the supporting
22 memorandum of points and authorities and declarations, the pleadings and other papers
23 on file in this action, and any other evidence that may be offered at a hearing if necessary.

24 Respectfully Submitted,

25 Dated: September 28, 2021

KRONENBERGER ROSENFELD, LLP

26 By: s/ Karl S. Kronenberger
27 Karl S. Kronenberger

28 Attorneys for Defendant Xiamen 35.com
Technology Co., Ltd.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(b)(2), this case should be dismissed as to Defendant Xiamen 35.com Technology Co., Ltd. (i.e., 35.CN), a company in Xiamen, China, for failure to state a claim and lack of personal jurisdiction.

Defendant 35.CN is a public company in China, which for years has provided internet and cloud computing services to Chinese customers under Chinese laws. As part of its services, 35.CN has registered as an accredited domain name registrar to facilitate third-party registrations of Chinese domain names from registries. 35.CN was not and is not the registrar for any of the Domain Names at issue. (SAC Ex. 7.)

Plaintiffs assert claims against OnlineNIC (the Domain Names’ registrar), ID Shield (the “Privacy Service”), and 35.CN (the purported “alter ego”) based on the third-party registration of Domain Names that allegedly infringe Plaintiffs’ trademarks. In doing so, Plaintiffs attempt to overturn years of precedent providing immunity for domain registrars. Furthermore, Plaintiffs’ Second Amended Complaint (“SAC”) is a house of cards built on key legal misassumptions, which, when discounted after careful analysis of the SAC and its voluminous Exhibits, leave the SAC without any cognizable legal claim.

Domain name registrars are not required to police their customers’ use of third-party domain names. Rather, rightsholders (like Plaintiffs) can obtain a court order against the registrant or the domain itself; and once a registrar is presented with such an order, it must comply with that decision under its Registrar Accreditation Agreement (“RAA,” SAC, Ex. 4) with ICANN. Instead of using this well-established process of suing the actual registrants of the Domain Name (“Registrants”)¹, Plaintiffs have sued Defendants on the baseless theory that ID Shield and its purported alter egos “accepted” liability for the Registrants’ conduct under the RAA by failing to disclose Registrants’ contact information within seven

¹Plaintiffs misleadingly call these Domain Name Registrants the “Licensees”; however, these third-party Registrants own and control the Domain Names, and thus it is legally impossible for them to obtain a license to the domain name property that they in fact own and which the registrars and privacy service never owned or controlled.

1 days of receiving evidence of harm. However, the SAC fails because that provision of the
 2 RAA, Section 3.7.7.3 (SAC Ex. 4) only applies to “Proxy Services” (which own and license
 3 domain names to customers) and not to “Privacy Services” such as ID Shield (which do
 4 not own or license domain names but merely provide “Privacy Services”). Furthermore, the
 5 RAA explicitly states that no third-party beneficiary rights shall be created by the
 6 agreement, i.e., Plaintiffs (who were not parties to the RAA) cannot base liability on, or
 7 assert they have standing under, the RAA. In summary, Plaintiffs’ allegations are contrary
 8 to established safeguards for domain name registrars and, if approved by the Court,
 9 threaten the existence of all domain name registrars.

10 35.CN moves to dismiss the SAC for two reasons. First, the Court should dismiss
 11 the SAC for failure to state a claim. Defendants have immunity in this case,² and there are
 12 insufficient allegations that any Defendant, and especially 35.CN, registered, used, or
 13 trafficked in the Domain Names or otherwise used Plaintiffs’ trademarks with a bad faith
 14 intent to profit or in commerce. While Plaintiffs lump the alleged conduct of all Defendants
 15 and the third-party Registrants together, Plaintiffs cannot avoid the clear statements in their
 16 SAC Exhibits, which demonstrate that none of the named Defendants registered or used
 17 the Domain Names or Plaintiffs’ marks. Nor did any Defendant agree to accept liability for
 18 claims arising from third-party registered domain names. For these reasons, Plaintiffs have
 19 failed to adequately allege a claim against any Defendant, including 35.CN.

20 Second, the Court should dismiss the SAC for lack of personal jurisdiction. Rather
 21 than outlining 35.CN’s contacts with the forum, Plaintiffs argue the Court has jurisdiction
 22 over 35.CN because (1) 35.CN is supposedly an alter ego of the other Defendants, (2)
 23 “Defendants” purportedly targeted Plaintiffs in California, and (3) Defendants agreed to a
 24 California forum selection clause in “one or more” contracts. (SAC ¶¶14–15 & Ex. 1.)
 25 Plaintiffs’ arguments fail because Plaintiffs have not adequately alleged that 35.CN is the
 26

27 ² Just as telephone service providers are not liable for illegal phone call scams, and internet
 28 service providers are not responsible for spam emails, domain name registrars and related
 providers such as ID Shield and OnlineNIC are immune from ordinary registration of
 domain names by their customers; and 35.CN was not even the registrar in this case.

1 alter ego of the other Defendants, jurisdictional contacts are not created based on Plaintiffs'
 2 location, and the RAA (or other contract) is not a basis for Plaintiffs to sue in this forum.
 3 Further, any request for jurisdictional discovery must be denied where after years of
 4 litigation involving significant party discovery about supposed "alter egos," Plaintiffs still
 5 cannot plausibly allege, and have not obtained evidence supporting, an alter ego claim.³

6 The time and money spent on this case is perplexing given the lack of liability and
 7 the lack of bad faith profits from the use of Plaintiffs' trademarks. If anything, this case is
 8 far more suitable for resolution under the streamlined Uniform Domain-Name Dispute-
 9 Resolution Policy ("UDRP") without further wasting Court and party resources. In either
 10 case, 35.CN is not a proper party to this case, and 35.CN requests that the Court rule on
 11 its motion without further discovery, given the history of Plaintiffs (a billion-dollar enterprise)
 12 leveraging their ability to outspend Defendants in litigation in order to gain a strategic
 13 advantage in litigation. Because there is no likelihood of being able to cure the SAC's
 14 defects, the SAC should be dismissed as to 35.CN with prejudice.

15 **STATEMENT OF ISSUES**

16 Should the SAC be dismissed as to Defendant 35.CN under Rule 12(b)(6) for failure
 17 to state a claim and/or Rule 12(b)(2) for lack of personal jurisdiction?

18 **STATEMENT OF FACTS**

19 **A. Background of 35.CN**

20 **1. 35.CN's Business Operations**

21 Defendant 35.CN is a public company in Xiamen, Fujian Province in China that is
 22 registered in China and organized under the laws of China. (Declaration of Zhang Weiwei
 23 ("Weiwei Decl.") ¶2.) 35.CN was established in 2004 and provides cloud computing,
 24 application software, email hosting, and business homepage building services as well as
 25 domain name and customer relationship management system ("CRM") services. (Weiwei
 26

27 ³ Plaintiffs have not alleged a basis for jurisdictional discovery in this case. Even though
 28 Plaintiffs have already conducted expansive discovery against OnlineNIC and ID Shield,
 further discovery is not appropriate as 35.CN did not register the Domain Names at issue
 or control the OnlineNIC or ID Shield registration database or email repository.

1 Decl. ¶2.) As part of its services, 35.CN is an ICANN-accredited registrar and assists
 2 customers with registering domain names; customers use 35.CN’s system and services in
 3 Chinese and make payment with Chinese currency. (Weiwei Decl. ¶3.)

