JASON D. RUSSELL (SBN 169219)
jason.russell@skadden.com
ANGELA COLT (SBN 286275)
angela.colt@skadden.com
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
Los Angeles, California 90071-3144
Telephone: (213) 687-5000
Facsimile: (213) 687-5600

Attorneys for Defendant
THE INTERNET SOCIETY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CRUZ

TODD GLASSEY and MICHAEL MCNEIL, Plaintiffs, v. MICROSEMI CORPORATION, ET AL., Defendants.	CASE NO.: 16-CV-01577 **(1) INTERNET SOCIETY'S NOTICE OF DEMURRER AND DEMURRER;** **(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT;** <u>Filed Under Separate Cover</u>: **(3) NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE;** **(4) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE;** **(5) REQUEST FOR JUDICIAL NOTICE;** **(6) DECLARATION OF ANGELA COLT;** **(7) PROOF OF SERVICE;** <u>Lodged Under Separate Cover</u>: **(8) [PROPOSED] ORDER ON DEMURRER;** **(9) [PROPOSED] ORDER ON SPECIAL MOTION TO STRIKE; and** **(10) [PROPOSED] ORDER ON REQUEST FOR JUDICIAL NOTICE.** Date: October 3, 2016 Time: 8:30 a.m. Judge: Hon. John Gallagher Department: 4 Action Filed: June 24, 2016

NOTICE OF DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 8:30 a.m., on October 3, 2016, in Department 4 of the Superior Court of the State of California, Santa Cruz County, located at 701 Ocean Street, Santa Cruz, CA 95060, Defendant the Internet Society ("ISOC") will, and hereby does, demur generally and specially to the fifth cause of action (the only cause of action alleged against ISOC) of the Complaint of Plaintiffs Todd Glassey and Michael McNeil.

Concurrently with the filing of this Demurrer, ISOC is filing a Special Motion to Strike the fifth cause of action of the Complaint pursuant to California Code of Civil Procedure § 425.16 (the "anti-SLAPP Motion"). If the Court grants ISOC's anti-SLAPP Motion and dismisses this action as to ISOC (as it should), this Demurrer will be moot.

As explained in the concurrently filed Declaration of Angela Colt, pursuant to California Code of Civil Procedure § 430.41(a)(2), this Demurrer is made following the conference of counsel, which took place on July 25, 2016.

This Demurrer is based on this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice filed concurrently herewith, the Declaration of Angela Colt, all pleadings and papers filed in this action, and such additional papers and arguments as may be presented at or in connection with the hearing.

Dated: August 29, 2016

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

By: /s/ Jason D. Russell
Jason D. Russell

Attorneys for Defendant The Internet Society

DEMURRER

Pursuant to sections 430.10(e), 430.10(g), 337, and 339 of the California Code of Civil Procedure, Defendant the Internet Society ("ISOC") will, and hereby does, demur generally and specially to the Complaint for Damages (the "Complaint") filed by Todd Glassey and Michael McNeil ("Plaintiffs"), on the following grounds, as set forth more fully in the Memorandum of Points and Authorities, and the concurrently filed Request for Judicial Notice and Declaration of Angela Colt in support thereof.

DEMURRER TO THE FIFTH CAUSE OF ACTION

Pursuant to Cal. Civ. Proc. Code § 430.10(e), ISOC demurs generally and specially to the Fifth Cause of Action for breach of contract on the grounds that it does not state facts sufficient to constitute a cause of action because it: (1) fails to plead breach of contract; (2) is barred by res judicata; and (3) is barred on its face by the statute of limitations, Cal. Civ. Proc. Code §§ 337, 339. Pursuant to Cal. Civ. Proc. Code § 430.10(g), ISOC further demurs generally and specially to the Fifth Cause of Action on the ground that it cannot be ascertained from the pleading whether the Fifth Cause of Action is based on a contract that is written, oral, or implied by conduct.

* * *

Pursuant to section 430.70 of the California Code of Civil Procedure, this Demurrer is based in part on the concurrently filed Request for Judicial Notice as explained more fully in the included Memorandum of Points and Authorities.

//

//

//

//

//

As explained in the concurrently filed Declaration of Angela Colt, pursuant to California Code of Civil Procedure § 430.41(a)(2), this Demurrer is made following the conference of counsel, which took place on July 25, 2016.