4 35.CN observes corporate formalities, such as through ordinary business filings of
 5 public companies in China, and it is adequately capitalized. (Weiwei Decl. ¶7; Declaration
 6 of Perry J. Narancic (“Narancic Decl.”) ¶¶5–6 & Exs. C–D.)

7 **2. 35.CN’s Lack of Connections with this Forum**

8 35.CN lacks contacts in California and the United States. (Weiwei Decl. ¶4.) 35.CN
 9 does not have any offices, employees, owners, directors, agents, accounts, assets,
 10 servers, or business in California or even the United States. (Weiwei Decl. ¶4.) After years
 11 of expansive discovery of 35.CN’s purported “alter egos” (OnlineNIC and ID Shield),
 12 including voluminous written discovery and depositions, Plaintiffs still cannot allege any
 13 direct contacts between 35.CN and this forum. Importantly, 35.CN did not register the
 14 Domain Names, nor did 35.CN serve as the registrar for the Domain Names (Weiwei Decl.
 15 ¶6; see SAC Ex. 7), nor are OnlineNIC or ID Shield the registrants of the Domain Names;
 16 rather, the Domain Names were registered and owned by third-party Registrants, i.e.,
 17 customers of the other Defendants. (SAC ¶¶28, 56 & Ex. 7.)

18 Plaintiffs allege, vaguely, that “Defendants” entered one or more contracts whereby
 19 the parties to the agreements submitted to the Court’s jurisdiction. (SAC ¶15 & Ex. 1.) First,
 20 Plaintiffs cite to Exhibit 1, which is a Domain Name Registration Agreement involving
 21 OnlineNIC and users of OnlineNIC’s domain name registration services; nothing in this
 22 contract references or otherwise applies to 35.CN. Second, Plaintiffs attach Exhibit 4,
 23 which is a template RAA with ICANN, which Plaintiffs claim was agreed to by registrars.
 24 This agreement expressly states in section 7.5: “No Third-Party Beneficiaries. This
 25 Agreement shall not be construed to create any obligation by either ICANN or Registrar to
 26 any non-party to this Agreement, including any Registered Name Holder.” While 35.CN is
 27 a party to the RAA with ICANN, that agreement is just with ICANN and (1) facilitates
 28 35.CN’s business outside of the United States, and (2) is separate from OnlineNIC’s RAA

1 with ICANN. (Weiwei Decl. ¶4; Narancic Decl. ¶4 & Ex. B [PMQ Depo.] at 32:18–25.)

2 **3. Separation Between 35.CN and Other Defendants**

3 35.CN's public company filings show that 35.CN and OnlineNIC are separate
4 companies and have been since 2007 when 35.CN sold its interest in OnlineNIC. (Weiwei
5 Decl. ¶5; Narancic Decl. ¶¶5–6 & Exs. C–D [public filings and translation]).

6 Currently (and at all relevant times), the business relationship between 35.CN and
7 OnlineNIC is that 35.CN merely provides facilities and services to OnlineNIC through an
8 outsourcing agreement. (Narancic Decl. ¶3 & Ex. A [OnlineNIC's First Amended
9 Responses to Plaintiff Facebook, Inc.'s First Set of Interrogatories, No. 9]). 35.CN does
10 not control, manage, or run the operations or decisions of OnlineNIC or ID Shield, and
11 35.CN did not participate in the actions of OnlineNIC or ID Shield as alleged in the SAC;
12 and neither OnlineNIC nor ID Shield control the decisions or agreements of 35.CN. (Weiwei
13 Decl. ¶5.) 35.CN and OnlineNIC do not share the same domain name registration database
14 (35.CN's registration database is located in China). (Weiwei Decl. ¶8.) Moreover, while
15 35.CN's office space is in the same building as OnlineNIC, they are on different floors along
16 with multiple companies. (Weiwei Decl. ¶9; Narancic Decl. ¶4 & Ex. B [PMQ Depo].)

17 **B. Procedural History**

18 The original Complaint was filed against OnlineNIC and ID Shield on October 28,
19 2019. [D.E. 1.] After years of litigation and discovery involving those two original
20 Defendants, the SAC was filed on June 1, 2021. [D.E. 109.] Plaintiffs (Facebook and
21 Instagram) allege cybersquatting under the Anticybersquatting Consumer Protection Act
22 ("ACPA") and infringement, false advertising, and dilution under the Lanham Act, 15 U.S.C.
23 §§1114, 1125, relating to various Domain Names (registered by the third-party Registrants)
24 that are purportedly similar to Plaintiffs' trademarks (such as "FACEBOOK" and
25 "INSTAGRAM"). (SAC ¶¶56, 76–137.) Defendant 35.CN and OnlineNIC are domain name
26 registrars in China and California, respectively, and ID Shield is a domain privacy service
27 that Plaintiffs allege is an alter ego of OnlineNIC. (SAC ¶43.) With its most recent
28 allegations, Plaintiffs also allege that 35.CN is an alter ego of OnlineNIC and thus subject



1 to jurisdiction in this Court based on OnlineNIC’s connections to California. (SAC ¶¶55.)

2 Prior to Defendant 35.CN being named, there was substantial discovery, including
 3 document productions and depositions. [See e.g., D.E. 55 ¶¶8 (outlining a production of
 4 over 28,000 documents by OnlineNIC), 118 ¶¶2 (noting depositions); Narancic Decl. ¶¶2.] In
 5 particular, in a deposition of the person most qualified of OnlineNIC (Carrie Yu), on July
 6 13, 2021, when questioned about 35.CN’s assets in the U.S., Ms. Yu testified that “35.CN
 7 only has RAA in the United States”; and Plaintiffs’ exhibits included the Initial Public
 8 Offering (Chinese and Translated Versions) of 35.CN, which outline that 35.CN sold its
 9 interest in OnlineNIC in 2007. (Narancic Decl. ¶¶5–6 & Exs. C–D.) Despite meritorious
 10 defenses, Plaintiffs’ unrelenting litigation tactics and other issues forced Defendants
 11 OnlineNIC and ID Shield to stop defending this case. [D.E. 118 ¶¶1; D.E. 131-1 ¶¶4–5].⁴

12 ARGUMENT

13 A. Standards of Review

14 1. Rule 12(b)(6) for Failure to State a Claim

15 A Rule 12(b)(6) dismissal can be based on the lack of a cognizable legal theory or
 16 the absence of sufficient facts alleged under a cognizable legal theory. *Godecke v. Kinetic*
 17 *Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). A pleading must “contain either direct
 18 or inferential allegations respecting all the material elements necessary to sustain recovery
 19 under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007). “A
 20 pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a
 21 cause of action will not do.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*,
 22 550 U.S. at 555). “[C]ourts ‘are not bound to accept as true a legal conclusion couched as
 23 a factual allegation.’” *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265,
 24 286 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further
 25 factual enhancement.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather,

26
 27 ⁴ Compare the Federal Trade Commission’s recent amended antitrust complaint against
 28 Facebook for its illegal “buy-or-bury” scheme in which it has been taking out alleged
 competitors, available at <https://www.ftc.gov/news-events/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush> (Aug. 19, 2021).

1 a claim must be “plausible on its face,” meaning that the claimant must plead sufficient
2 factual allegations to “allow the court to draw the reasonable inference that the defendant
3 is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

4 In particular, in pleading a claim against multiple defendants, a plaintiff must
5 adequately identify each individual defendant's culpable conduct; defendants cannot
6 simply be grouped together in a claim without some specification as to which defendant is
7 responsible for which wrong. See e.g., *United States ex rel. Silingo v. Wellpoint, Inc.*, 904
8 F.3d 667 (9th Cir. 2018) (finding that when defendants engage in different wrongful
9 conduct, plaintiffs must differentiate their allegations); *Bank of America, N.A. v. Knight*, 725
10 F.3d 815, 818 (7th Cir. 2013). Compare *United States ex rel. Swoben v. United Healthcare*
11 *Ins. Co.*, 848 F.3d 1161 (9th Cir. 2016). Likewise, the complaint must “plausibly connect”
12 each defendant to the alleged claims for relief. See *Vázquez v. Surillo-Ruiz*, 76 F. Supp.
13 3d 381, 393 (D. P.R. 2015).

14 For purposes of a motion to dismiss, complaint exhibits are part of the “complaint.”
15 See *In re NVIDIA Corp. Secur. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Notably, the
16 court must disregard allegations in a complaint if they are contradicted by facts established
17 by reference to documents attached as exhibits to the complaint. See *Sprewell v. Golden*
18 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Thompson v. Ill. Dep’t of Prof.*
19 *Regulation*, 300 F.3d 750, 754 (7th Cir. 2002) (noting the exhibit trumps the allegations);
20 *United States ex re. Riley v. St. Luke’s Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004).
21 Where modification could not cure the deficiencies in a pleading, i.e., where amendment
22 would be futile, a Rule 12(b)(6) motion is properly granted without leave to amend. See
23 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

24 2. Rule 12(b)(2) for Lack of Personal Jurisdiction

25 “In opposing a defendant's motion to dismiss for lack of personal jurisdiction, the
26 plaintiff bears the burden of establishing that jurisdiction is proper.” *Ranza v. Nike, Inc.*,
27 793 F.3d 1059, 1068 (9th Cir. 2015). While uncontroverted allegations in a complaint are
28 taken as true, a plaintiff cannot simply rest on the bare allegations of a complaint, and

1 courts need not assume the truth of allegations in a pleading that are contradicted by
 2 affidavit. See *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011);
 3 *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

4 Where, as here, the court is asked to rule on the theory of jurisdictional allegations
 5 (which could include an alter ego theory), the court determines whether the facts alleged,
 6 if true, are sufficient to establish jurisdiction; no evidentiary hearing, factual determination,
 7 or discovery is necessary for that purpose. See *Credit Lyonnais Sec. (USA), Inc. v.*
 8 *Alcantara*, 183 F.3d 151, 153 (2d Cir. 1999). *C.f. Laub v. U.S. Dep't of Interior*, 342 F.3d
 9 1080, 1093 (9th Cir. 2003) (noting discovery may be granted where facts are controverted).

10 In this case, the SAC should be dismissed as to 35.CN due to the failure to state
 11 any viable claim as to 35.CN under Rule 12(b)(6) and for lack of personal jurisdiction under
 12 Rule 12(b)(2). Plaintiffs' tenuous allegations, which lump separate companies and third
 13 parties (which could not plausibly be engaged in the exact same conduct) together, are
 14 contrary to legal standards and common sense regarding the domain name registration
 15 process and immunity for registrars under these circumstances. Thus, relief is proper.

16 **B. Overview of Domain Name Registration and Other Defendants**

17 Plaintiffs' SAC Exhibits and a basic understanding of the domain name registration
 18 process demonstrate how Plaintiffs fail to state a valid claim and fail to make a prima facie
 19 showing of personal jurisdiction through direct contacts or an indirect "alter ego" theory.

20 **1. Domain Name Registration Generally**

21 The rights to domain names are sold to the public (i.e., to "registrants") in a process
 22 known as "domain name registration." *Petroliam Nasional Berhad v. GoDaddy.com, Inc.*,
 23 897 F. Supp. 2d 856, 859 (N.D. Cal. 2012), *aff'd*, 737 F.3d 546 (9th Cir. 2013).
 24 Domain name "registries" are the entities responsible for maintaining the master list of
 25 all domain names. *Id.* A person who registers a domain name does so through
 26 a domain name "registrar" (such as Go Daddy, OnlineNIC, or 35.CN). *Id.* The registrar is
 27 the designated intermediary between the domain name registrant and registry. *Id.*
 28 Registrars are accredited by the Internet Corporation for Assigned Names and Numbers



1 (“ICANN”), the international non-profit corporation that has been designated by the United
 2 States government to manage and coordinate domain names and IP Addresses. *Id.*
 3 The registrar's participation in this process is entirely automated. *Id.* Put differently,
 4 registrars do not “own,” “sell,” or “register” domain names registered by their customers
 5 (the “registrants”) but instead permit registrants to purchase domain names for a time.

6 Under ICANN rules, the “registrant” (also known as the “Registered Name Holder”)
 7 is only the person or entity that holds the rights in and to a domain name⁵, which is personal
 8 property under Ninth Circuit law. *See Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir.
 9 2003); *Off. Depot Inc. v. Zuccarini*, 596 F.3d 696, 698–99 (9th Cir. 2010). In other words,
 10 the named “registrant” listed in public WHOIS records is not necessarily the legal
 11 “registrant” of a domain name. For example, in the registrar accreditation agreement
 12 between ICANN and registrars (the RAA), ICANN provides for two ways in which
 13 companies can offer privacy services to customers, thereby protecting the private contact
 14 details of registrants: i) registrars may offer a “Privacy Service” whereby the registrar’s (or
 15 a third-party Privacy Service’s) contact information appears in WHOIS database records
 16 while the registrant remains the true owner and “registrant” in control of the domain names
 17 (SAC Ex. 4); or ii) registrars may offer “Proxy Services,” whereby the registrar registers
 18 and takes legal ownership of the customer’s domain name but licenses the domain name
 19 back to the registrant such that the registrant can use domain name. (D.E. 109-4 at 59 &
 20 SAC Ex. 4 [RAA and Specifications].)

21 **2. The Actual Registrants of the Domain Names**

22 Plaintiffs allege that at least thirty-five Domain Names were “registered, used, or
 23 trafficked in” that were identical or confusingly similar to Plaintiffs’ trademarks. (SAC ¶¶56.)
 24 As Plaintiffs are well-aware and indicate, the third-party Registrants (which Plaintiffs
 25 mistakenly call “Licensees”) were the actual “registrants” of the Domain Names. (See SAC
 26 ¶¶27–28, 71 & Ex. 4 [RAA and Specifications].) Importantly, Plaintiffs admit that 35.CN did
 27 not register the Domain Names (SAC ¶¶28, 42, alleging that OnlineNIC and/or ID Shield
 28

⁵<https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#4>.

1 registered the Domain Names for third-party "Licensees"). Furthermore, Plaintiffs' Exhibits
 2 to the SAC clarify that no Defendant, including 35.CN, has ever owned or licensed the
 3 Domain Names on behalf of Registrants. (SAC Exs. 4–7, e.g., confirming "Privacy
 4 Services" do not own or license domain names to customers).