Dated: August 29, 2016

Respectfully submitted,

By: /s/ Jason D. Russell

Jason D. Russell
Angela Colt

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
Los Angeles, CA 90071
Telephone: (213) 687-5000
Facsimile: (213) 621-5130
jason.russell@skadden.com
angela.colt@skadden.com

Attorneys for Defendant The Internet Society

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

Defendant the Internet Society ("ISOC") respectfully submits this Memorandum of Points and Authorities in Support of Its Demurrer to the Complaint for Damages (the "Complaint") filed by plaintiffs Todd Glassey and Michael McNeil ("Plaintiffs").

Bluntly stated, ISOC has no idea why it has been named to this lawsuit. From the face of the Complaint, it is a purported dispute between Plaintiffs and their former employer over rights to certain intellectual property. Plaintiffs attach to the Complaint two agreements from 1999 purporting to settle a dispute between Plaintiffs and their former employer. (*See* Compl. Exs. A, B (collectively the "1999 Settlement Agreements").)

As even a cursory examination reveals, ISOC is not a party to either of the 1999 Settlement Agreements, which form the basis for Plaintiffs' breach of contract action. Indeed, other than being sued (repeatedly) by Plaintiffs, ISOC has no relationship, contractual, employment, or otherwise with either of the Plaintiffs and undertook no actions with respect to the creation, protection, or exploitation of the intellectual property at issue. This is because ISOC is a non-profit educational organization, which, through its sponsorship of the Internet Engineering Task Force, promulgates protocols and standards, for "Internet users worldwide" to insure continued equal access to everyone to the internet. (Compl. ¶ 32.)

While far from a model of clarity, the one thing that is clear from Plaintiffs' Complaint is that ISOC is not a proper party to it. Plaintiffs do not describe *any* relationship between ISOC and the 1999 Settlement Agreements (or either of the Plaintiffs). Nor could they, because the 1999 Settlement Agreements show on their face that ISOC is not a party to them. Breezing by the pesky prerequisite that a breach of contract claim can only be asserted against a party to the contract, Plaintiffs claim ISOC breached the contracts, "by failing to acknowledge [its] obligations thereunder," and "by failing to stress those using the intellectual property through the so-called Open Source agreement of their obligations under Exhibit 'A' and Exhibit 'B.'" (Compl. ¶ 13.) At the risk of stating the obvious,

because ISOC is not a party to either of the 1999 Settlement Agreements, it does not have any obligations under them and therefore cannot be liable for breaching any terms imposed by either of them.

Sadly, this is Plaintiffs' *fourth* attempt in *seven* years to allege a breach of the 1999 Settlement Agreements against ISOC (and other defendants). Each time, the suits are dismissed, but not before Plaintiffs waste scarce resources of the ISOC that could be better served insuring equal unfettered access to everyone to the internet. Plaintiffs brought suit related to the 1999 Settlement Agreements in this Court in 2009, in the United States District Court for the Northern District of California in 2013, and then again in 2014. (*See* Ex. 1, Amended Compl. at 33, *Michael E. McNeil and Todd S. Glassey v. Book et al*., No. CV-165643 (Santa Cruz Super. Ct., filed May 21, 2010) ("*Glassey I*"); Ex. 4 ¶¶ 37, 78, 79, 84, 85, Compl., ECF No. 1, *Glassey, et al. v. Symmetricom, Inc.*, No. 3:13–cv–04662–NC (N.D. Cal., filed Oct. 7, 2013) ("*Glassey II*"); Ex. 10 ¶¶ 5, 183, 215-48, Second Amended Compl., ECF No. 112, *Glassey v. Microsemi, Inc*., No. 14-cv-03629-WHA (N.D. Cal., filed Nov. 13, 2014) ("*Glassey III*").)[1] Each of these actions was dismissed, most recently by the court in *Glassey III*, which found Plaintiffs' claims to be "hopeless and utterly frivolous." *Glassey III*, 2014 WL 7387161, at *5 (N.D. Cal. Dec. 29, 2014). The Ninth Circuit affirmed that conclusion – and the dismissal of Plaintiffs' claims – in March of this year. *Id.*, 636 F. App'x 433 (9th Cir. 2016).

Unsatisfied with *Glassey I*, *Glassey II*, and *Glassey III*, Plaintiffs here continue, bizarrely, to claim that ISOC is somehow in breach of agreements to which ISOC is not alleged to have, nor indeed has ever had, any relationship. Plaintiffs have thrice complained about alleged breaches of the 1999 Settlement Agreements. Making these claims even more bizarre, Plaintiffs were forced to concede in *Glassey III* that they do not even own the

[1] All "Ex." references herein are to the exhibits to the concurrently filed Declaration of Angela Colt, unless otherwise noted. As explained in ISOC's concurrently filed Request for Judicial Notice, all exhibits may properly be considered in connection with this Demurrer. All emphasis in quotations is added, and internal citations, quotation marks, ellipses, brackets and other internal marks are omitted, unless otherwise noted.

technology that they complain has been improperly used and the Ninth Circuit reached the same conclusion in affirming dismissal of Plaintiffs' claims about the misuse of this technology.

Plaintiffs' sole cause of action against ISOC for breach of contract fails as a matter of law because: (1) Plaintiffs do not and cannot allege ISOC is a party, or even in privity with a party to the 1999 Settlement Agreements and thus cannot be liable for any purported breach; (2) res judicata bars Plaintiffs' claim because it was litigated and resolved adversely to them several times already; and (3) the claim is time-barred, as the Ninth Circuit confirmed just a few months ago in affirming the dismissal of Plaintiffs' virtually identical claims. Plaintiffs' actions are untenable and their claims should be dismissed as a matter of law (again) with prejudice.

SUMMARY OF ALLEGATIONS AND JUDICIALLY NOTICEABLE FACTS[2]

ISOC is a not-for-profit corporation whose "principal purpose is to maintain and extend the development and availability of the Internet and its associated technologies and applications."[3] ISOC promotes "the open development, evolution, and use of the Internet for the benefit of all people throughout the world."[4] Plaintiffs allege ISOC "sponsors and operates the Internet Engineering Task Force ('IETF') which acts as the standards organization for Internet users worldwide." (Compl. ¶ 32.)

---

[2] The facts are taken from the allegations in the Complaint ("Compl."), documents attached to and incorporated into the Complaint by reference, and matters of which the Court may take judicial notice. *See* Robert I. Weil et al., *California Practice Guide: Civil Procedure Before Trial* § 7:46 (The Rutter Group 2016) ("Rutter Guide") ("[A]llegations of the complaint are *not* accepted as true if they contradict or are inconsistent with facts judicially noticed by the court. . . . [I]n ruling on a demurrer, the court may consider matters outside the complaint if they are judicially noticeable under Ev. C. §§ 452 or 453") (emphasis in original) (citing *Cansino v. Bank of America*, 224 Cal. App. 4th 1462, 1474 (2014) (sustaining demurrer and rejecting allegation contradicted by judicially noticed facts)).

[3] The Internet Society, http://www.isoc.org/isoc/general/ (last visited Aug. 26, 2016).

[4] The Internet Society, http://www.internetsociety.org/who-we-are/mission (last visited Aug. 26, 2016).

The gravamen of the allegations against ISOC is that ISOC purportedly breached the 1999 Settlement Agreements in two ways: first, "by failing to acknowledge [its] obligations thereunder"; and second, "by failing to stress those using the intellectual property through the so-called Open Source agreement of their obligations under Exhibit 'A' and Exhibit 'B.'" (Compl. ¶ 13.) Plaintiffs do not allege that ISOC was a party to, or even in privity with a party to, the 1999 Settlement Agreements, and ISOC's name appears nowhere in the 1999 Settlement Agreements that Plaintiffs allege ISOC to have breached. (*See* Compl. Exs. A and B.)

In May 2010, Plaintiffs filed a *pro se* complaint against various defendants in this Court, alleging, *inter alia*, that their former employer Datum had breached the 1999 Settlement Agreements by failing "to notify Glassey and McNeil per the contract of both the transfer of the property to the new owner, and that the new owner agrees to meet all the agrees [sic] to honor the terms and condition [sic] of the agreement." (Ex. 1 at 33, Amended Complaint and exhibits, *Glassey I*.) Although ISOC was not initially named as a defendant in *Glassey I*, Plaintiffs subsequently filed in 2012 an Amendment to the Second Amended Complaint, inserting the "true name" of the defendant "The Internet Society" wherever the "fictitious name" of the defendant "Doe 60" appeared in the complaint. (Ex. 3, Amendment to Second Amended Complaint filed September 4, 2012 in *Glassey I*.) Plaintiffs subsequently voluntarily dismissed *Glassey I*. *Glassey III*, 2014 WL 7387161, at *1 (N.D. Cal. Dec. 29, 2014), *aff'd*, 636 F. App'x 433 (9th Cir. 2016).