5 As shown by the SAC and prior filings by OnlineNIC, the third-party Registrants
 6 were responsible for registering the Domain Names but did not necessarily use those
 7 Domain Names for any unlawful purpose, if at all (e.g., domain names may have been
 8 registered in an automated manner simply due to an expiration of the domain name by
 9 another user); as one example, a UK company domain name registrant, Lockspin UK Ltd.,
 10 admitted that one of its Domain Names, TrollfaceBook.com, pointed to a website that
 11 contained an "internet meme" that had "nothing to do with Facebook." [D.E. 146 ¶¶5–6 &
 12 146-3; SAC 56 ¶31 & Ex. 8.] As other examples, in SAC Exhibit 8, certain Domain Names
 13 were "parked" (i.e., not used in commerce), used for websites that were completely
 14 unrelated to Plaintiffs (i.e., not infringing or unlawful), or used to describe services related
 15 to the Facebook platform (i.e., subject to a fair use defense); for other Domain Names,
 16 Plaintiffs simply show an "alert" page but no actual use in commerce. The SAC has no
 17 specific factual allegation to support the claim that the Domain Names were owned or
 18 controlled by any of the Defendants. Further, Plaintiffs were on actual notice of at least
 19 some of the true Domain Name Registrants prior to the filing of the SAC.

20 3. ID Shield is a Privacy Service Only, Thus Not Subject to RAA 3.7.7.3

21 Contrary to Plaintiffs' allegations, ID Shield was never the "registrant" or "registered
 22 name holder" of any Domain Name, as it is only a "Privacy Service" that did not hold any
 23 property or other rights in the Domain Names.⁶ In fact, Plaintiffs concede that ID Shield is
 24 a "domain name privacy service" for "OnlineNIC's customers." (SAC ¶10.) Pursuant to the
 25 RAA Specifications attached as Exhibit 4 to the SAC, a "Privacy Service" is not the
 26 "registrant" of a domain name but is merely used for alternative contact information (SAC
 27 Ex. 4, D.E. 109-4 at 59), and alternatively, a "Proxy Service" is indeed the "registrant" of a

28 ⁶ <https://www.icann.org/resources/pages/faqs-84-2012-02-25-en#4>.

1 domain name, owns the domain name, and licenses the domain name to its customers.
2 Privacy Services and Proxy Services are thus mutually exclusive alternatives for protecting
3 the privacy of customers, as demonstrated by the exact provisions of the RAA:

4 1.2 “Privacy Service” is a service by which a Registered Name is registered to
5 its beneficial user as the Registered Name Holder, but for which alternative,
6 reliable contact information is provided by the P/P Provider for display of the
7 Registered Name Holder’s contact information in the Registration Data Service
(Whois) or equivalent services. (emphasis added)

8 1.3 “Proxy Service” is a service through which a Registered Name Holder
9 licenses use of a Registered Name to the P/P Customer in order to provide the
10 P/P Customer use of the domain name, and the Registered Name Holder's
11 contact information is displayed in the Registration Data Service (Whois) or
12 equivalent services rather than the P/P Customer’s contact information.

13 OnlineNIC’s website (SAC Ex. 5) is consistent with the fact that it offers Privacy
14 Services and not Proxy Services, as only a Privacy Service provides for the customer to
15 maintain ownership of their domain name:

16 OnlineNIC ID Shield makes your privacy possible while maintaining your
17 ownership over your domain . . . Although the whois information shows our
18 information, you retain full ownership of the domain. You have complete control
19 over the domain, you manage all facets of the domain. (emphasis added)

20 Likewise, the ID Shield terms (SAC Ex. 6) reinforce how its services are Privacy Services:
21 “You will retain the right to sell, transfer, or assign each IDS Domain.”

22 Under Section 3.7.7.3 of the RAA, a registered name holder that “intends to license
23 use of a domain name to a third party . . . shall accept liability for harm . . . unless it
24 discloses the current contact information provided by the licensee and the identity of the
25 licensee within seven (7) days.” (SAC Ex. 4.) Conversely, a Privacy Service never owns
26 the domain names of its customers and thus cannot provide any license to its customers,
27 making Section 3.7.7.3 of the RAA and its seven-day rule inapplicable to Privacy Services.⁷

28 Plaintiffs allege that OnlineNIC, the registrar, was an “alter ego” of ID Shield.

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⁷ Further, the RAA explicitly states no third-party beneficiary rights shall be created, so Plaintiffs do not even have standing to allege rights under the RAA. (SAC Ex. 4.)

1 **C. The SAC fails to state a viable claim against 35.CN.**

2 The SAC should be dismissed for failure to state a claim. As an initial matter, 35.CN
 3 cannot be liable for the claims at issue because the SAC fails to adequately allege sufficient
 4 claims against ID Shield or OnlineNIC. Further, 35.CN was not the registrant or even the
 5 registrar for the Domain Names at issue. Without explaining what party took what action,
 6 Plaintiffs lump together all their allegations against 35.CN (a Chinese public company with
 7 diverse interests), OnlineNIC (a domain name registrar), ID Shield (a domain name privacy
 8 service), and the third-party Registrants (who actually registered the Domain Names). This
 9 shotgun pleading is improper as it makes it impossible for Defendants to determine what
 10 factual allegations give rise to what claims against which particular parties. Regardless of
 11 the inappropriate pleading, Plaintiffs' claims against 35.CN fail where Plaintiffs have not
 12 alleged that any Defendant used Plaintiffs' marks in commerce.

13 **1. 35.CN is immune from liability as a registrar in this context.**

14 There is no trademark cause of action against a domain name registrar acting in its
 15 capacity as a registrar. See 15 U.S.C. §1114(2)(D)(iii) (outlining immunity absent bad faith
 16 intent to profit); *Lockheed Martin Corp. v. Network Sols., Inc.*, 141 F. Supp. 2d 648, 655
 17 (N.D. Tex. 2001); *Petroliam Nasional Berhad v. GoDaddy.com, Inc.*, 737 F.3d 546, 551
 18 (9th Cir. 2013) (“the limitations on secondary liability in Section 1114 are equally consistent
 19 with the existence or absence of a cause of action for contributory cybersquatting under
 20 Section 1125(d)"); *Rigsby v. GoDaddy Inc.*, No. CV-19-05710-PHX-MTL, 2021 WL
 21 2416829, at **3–4 (D. Ariz. June 14, 2021) (citing cases confirming registrars did not “use”
 22 domain names under the Lanham Act). In other words, domain name registrars do not
 23 “register, traffic in, or use” domain names based on their customers' registrations. See
 24 *Petroliam Nasional Berhad*, 737 F.3d at 550–54 (noting there is no secondary or
 25 contributory liability of domain name registrars); *Facebook v. Namecheap, Inc.*, Case No.
 26 2:20-cv-00470-GMS, D.E. 52, p. 9:11–21 (finding plaintiffs failed to sufficiently allege that
 27 Namecheap used, registered, or trafficked in the infringing domain names where the
 28 allegations “only refer to how licensees used the domain names”). Similarly, under the RAA

1 Specifications (SAC Ex. 4), a “Privacy Service” (contrasted with a “Proxy Service”) does
 2 not actually control or license use of domain names and thus does not accept any liability
 3 for customers’ domain names under the RAA.

4 Because there is safe-harbor protection for domain name registrars like 35.CN (as
 5 well as OnlineNIC and privacy services such as ID Shield), there can be no direct liability
 6 for trademark claims, and the SAC must be dismissed without leave to amend.

7 **2. Plaintiffs fail to state a claim for cybersquatting.**

8 To state a valid claim of cybersquatting under the ACPA, the plaintiff must allege
 9 (1) it has a valid trademark; (2) its mark is distinctive or famous; (3) the defendant’s domain
 10 name is identical or confusingly similar to, or in the case of famous marks, dilutive of, the
 11 owner’s mark; and (4) the defendant “registers, traffics in, or uses” the domain name (5)
 12 and has a bad faith intent to profit from the mark. 15 U.S.C. §1125(d)(1)(A); *Interstellar*
 13 *Starship Services, Ltd v. Epix, Inc.*, 304 F.3d 936, 946 (9th Cir. 2002); *DaimlerChrysler v.*
 14 *The Net Inc.*, 388 F.3d 201, 204 (6th Cir. 2004).