In 2013, Plaintiffs sued Symmetricom, Inc., in the United States District Court for the Northern District of California, alleging, *inter alia*, breach of the agreement attached to the instant Complaint as Exhibit B. Plaintiffs later filed a request for voluntary dismissal, which the district court granted. (Ex. 6, Dismissal Order, *Glassey II*, ECF No. 45.)

Then, in 2014, Plaintiffs filed another *pro se* suit in the Northern District of California, against numerous defendants, including, among others, ISOC, Microsemi, the President of the United States, the United States, Governor Brown, and the State of

California. (Ex. 7, Amended Compl., *Glassey III*.)[5] Plaintiffs alleged, *inter alia*, that (1) ISOC was improperly using the technology at issue in the 1999 Settlement Agreements; (2) Microsemi breached the 1999 Settlement Agreements by refusing to "create a document saying they will be bound by the terms of the contract"; and (3) "virtually all networking systems in use globally" infringed upon patented technology, which was purportedly owned by Plaintiffs and which was the subject of the 1999 Settlement Agreements. (Ex. 10, ¶¶ 5, 183, 215-48, Second Amended Compl., ECF No. 112, filed November 13, 2014 in *Glassey III*; Ex. 8, Settlement Agreement and Mutual Release, ECF No. 31, filed September 2, 2014 as an exhibit to the Amended Complaint filed August 27, 2014 in *Glassey III*; Ex. 9, Settlement Agreement and Mutual Release, ECF No. 31-1, filed September 2, 2014 as an exhibit to the Amended Complaint filed August 27, 2014 in *Glassey III*.) In December 2014, the district court, having "reviewed the more than 1,000 pages larded in the record by [P]laintiffs," denied Plaintiffs' numerous motions, and dismissed with prejudice Plaintiffs' action, reasoning, *inter alia*, that even Plaintiffs "concede that they do not own the asserted patents" and Plaintiffs' "claims are time-barred. Most, if not all, of plaintiffs' claims date back to the 1990s and early 2000s." *Glassey III*, 2014 WL 7387161, at *1, *5. The court also noted that "[t]wenty defendants, including the United States, and seven law firms should not be dragged into incurring the expense of this hopeless and utterly frivolous lawsuit." *Glassey III*, 2014 WL 7387161, at *5. The Ninth Circuit affirmed the district court's decision in all respects in March 2016. *Glassey v. Microsemi, Inc.*, 636 F. App'x 433, 434 (9th Cir. 2016).

As explained below, the Court should sustain the Demurrer because (1) Plaintiffs do not and cannot make out a claim against ISOC for breach of contracts to which ISOC was

---

[5] The district court in *Glassey III* noted that after Plaintiffs voluntarily dismissed *Glassey I*, they "subsequently commenced a new lawsuit in federal court," [*i.e.*, *Glassey II*], which Plaintiffs also voluntarily dismissed before commencing *Glassey III*. *Glassey III*, 2014 WL 7387161, at *1 (discussing *Glassey, et al. v. Symmetricom, Inc.*, No. 3:13–cv–04662–NC (N.D. Cal.) (Judge Nat Cousins)).

not a party (nor even allegedly in privity with a party); (2) Plaintiffs' claim is barred by res judicata; and (3) the statute of limitations has long since passed.

ARGUMENT

A pleading is "subject to demurrer when matters judicially noticed by the court render the complaint meritless." *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981). "A plaintiff may not avoid a demurrer by pleading facts or . . . by suppressing facts which prove the pleaded facts false." *Larson v. UHS of Rancho Springs, Inc.*, 230 Cal. App. 4th 336, 344 (2014), *as modified* (Oct. 2, 2014), *review denied* (Jan. 14, 2015). As shown by the Complaint, its attached exhibits, and matters subject to judicial notice, the Demurrer should be sustained because (1) ISOC was not a party to any contract; (2) Plaintiffs' breach of contract claims have already been necessarily decided against them; and (3) the Complaint is time-barred.

I. THE DEMURRER SHOULD BE SUSTAINED BECAUSE PLAINTIFFS DO NOT (AND CANNOT) ALLEGE THAT ISOC WAS A PARTY TO, OR IN PRIVITY WITH A PARTY TO, ANY CONTRACT

It is axiomatic that "[u]nder California law, only a signatory to a contract may be liable for any breach." *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 452 (1987). *See also Tri-Continent Int'l Corp. v. Paris Sav. & Loan Ass'n*, 12 Cal. App. 4th 1354, 1359 (1993) (plaintiff "cannot assert a claim for breach of contract against one who is not a party to the contract"); *Infinet Mktg. Servs., Inc. v. Am. Motorist Ins. Co.*, 150 Cal. App. 4th 168, 180 (2007) (no liability for breach of implied covenant of good faith and fair dealing where there was no contractual relationship and no privity of contract).

Here, Plaintiffs do not allege that ISOC was a party (or even in privity with a party) to the 1999 Settlement Agreements. Nor could they. The 1999 Settlement Agreements were entered into by and between Datum, Inc. and Plaintiffs. Even a cursory review shows there is no reference to ISOC anywhere in the 1999 Settlement Agreements. (*See* Compl. Exs. A, B.) The Court can therefore determine that, as a matter of law, ISOC was not a party to, and therefore cannot be liable for any alleged breach of, the 1999 Settlement Agreements. *See State Ready Mix, Inc. v. Moffatt & Nichol*, 232 Cal. App. 4th 1227, 1231

(2015) (affirming sustaining of demurrer without leave to amend where defendant was not in privity of contract with plaintiff).

II. RES JUDICATA BARS PLAINTIFFS' CLAIM

Even if Plaintiffs could plausibly allege that ISOC was somehow bound by the 1999 Settlement Agreements (which, as a matter of law, they cannot), Plaintiffs' breach of contract claim against ISOC would be barred by the doctrine of res judicata, which precludes the re-litigation of issues argued and finally decided in *Glassey III*, and those issues which could have been brought, in *Glassey I*, *Glassey II*, and *Glassey III*.

"[A] general demurrer lies where . . . matters judicially noticed show that plaintiff is . . . asserting an issue decided against plaintiff in the prior action." Rutter Guide § 7:60.9 (citing *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 792 (2010) (party's wrongful death action barred by her prior voluntary dismissal of action for loss of consortium against same defendant); *Gabriel v. Wells Fargo Bank, N.A.*, 188 Cal. App. 4th 547, 556 (2010) (complaint barred by issue preclusion)). Whether applying federal or state law of preclusion, the result is the same: Plaintiffs' claim for breach of contract is barred.[6]

A. The Law Of Res Judicata Is The Same Under State And Federal Standards

Under both federal and state law, issues that were or could have been raised in a prior action are precluded from relitigation. *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011) (a "final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised* in that action"); *Franceschi v. Franchise Tax Bd.*, 1 Cal. App. 5th 247, 257 (2016) ("Res judicata bars the litigation not only of issues that were actually litigated in the prior proceeding, but also issues that *could have been litigated* in that proceeding. A predictable doctrine of *res judicata* benefits both

---

[6] The preclusive effect of a judgment of a federal court "is determined by federal law . . . where the prior judgment was on the basis of federal question jurisdiction." *Nathanson v. Hecker*, 99 Cal. App. 4th 1158, 1163 (2002). The preclusive effect of a state court judgment "is determined by the law of the state where the judgment was rendered." *Hawkins v. SunTrust Bank*, 246 Cal. App. 4th 1387, *2 (2016), *review denied* (July 20, 2016).

the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.*'") (emphasis in original). As the California Court of Appeal recently held in *Franceschi*:

> If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions.

Id. at 259 (emphasis in original).[7]

The test for whether a subsequent action is barred is the same under state and federal law. *See Paulo*, 669 F.3d at 917 (issue preclusion applies when "(1) the issue necessarily decided at the previous proceeding is identical to the one which is sought to be relitigated; (2) the first proceeding ended with a final judgment on the merits; and (3) the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.") (alteration in original); *Franceschi*, 1 Cal. App. 5th at 257 ("Res judicata precludes the relitigation of a cause of action only if (1) the decision in the prior proceeding is final and on the merits; (2) the present action is on the same cause of action as the prior proceeding; and (3) the parties in the present action or parties in privity with them were parties to the prior proceeding.").[8]