15 Plaintiffs have not adequately pled the fourth and fifth elements (registration or use
 16 and bad faith) as to 35.CN beyond unreasonable inferences and conclusory legal
 17 allegations cast in the form of factual allegations, which this Court need not accept. Thus,
 18 the first cause of action must be dismissed.

19 **i. Plaintiffs fail to adequately allege that ID Shield or OnlineNIC**
 20 **“registers, traffics in, or uses” the Domain Names; and thus, 35.CN**
 21 **cannot be liable under an “alter ego” or similar theory.**

22 Plaintiffs fail to allege facts showing that ID Shield or OnlineNIC “registers, traffics
 23 in, or uses” the Domain Names. First, the “word ‘registers,’ when considered in context,
 24 obviously refers to a person who presents a domain name for registration, not to the
 25 registrar.” *Solid Host, NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1104 (C.D. Cal. 2009)
 26 (quoting *Lockheed Martin Corp. v. Network Solutions, Inc.*, 141 F. Supp. 2d 648, 650–51
 27 (N.D. Tex. 2001). Second, the ACPA defines “trafficking in” to mean “transactions that
 28 include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of

1 currency, and any other transfer for consideration or receipt in exchange for consideration.”
 2 15 U.S.C. §1125(d)(1)(E). Third, the ACPA imposes liability on persons who “use” an
 3 infringing domain name “only if that person is the domain name registrant or that
 4 registrant’s authorized licensee.” 15 U.S.C. §1125(d)(1)(D).

5 Plaintiffs’ ACPA claim fails because it does not sufficiently allege that 35.CN, ID
 6 Shield, or OnlineNIC registered, trafficked in, or used the Domain Names. Although
 7 Plaintiffs improperly lump together allegations against all Defendants and the third-party
 8 Registrants (which Plaintiffs call the “Licensees,” despite no license referenced in any of
 9 the documents at issue), the SAC Exhibits confirm that the third-party Registrants
 10 (customers of other Defendants) “registered,” owned, and retained control over the Domain
 11 Names (while using ID Shield contact information on WHOIS records), and that only the
 12 Registrants, if anyone, could have “trafficked in” or “used” the Domain Names. (SAC Exs.
 13 4–7.) Thus, Plaintiffs’ allegations are insufficient to state a claim against ID Shield and, by
 14 consequence, against its claimed alter egos OnlineNIC and 35.CN.

15 **ii. Plaintiffs fail to allege any “bad faith intent to profit.”**

16 The bad faith required to support a cybersquatting claim is not general bad faith, but
 17 a bad faith intent to profit from the mark. 15 U.S.C. §1125(d)(1)(A)(i); *see also Solid Host,*
 18 *NL*, 652 F. Supp. 2d at 1110 (finding provision of a privacy service and refusing to reveal
 19 its customers’ identity did not constitute a bad faith intent to profit from the goodwill of
 20 another’s mark under the ACPA), *declined to follow on other grounds by Petroliam*
 21 *Nasional Berhad v. GoDaddy.com, Inc.*, 737 F.3d 546 (9th Cir. 2013); *GoPets Ltd. v. Hise*,
 22 657 F.3d 1024, 1030 (9th Cir. 2011). Courts may consider various factors in reviewing “bad
 23 faith,” such as bona fide noncommercial or fair use, intent to divert customers from the
 24 mark owner’s website, an offer to transfer or sell the domain name to the mark owner or a
 25 third party for financial gain, and the provision of material and misleading false contact
 26 information (i.e., more than use of a privacy service); bad faith intent is not found in any
 27 case where the person had reasonable grounds to believe the use of the domain name
 28 was fair use or otherwise lawful. 15 U.S.C. §1125(d)(1)(B)(i)–(ii).

1 Here, Plaintiffs fail to allege sufficient facts showing any intent by Defendants to
 2 profit from their marks. Instead, it was the Registrants who registered (but did not
 3 necessarily “use”) the Domain Names, such as to create “meme” or “parking” websites
 4 (without evidence of bad faith intent to profit, e.g., domains may have been picked up after
 5 the expiration of the prior owner’s registration). There are insufficient allegations of bad
 6 faith against ID Shield (first, because it did not, and could not, accept liability for the Domain
 7 Names under the RAA as it was merely a “Privacy Service,” rather than a “Proxy Service”;
 8 and second, because purportedly failing to reveal its customers’ identities within a seven-
 9 day period does not rise to the level of “bad faith”). Even further removed, there are
 10 insufficient allegations of bad faith intent by OnlineNIC or 35.CN to profit from the goodwill
 11 of Plaintiffs’ marks. In fact, Plaintiffs fail to allege any facts showing that 35.CN intended to
 12 profit from Plaintiffs’ marks at all (because no such facts exist). For these reasons, the SAC
 13 fails to state a valid ACPA claim and should be dismissed.

14 **3. Plaintiffs fail to state any other claim under the Lanham Act.**

15 To allege claims for trademark infringement, false designation of origin, and dilution,
 16 Plaintiffs must sufficiently allege that 35.CN used Plaintiffs’ trademarks in commerce in
 17 connection with the sale or advertising of goods or services. 15 U.S.C. §§1114(1)(a),
 18 1125(a)(1); *see also Gibson Brands, Inc. v. Viacom Int’l, Inc.*, 640 Fed. Appx. 677, 678 (9th
 19 Cir. 2016); *Bosley Med. Inst., Inc. v. Kremer*, 403 F. 3d 672, 677 (9th Cir. 2005) (use of
 20 mark must be “in connection with a sale of goods or services”). Because Plaintiffs fail to
 21 make these allegations or outline any facts to justify secondary liability, and because no
 22 such facts exist, the SAC should be dismissed.

23 **i. Plaintiffs fail to allege Defendants used their marks in commerce.**

24 Under the Lanham Act, “a mark shall be deemed to be in use in commerce . . . when
 25 it used or displayed in the sale or advertising of services and the services are rendered in
 26 commerce.” *Rearden LLC v. Rearden Com., Inc.*, 683 F.3d 1190, 1204 (9th Cir. 2012).
 27 “Registration of a domain name without more [is not sufficient and] does not constitute
 28 service mark or trademark infringement.” *GoPets*, 657 F.3d at 1035; *see Dent v. Lotto*

1 *Sport Italia SpA*, No. CV-17-00651-PHX-DMF, 2020 WL 1170840, *12 (D. Ariz. March 11,
 2 2020) (registrant who did not market or sell goods or services in connection with infringing
 3 domains did not use marks in commerce or violate Lanham Act); *Lockheed Martin Corp.*
 4 *v. Network Solutions, Inc.*, 985 F. Supp. 949, 961 (C.D. Cal. 1997) (“Where domain names
 5 are used to infringe, the infringement does not result from [the registrar’s] publication of
 6 the domain name list, but from the registrant’s use of the name on a Web site or other
 7 Internet form of communication in connection with goods or services.”).