---

[7] California courts have also described the preclusion of issues that could have been raised as the doctrine against claim-splitting. *See, e.g., Crowley v. Katleman*, 8 Cal. 4th 666, 681 (1994) ("A pleading that states the violation of one primary right in two causes of action contravenes the rule against 'splitting' a cause of action."); *Flickinger v. Swedlow Eng'g Co.*, 45 Cal. 2d 388, 393 (1955) ("[A] party cannot by negligence or design withhold issues and litigate them in successive actions; *he may not split his demands* or defenses; he may not submit his case in piecemeal fashion."). Regardless of the nomenclature, the result is the same: "The doctrines of res judicata and collateral estoppel preclude piecemeal litigation by splitting a single cause of action or relitigating the same primary right." *Hawkins*, 246 Cal. App. 4th at *3 .

[8] "Pursuant to California's so-called 'primary right theory' of what constitutes a single cause of action, even if a plaintiff has various forms of relief available to him, or can present different legal theories for relief, there remains only one cause of action if the facts indicate that only one primary right of the plaintiff has been violated." *Ford Motor Co. v. Superior Court*, 35 Cal. App. 3d 676, 679 (1973); *see also Crowley*, 8 Cal. 4th at 681 ("The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action."); *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel*, 6 Cal. App. 4th 157, 162 (1992) ("Here, the *(cont'd)*

B. Plaintiffs Here Raise The Same Issues That Were Brought, Or Could Have Been Brought, In *Glassey III*

Although Plaintiffs pleaded varying theories of harm in *Glassey III*, *Glassey II*, and *Glassey I* (ranging from patent infringement and breach of one or both of the 1999 Settlement Agreements to fraud, "tortuous [sic] interference," and violations of the Clayton and Sherman Acts) and here (breach of the 1999 Settlement Agreements), all of the theories relate to the same conduct, and are therefore based on a single cause of action: Plaintiffs allege that any use of the intellectual property at issue in the 1999 Settlement Agreements is improper, and that anyone using that intellectual property was required to acknowledge their (nonexistent) obligations under the 1999 Settlement Agreements. (*Compare* Compl. ¶ 13 (alleging ISOC breached the 1999 Settlement Agreements "by failing to acknowledge [its] obligations thereunder" and that "IETF additionally breached by failing to stress to those using the intellectual property . . . their obligations under [the 1999 Settlement Agreements]") and Compl. ¶ 33 (alleging ISOC "failed to provide its assignor written acknowledgement of its obligations" and "failed to stress the restrictions on the use of the intellectual property covered by [the 1999 Settlement Agreements] to the point almost universal abuse of the intellectual property has developed") *with* Ex. 10 ¶ 181, *Glassey III*, ECF No. 112 (alleging IETF and Microsemi "acted in concert" "to allow Plaintiffs' protected Phase-II IP to be placed into Network Standards . . . in violation of Plaintiffs' IP Rights"), Ex. 10 ¶ 183 (alleging Microsemi breached the 1999 Settlement Agreements because it "refused" to "create a document saying [it] will be bound by terms of the [1999 Settlement Agreements]"), and Ex. 10 ¶ 218 (alleging "many of the IETF Standards published . . . have been identified 'to have Plaintiffs' IP inside them without authorization").)

As the federal court noted in dismissing *Glassey III*, "[a]fter the settlement

---

(cont'd from previous page)
allegations of the conspiracy claim are the same as those originally sought to be included in the first action, and include the allegations of accountant malpractice and fraud alleged therein. Appellants' second suit would merely have split their cause of action in violation of the policy against misuse of court time.").

agreements were signed—approximately seven years later—plaintiffs commenced a lawsuit in Santa Cruz Superior Court, alleging malpractice, *breach of contract, and other claims arising from the settlement agreements*." *Glassey III*, 2014 WL 7387161, at *1 (discussing *Glassey I*).[9]

The decision of the district court in *Glassey III* necessarily relied on a resolution of these issues because all of Plaintiffs' purported rights (whether to the intellectual property or for any breach) flow from the 1999 Settlement Agreements, which were the focus of *Glassey III*. *Glassey III*, 2014 WL 5499098, at *1 (N.D. Cal. Oct. 30, 2014) (dismissing for failure to state a claim and noting: "The agreements from the late 1990s were allegedly 'breached' by defendant Microsemi Inc. The 'Phase II Technology' was and is allegedly 'inside the machines' adopted by the [IETF]."). Accordingly, the issues here are the same as those that were or could have been brought in *Glassey III*.