8 The SAC lacks allegations of Defendants’ “use” of Plaintiffs’ marks in commerce.
 9 First, the third-party Registrants did not use marks in commerce simply by registering the
 10 Domain Names. Second, ID Shield and OnlineNIC did not use any marks in commerce by
 11 allowing their customers to register Domain Names. Third, the SAC is devoid of any
 12 allegations that 35.CN itself used the marks in commerce in connection with the sale or
 13 advertisement of any goods or services; and 35.CN cannot be liable under an “alter ego”
 14 theory because the allegations are insufficient to state a claim against ID Shield and
 15 OnlineNIC in the first instance. Therefore, because Plaintiffs fail to allege the requisite
 16 element of a “use in commerce” by any Defendant, and especially 35.CN, Plaintiffs’
 17 Lanham Act claims must be dismissed in their entirety and at least as to 35.CN.

18 **ii. Plaintiffs fail to allege a sufficient basis for secondary liability.**

19 The Lanham Act authorizes two forms of secondary liability: contributory and
 20 vicarious liability. *Perfect 10, Inc. v. Visa Int’l Serv. Ass’n*, 494 F. 3d 788, 807 (9th Cir.
 21 2007). Plaintiffs fail to allege either form, and the SAC should be dismissed.

22 First, contributory liability requires that the defendant “intentionally induced” third
 23 party’s infringement or “direct[ly] control[led] and monitor[ed]” the instrumentality used. *Id.*
 24 at 807. Domain name registrars do not typically have the required level of “direct control
 25 and monitoring” over their customers to support a claim for contributory infringement. See
 26 *e.g.*, *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F. 3d 980, 985 (9th Cir. 1999)
 27 (“NSI cannot reasonably be expected to monitor the Internet”) (quoting *Lockheed Martin I*,
 28 985 F. Supp. at 962). Plaintiffs fail to show that OnlineNIC and ID Shield had the requisite



1 control of the third-party Registrants; and Plaintiffs do not, and cannot, allege that 35.CN
 2 had the ability to control and monitor use of the Domain Names by their Registrants (who
 3 were not 35.CN's customers). (Weiwei Decl. ¶¶5–6.) Thus, there is no claim under the
 4 Lanham Act for contributory liability.

5 Second, vicarious trademark liability requires a defendant and infringer to have an
 6 apparent or actual partnership, authority to bind one another, or joint ownership or control
 7 over the infringing product. *Perfect 10*, 494 F. 3d at 807. Plaintiffs plead no such allegations
 8 here. Thus, each of Plaintiffs' claims against 35.CN fail on the face of the SAC.

9 **D. The Court lacks personal jurisdiction over 35.CN.**

10 The SAC should be dismissed as to 35.CN for lack of personal jurisdiction under
 11 Rule 12(b)(2). Plaintiffs bear the burden of showing that personal jurisdiction is permitted
 12 by the local long-arm statute, and that the exercise of that jurisdiction does not violate
 13 federal due process. See *Schwarzenegger*, 374 F.3d at 800–01. Personal jurisdiction must
 14 be established for each defendant and by each plaintiff. *Prime Healthcare Centinela, LLC*
 15 *v. Kimberly-Clark Corp.*, No. CV148390DMGPLAX, 2016 WL 7177532, at *1 (C.D. Cal.
 16 May 26, 2016); see also *Action Embroidery Corp. v. Atl. Embroidery, Inc.*, 368 F.3d 1174,
 17 1180 (9th Cir. 2004) (“Personal jurisdiction must exist for each claim asserted against a
 18 defendant.”). Where a motion to dismiss for lack of personal jurisdiction is based on written
 19 submissions, the plaintiff must make a prima facie showing of jurisdictional facts including,
 20 if applicable, facts supporting an alter ego theory. See *Ranza*, 793 F.3d at 1068.

21 Plaintiffs cannot establish jurisdiction over 35.CN under either a conventional or
 22 alter ego analysis, including because Plaintiffs cannot show any fraud or injustice that will
 23 result from dismissal. Moreover, there is no specific personal jurisdiction based on 35.CN's
 24 contacts, and Plaintiffs do not and cannot allege the requisite contacts with this forum. In
 25 particular, Plaintiffs allege that 35.CN is responsible for the actions of OnlineNIC and ID
 26 Shield under an alter ego theory. (SAC ¶¶11–12, 44–55.) Plaintiffs' argument fails. First,
 27 because ID Shield cannot accept liability as a “Privacy Service,” there can be no
 28 attributable liability to OnlineNIC or subsequently to 35.CN under an alter ego theory.

1 Further, there is no secondary liability against 35.CN under an alter ego theory because,
 2 contrary to Plaintiffs' claims, 35.CN does not control the decisions of OnlineNIC and
 3 ID Shield, and neither OnlineNIC nor ID Shield control the decisions or agreements of
 4 35.CN. (Weiwei Decl. ¶5.) Notably, Plaintiffs fail to allege (and have no facts to support)
 5 that OnlineNIC and ID Shield did not observe corporate formalities or were inadequately
 6 capitalized so as to create a fraud or injustice required for alter ego liability. While Plaintiffs
 7 outline a number of claimed judgments against OnlineNIC, including a purported \$33.15
 8 million judgment not issued on the merits (SAC ¶61), Plaintiffs notably omit any financial
 9 allegations, such as about the lack of OnlineNIC's or ID Shield's finances,
 10 undercapitalization, or commingling of funds, to support any "alter ego" theory.

11 **1. There is no general jurisdiction over 35.CN, including because its place**
 12 **of incorporation and principal place of business are outside California.**

13 To establish general personal jurisdiction, a plaintiff must allege facts demonstrating
 14 that a defendant has substantial, continuous, and systematic contacts with the forum so
 15 as to render it "essentially at home" in the forum. *Daimler AG v. Bauman*, 571 U.S. 117,
 16 127 (2014). With respect to a corporation, the place of incorporation and principal place
 17 of business are paradigmatic bases for jurisdiction. *Daimler AG*, 571 U.S. at 137; *Holland*
 18 *America Line Inc. v. Wärtsilä North America, Inc.*, 485 F.3d 450, 459 (9th Cir. 2007).

19 Here, 35.CN is a Chinese company organized under Chinese laws; and Plaintiffs
 20 do not allege any place of incorporation, principal place of business, or any direct contacts
 21 of 35.CN in California. (See SAC ¶11; Weiwei Decl. ¶¶2–4.) Thus, 35.CN is not "at home"
 22 in California, and this Court lacks general personal jurisdiction over it.

23 **2. There is no specific jurisdiction over 35.CN because it did not**
 24 **purposefully direct any activities at California, the case is not related to**
 25 **forum contacts, and exercise of jurisdiction would be unreasonable.**

26 Courts in the Ninth Circuit employ a three-prong test when determining whether a
 27 nonresident defendant may be subject to specific personal jurisdiction in a forum: (1) the
 28 defendant must have purposefully directed its activities or purposefully availed itself of the

1 benefits afforded by the forum's laws; (2) the claim must arise out of or relate to the
 2 defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with
 3 fair play and substantial justice. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1023 (9th
 4 Cir. 2017); *Schwarzenegger*, 374 F.3d at 802. None of the requirements is met here.