C. *Glassey III* And This Action Involve The Same Parties

There is no dispute that Plaintiffs and ISOC were parties in *Glassey III*. *Id*. at *2.

D. The *Glassey III* Judgment Was Final And On The Merits

Similarly, there is no question that the federal judgment against Plaintiffs in *Glassey III* was final and on the merits. *See Glassey III*, 2014 WL 7387161, at *4 (dismissing Plaintiffs' second amended complaint and noting "plaintiffs have utterly failed to file a pleading that states a plausible claim"). And that Plaintiffs do not own the intellectual property that is the subject of the 1999 Settlement Agreements has already been decided by another court and is not open to relitigation. *Id*. at *4-5.

To allow Plaintiffs to avoid preclusion here—with Plaintiffs who never tire of raising claims related to their nonexistent property rights under the 1999 Settlement

---

[9] In particular, Plaintiffs alleged in *Glassey I* that Datum "breached the IP Maintenance Requirements of the settlements in the failure to notify Glassey and McNeil per the contract of both the transfer of the property to the new owner, and that the new owner agrees to meet all the agrees [sic] to honor the terms and condition [sic] of the agreement." (Ex. 1 at 34, Amended Complaint, *Glassey I*; *see* Ex. 3, Amendment to Second Amended Complaint, *Glassey I*.)

Agreements—would seriously undermine "the bar on successive litigation." *Paulo*, 669 F.3d at 918.[10] Whether applying federal or state preclusion law, Plaintiffs cannot escape the preclusive effect of the *Glassey III* decision.

III. THE COMPLAINT IS TIME-BARRED

"When a ground for objection to a complaint, such as the statute of limitations, appears on its face or from matters of which the court may or must take judicial notice, a demurrer on that ground is proper." *Vaca v. Wachovia Mortg. Corp.*, 198 Cal. App. 4th 737, 746 (2011) ("Plaintiff cannot rely on either the continuing wrong or fraudulent concealment doctrines to escape this conclusion. No reasonable possibility exists that plaintiff could amend to plead around the limitations periods—a plaintiff may not avoid a demurrer by pleading facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or by suppressing facts which prove the pleaded facts false.") (affirming order sustaining demurrer without leave to amend where complaint was facially time barred). *See also* Rutter Guide § 7:50 ("Where the dates alleged in the complaint show the action is barred by the statute of limitations, a general demurrer lies.").

The district court decided in *Glassey III*, in a decision affirmed by the Ninth Circuit, that Plaintiffs' claims for breach of the 1999 Settlement Agreements are barred by the statute of limitations. *Glassey III*, 2014 WL 7387161, at *3 ("Even if plaintiffs never received a 'countersigned copy' of the settlement agreements for '12 and ¾ years,' plaintiffs sued to enforce those agreements back in 2009. The statute of limitations has passed."). Accordingly, Plaintiffs are barred by res judicata from relitigating whether the

[10] As the federal court noted in *Glassey III*, Mr. Glassey is litigious: "Mr. Glassey has commenced several actions in our district. *See, e.g., Glassey v. Amano Corp., et al.,* No. 04–05142 (N.D.Cal.Bankr.) (Judge Marilyn Morgan); *Glassey v. National Institute of Standards & Technologies, et al.,* No. 5:04–cv–02522–JW (N.D.Cal.) (Judge James Ware); *Glassey v. Amano Corporation, et al.,* No. 5:05–cv–01604–RMW (N.D.Cal.) (Judge Ronald Whyte); *Glassey v. D–Link Corporation,* No. 4:06–cv–06128–PJH (N.D.Cal.) (Judge Phyllis Hamilton); *Glassey, et al. v. Symmetricom, Inc.,* No. 3:13–cv–04662–NC (N.D.Cal.) (Judge Nat Cousins)." *Glassey III*, 2014 WL 7387161, at *1 n.1.

statute of limitations has run. (*See supra* § II.) But even if the district court in *Glassey III* had not already expressly found the limitations period had run, this Court should agree.