5 **i. 35.CN did not purposefully direct its activities towards California,**
 6 **regardless of Plaintiffs' contacts or contracts, under either an**
 7 **analysis of 35.CN's direct contacts or an indirect "alter ego" theory.**

8 **a. Plaintiffs fail to show any direct contacts.**

9 The "purposeful direction" test applies where the claims arise from tortious conduct.
 10 *Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1142 (9th Cir. 2017); *see also Adidas Am., Inc.*
 11 *v. Cougar Sport, Inc.*, 169 F. Supp. 3d 1079, 1087 (D. Or. 2016) (purposeful direction
 12 applies to trademark claims). To establish purposeful direction, a plaintiff must show that
 13 the defendant (1) committed an intentional act, (2) expressly aimed at the forum state, and
 14 (3) causing harm that the defendant knows is likely to be suffered in the forum state. *Morrill*,
 15 873 F.3d at 1142. Simply registering someone else's trademark as a domain name and
 16 posting a website is not sufficient to subject a party domiciled in one state to jurisdiction in
 17 another. *Panavision Int'l, L.P. v. Toepfen*, 141 F.3d 1316, 1322 (9th Cir. 1998).

18 Plaintiffs allege no intentional conduct by 35.CN aimed at California. Regardless of
 19 where Plaintiffs are located, this prong is not met. To clarify, the personal jurisdiction
 20 analysis "looks to the defendant's contacts with the forum State itself, not the defendant's
 21 contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 284 (2014). "The
 22 plaintiff cannot be the only link between the defendant and the forum." *Id.* at 277. Thus,
 23 Plaintiffs' contacts do not authorize hailing a foreign company into litigation here.

24 Moreover, there are no contracts that authorize jurisdiction over 35.CN in this case.
 25 Contrary to Plaintiffs' allegations, OnlineNIC's contract for domain name registration does
 26 not reference or involve 35.CN (SAC Ex. 1). Similarly, the RAA between 35.CN and ICANN
 27 expressly states: "No Third-Party Beneficiaries. This Agreement shall not be construed to
 28 create any obligation by . . . Registrar to any non-party . . ." The Ninth Circuit has held that

1 the RAA does not create any right or duty owed to nonparties, such as Plaintiffs. See
2 *Balsam v. Tucows, Inc.*, 627 F. 3d 1158, 1162–63 (9th Cir. 2010).

3 **b. Plaintiffs fail to show indirect “contacts” where Plaintiffs**
4 **have not and cannot adequately allege alter ego liability as**
5 **connections do not rise to the level of a “unity of interest,”**
6 **and no “fraud or injustice” would result from this case.**

7 In certain limited circumstances, contacts of a subsidiary or parent may be attributed
8 to the other for jurisdictional purposes if the foreign entity is not really separate from its
9 domestic affiliate and the plaintiff makes a prima facie case to establish alter ego liability.
10 See *Daimler AG*, 571 U.S. at 134–36 (rejecting jurisdiction based on mere agency
11 liability); *Ranza*, 793 F.3d at 1071–73 (finding no “alter ego” jurisdiction); *MH Pillars Ltd. v.*
12 *Realini*, No. 15-CV-1383-PJH, 2017 WL 916414, at *12 (N.D. Cal. Mar. 8, 2017). Alter ego
13 liability requires (1) that there is such unity of interest and ownership that the separate
14 personalities or the two entities no longer exist, and (2) that failure to disregard their
15 separate identities would result in fraud or injustice. *Williams v. Yamaha Motor Co. Ltd.*,
16 851 F.3d 1015, 1021 (9th Cir. 2017). The stringent pleading requirement reflects the
17 principle that disregarding the corporate entity is an extreme remedy; and mere conclusory
18 allegations of alter ego status are not sufficient. *NuCal Foods, Inc. v. Quality Egg LLC*, 887
19 F. Supp. 2d 977, 993 (E.D. Cal. 2012) (noting it is axiomatic that there is a general
20 presumption in favor of respecting the corporate entity).

21 As an initial matter, and as explained above, there is no viable claim against any
22 Defendant. Thus, there is no basis for any “alter ego” liability because there is no
23 underlying liability of ID Shield or OnlineNIC. Further, Plaintiffs fail to adequately allege
24 alter ego liability considering the two prongs (unity of interest and fraud or injustice).

25 **1. There is no unity of interest involving 35.CN.**

26 The “unity of interest” prong requires a showing that the parent controls the
27 subsidiary to such a degree as to render the latter the mere instrumentality of the former.
28 *Ranza*, 793 F.3d at 1073–75. The test envisions pervasive control over the subsidiary,

1 such as when a parent corporation dictates every facet of the subsidiary's business from
 2 broad policy decisions to routine matters of day-to-day operation; total ownership and
 3 shared management personnel are alone insufficient. *Id.* (finding overlapping director,
 4 employees, and management as well as substantial involvement did not undermine
 5 entities' formal separation as there was not functionally one single enterprise).

6 Courts may consider various factors in assessing a unity of interest: (1) the
 7 commingling of funds and other assets of the entities, (2) the holding out by one entity that
 8 it is liable for the debts of the other, (3) identical equitable ownership of the entities, (4) use
 9 of the same offices and employees, (5) use of one as a mere shell or conduit for the affairs
 10 of the other, (6) inadequate capitalization, (7) disregard of corporate formalities, (8) lack of
 11 segregation of corporate records, and (9) identical directors and officers. See *e.g.*,
 12 *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1040 (N.D. Cal. 2014); see also *Ranza*, 793 F.3d at
 13 1074 (noting lack of evidence that company was undercapitalized, failed to keep records,
 14 or freely transferred assets, which would indicate signs of a “sham” corporate veil).

15 Here, 35.CN does not exercise the pervasive control over OnlineNIC or ID Shield
 16 as is necessary to establish a “unity of interest” and to pierce the veil of a supposed “sham”
 17 corporation. In particular, Plaintiffs have not alleged (and cannot show) any facts of
 18 undercapitalization, failure to keep adequate records, or freely transferred assets. 35.CN
 19 on the one hand, and OnlineNIC and ID Shield, on the other hand, have separate
 20 businesses, operations, registration databases, and offices (Weiwei Decl. ¶¶5–9); and
 21 common directors or employees, even with a shared office, is insufficient to establish alter
 22 ego liability. Thus, the first prong of the alter ego test is not satisfied.

23 **2. Plaintiffs have failed to establish fraud or injustice.**

24 Even if the first prong is met, alter ego liability will not be found without showing that
 25 an injustice would result from the recognition of separate corporate identities. *Incipio, LLC*
 26 *v. Argento Sc By Sicura Inc.*, No. SACV1701974AGKESX, 2018 WL 4945002, at *3 (C.D.
 27 Cal. July 18, 2018). “To establish inequity in the absence of alter ego liability, a plaintiff
 28 must plead facts sufficient to demonstrate that conduct amounting to bad faith makes it

1 inequitable for the corporate owner to hide behind the corporate form.” *Stewart v. Screen*
 2 *Gems-EMI Music, Inc.*, 81 F. Supp. 3d 938, 963 (N.D. Cal. 2015). “Inequitable results
 3 flowing from the recognition of the corporate form include the frustration of a meritorious
 4 claim, perpetuation of a fraud, and the fraudulent avoidance of personal liability.” *Pac. Mar.*
 5 *Freight, Inc. v. Foster*, No. 10-CV-0578-BTM-BLM, 2010 WL 3339432, at *7 (S.D. Cal.
 6 Aug. 24, 2010). However, difficulty in enforcing a judgment or collecting a debt does not
 7 satisfy this standard. *XR Commc’ns, LLC v. Ruckus Wireless, Inc.*, No.
 8 SACV1700596AGJCGX, 2018 WL 3156851, at *5 (C.D. Cal. Mar. 30, 2018). The corporate
 9 form is disregarded only in narrowly defined situations when the ends of justice so require
 10 and where the plaintiff shows that a defendant’s conduct amounted to bad faith. *NuCal*
 11 *Foods, Inc.*, 887 F. Supp. 2d at 992–95 (finding court could not exercise jurisdiction under
 12 an alter ego theory where the plaintiff failed to show that those who controlled the
 13 companies treated them as a single enterprise to commit fraud with impunity).