The statute of limitations for an action on any written contract is four years. Cal. Civ. Proc. Code § 337. However, where an action "is not an action on a contract between contracting parties who are in privity," it "is instead an action brought on equitable principles implied in the law and is thus governed by the two-year statute of limitations prescribed in section 339." *Am. States Ins. Co. v. Nat'l Fire Ins. Co. of Hartford*, 202 Cal. App. 4th 692, 699 (2011) (citing 2-year limitations period under Cal. Civ. Proc. Code § 339).

As noted, Plaintiffs fail to allege ISOC was a party to, or in privity with a party to, the 1999 Settlement Agreements, which were executed in 1999. (Compl. Ex. A at 1, 14; Compl. Ex. B at 1, 9.) Thus, this "is not an action on a contract between contracting parties who are in privity," so the two-year statute of limitations applies. *Am. States Ins. Co.*, 202 Cal. App. 4th at 699; Cal. Civ. Proc. Code § 339.

Glassey I, brought in 2009 and amended to include ISOC as a defendant in 2012, shows that at least as early as November 6, 2008, Plaintiffs were on notice of any purported breach of the 1999 Settlement Agreements. (Ex. 1 at 10 ("On or about November 6, 2008, Glassey and McNeil obtained sufficient cause to commence suit, premised on the alleged breach of the terms of the second Settlement Agreement"); Ex. 3, *Glassey I*, Amendment to Second Amended Compl.; Ex. 2 ¶¶ 108-118, *Glassey I*, Second Amended Complaint.) Thus, by no later than 2008, Plaintiffs were on notice that (1) the 1999 Settlement Agreements may have been breached; and (2) ISOC was not a party to them.[11] The two-year statute of limitations period against ISOC had run at least by November 2010.

Plaintiffs' filing of *Glassey I* and *Glassey II* does not save them from the statute of limitations because they voluntarily dismissed both actions. An action that is voluntarily

---

[11] Indeed, Plaintiffs should have been on notice that ISOC was not a party to the 1999 Settlement Agreements—and therefore not liable for breach thereof—back in 1999, when Plaintiffs signed the agreements, and ISOC's name was nowhere to be found.

dismissed does *not* toll the statute of limitations. *See Thomas v. Gilliland*, 95 Cal. App. 4th 427, 429 (2002). Thus, whatever claim Plaintiffs may have had against ISOC in 2009 in *Glassey I*—a suit alleging breach of the 1999 Settlement Agreements—should have been brought then.

Plaintiffs' only response to the fact that their claims are time-barred has been to claim that they "only received a fully executed agreement on or about February 26, 2013 and are informed and believe that any statutes of limitation were tolled while the agreement was wrongfully withheld from them." (Compl. ¶ 12.) This strange contention, besides being illogical, is irrelevant for several reasons. *First*, the court in *Glassey III* held Plaintiffs' claims were time-barred and implicitly or explicitly rejected Plaintiffs' excuse that they did not have an executed copy of the settlement agreement. Having rejected it in a determination embodied in a final judgment, that determination is now binding and cannot be collaterally challenged here.

Second, as a factual matter, this contention is irrelevant to the statute of limitations questions. Whether or not Plaintiffs had a fully executed version of the settlement agreement, they obviously knew who the parties to the agreement were in 1999 when the agreement was executed, they knew ISOC was not one of those parties, and they knew when the contract was allegedly breached, *i.e.*, November 6, 2008. (Ex. 1 at 10 ("On or about November 6, 2008, Glassey and McNeil obtained sufficient cause to commence suit, premised on the alleged breach of the terms of the second Settlement Agreement"). Moreover, if in fact a fully executed version of the 1999 Settlement Agreement was withheld, presumably that would itself be a breach that started the statute of limitations running. Regardless, under any scenario, the statute of limitations had expired long before they commenced this action.

Accordingly, even if the district court in *Glassey III* had not found that the statute of limitations for Plaintiffs' claims regarding the 1999 Settlement Agreements had "long since passed," this Court should agree that Plaintiffs' claim against ISOC for breach of those agreements is time-barred.

CONCLUSION

For these reasons, the Demurrer should be sustained in its entirety without leave to amend.

Dated: August 29, 2016

Respectfully submitted,

By: /s/ Jason D. Russell

Jason D. Russell
Angela Colt

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
300 South Grand Avenue, Suite 3400
Los Angeles, CA 90071
Telephone: (213) 687-5000
Facsimile: (213) 621-5130
jason.russell@skadden.com
angela.colt@skadden.com

Attorneys for Defendant The Internet Society