14 Plaintiffs have not adequately alleged—and cannot show—fraud or manifest
 15 injustice would result if the Court recognized 35.CN, on the one hand, and OnlineNIC and
 16 ID Shield, on the other hand, as separate entities. In particular, Plaintiffs have litigated
 17 against OnlineNIC and ID Shield for years; both Defendants have produced expansive
 18 discovery responses and documents; and Plaintiffs have taken depositions. [See e.g., D.E.
 19 55 & 118 outlining discovery.] In the SAC, Plaintiffs outline a number of claimed judgments
 20 against OnlineNIC, including a claimed \$33.15 million default judgment. However, Plaintiffs
 21 have not alleged a lack of finances or other fraud or injustice. Further, Plaintiffs self-
 22 reported \$66 billion in cash and cash equivalents as of June 30, 2021,⁸ and have touted
 23 expansive resources in China and abroad. Thus, if Plaintiffs had any viable claim against
 24 35.CN (which is disputed), Plaintiffs could bring their claim in China.

25 Therefore, the first prong of specific jurisdiction is not satisfied.

26 //

27 _____
 28 ⁸ <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Second-Quarter-2021-Results/>.

1 **ii. The claims do not arise out of 35.CN's activities in California.**

2 The second “arising out of” requirement is met if, “but for” the contacts between the
3 defendant and the forum state, a plaintiff’s cause of action would not have arisen. *Ballard*
4 *v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995). Here, Plaintiffs allege no activity by 35.CN
5 that occurred in California. Further, 35.CN’s sole contact with the United States is the RAA
6 with ICANN. However, the RAA does not establish 35.CN’s contacts in California, and
7 Plaintiffs’ claims do not arise from the RAA, including because a) the RAA only governs
8 disputes between ICANN and 35.CN (for conduct outside the United States) and expressly
9 excludes rights to third parties like Plaintiffs (SAC Ex. 4), and b) the Domain Names were
10 registered under the OnlineNIC RAA, not the 35.CN RAA. Plaintiffs have not—and
11 cannot—allege that 35.CN engaged in California contacts that gave rise to the claims.

12 **iii. Exercising personal jurisdiction over 35.CN would be unreasonable,**
13 **including considering the high bar for an international party.**

14 When determining whether the exercise of personal jurisdiction over a non-resident
15 defendant is reasonable, courts evaluate the following factors: (1) the extent of the
16 defendant's purposeful interjection into the forum state, (2) the burden on the defendant in
17 defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's
18 state, (4) the forum state's interest in adjudicating the dispute, (5) the most efficient judicial
19 resolution of the controversy, (6) the importance of the forum to the plaintiff's interest in
20 convenient and effective relief, and (7) the existence of an alternative forum. *See Amoco*
21 *Egypt Oil Co. v Leonis Navigation Co.*, 1 F.3d 848, 851–53 (9th Cir. 1993); *In re Cathode*
22 *Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1013 (N.D. Cal. 2014). “[I]n personal
23 jurisdiction cases, the burden on the defendant is the primary concern.” *Pacific Atlantic*
24 *Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1330 (9th Cir. 1985); *see also Young v.*
25 *Actions Semiconductor Co.*, 386 F. App'x 623, 628 (9th Cir. 2010) (noting a foreign party
26 bears a “substantial burden” in defending claims in a foreign legal system).

27 As the Supreme Court recognized, “[t]he unique burdens placed upon one who must
28 defend oneself in a foreign legal system should have significant weight” in assessing

1 reasonableness. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 114 (1987)
 2 (noting great care and reserve should be exercised when extending personal jurisdiction
 3 into the international field). The Ninth Circuit has similarly explained that “[w]here, as here,
 4 the defendant is from a foreign nation rather than another state, the sovereignty barrier is
 5 high and undermines the reasonableness of personal jurisdiction.” *Amoco Egypt Oil Co.*,
 6 1 F.3d at 852. Moreover, before taking an expansive view of jurisdiction over a foreign
 7 citizen, courts should (and do) pay heed to the risks to international comity. See *Daimler*
 8 *AG*, 571 U.S. at 141; *c.f. Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993) (ruling
 9 lack of jurisdiction over a citizen of Turkey who had traveled to the U.S. three times over
 10 several years); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d
 11 1114, 1126 (9th Cir. 2002) (finding jurisdiction over Indian defendant unreasonable, and
 12 noting the defendant did not own property in the forum and had no employees or persons
 13 authorized to act on its behalf in the forum); *Mujica v. AirScan Inc.*, 771 F.3d 580, 598 (9th
 14 Cir. 2014) (outlining comity as a doctrine of prudential abstention that counsels voluntary
 15 forbearance when another sovereign has a legitimate claim to jurisdiction).

16 All factors show that jurisdiction over 35.CN would be unreasonable.

17 First, 35.CN has not purposefully interjected itself into the forum. 35.CN is a Chinese
 18 company (SAC ¶11) organized under Chinese laws. (Weiwei Decl. ¶¶2, 7.)

19 Second, 35.CN would suffer a substantial burden in defending in the U.S. Despite
 20 technological advances, 35.CN would spend considerable resources in traveling and
 21 defending a case here and would require ongoing translation services. (Weiwei Decl. ¶10.)

22 Third, 35.CN is a public company in China. (See Weiwei Decl. ¶2.) Thus, an action
 23 against 35.CN (a Chinese company with Chinese customers) in the U.S. under U.S. law
 24 would strain diplomatic relations between the U.S. and China, considering 35.CN’s nearly
 25 exclusive focus is on Chinese customers.

26 Fourth, while the U.S. has an interest in adjudicating a dispute involving residents
 27 and businesses in the U.S., it can effectively do so with its claims against the original
 28 Defendants (OnlineNIC and ID Shield), which it has been doing for years; and Plaintiffs

1 can more adequately resolve this dispute through the UDRP process. There is minimal
2 interest in also overseeing a foreign company, and its addition at this stage is suspect.

3 Fifth, the most efficient judicial resolution of the controversy against 35.CN would
4 be for Chinese regulatory, legislative, and judicial bodies to oversee and adjudicate any
5 claims against 35.CN, including as the relevant witnesses and evidence would be in China.

6 Sixth, there is minimal importance to Plaintiffs' interest in convenient and effective
7 relief, as Plaintiffs can still proceed against the original Defendants (although 35.CN
8 disputes that Plaintiffs could support default judgment) or in a UDRP case.

9 Seventh, there is an alternative forum in China and through the UDRP process to
10 handle potential disputes. *See e.g. Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics*
11 *Inc.*, 159 F. Supp. 3d 1316, 1331–32 (S.D. Fla. 2016). Plaintiffs have vast resources and
12 are international, and they could litigate in China or per the UDRP (if they had valid claims).

13 Because Plaintiffs have already conducted vast discovery and there is no basis for
14 personal jurisdiction over 35.CN, the SAC should be dismissed.

15 **CONCLUSION**

16 Plaintiffs have failed to state a valid claim against 35.CN and have failed to show
17 alter ego liability or another basis for personal jurisdiction. For the reasons set forth above,
18 the Court should dismiss the SAC in its entirety as to 35.CN.

19
20 Respectfully Submitted,

21 DATED: September 28, 2021

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