

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

COMMERCIAL CONNECT, LLC,)

Plaintiff,)

v.)

INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
and INTERNATIONAL CENTRE FOR)
DISPUTE RESOLUTION,)

Defendants.)

CASE NO.)

3:16-CV-00012-JHM)

**SPECIAL APPEARANCE BY DEFENDANT INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS IN OPPOSITION TO PLAINTIFF'S MOTION
FOR A TEMPORARY RESTRAINING ORDER**

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OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby specially appears to oppose Plaintiff’s Motion for Temporary Restraining Order (“Motion”). (Dkt. No. 3.) By doing so, ICANN does not submit to jurisdiction in this Court, or any court in Kentucky, and ICANN does not waive the requirement that Plaintiff properly serve ICANN with process. Instead, in addition to the other arguments presented herein, ICANN expressly opposes jurisdiction in this Court, as well as any other court in Kentucky, and objects to Plaintiff’s on-going failure to serve ICANN with process as required by Rule 4 of the Federal Rules of Civil Procedure. Nevertheless, ICANN submits this Opposition – as ordered by the Court in its January 22, 2016 conference with the parties – to assist the Court in evaluating both Plaintiff’s Motion and Plaintiff’s counsel’s motion to withdraw. (Dkt. No. 7.)

INTRODUCTION

This matter and Plaintiff’s Motion arise out of Plaintiff’s application to ICANN to operate the Internet top-level domain name (“TLD”) .SHOP. Through its Motion, Plaintiff seeks to enjoin ICANN from facilitating an auction on January 27, 2016, between the eight other applicants for the .SHOP TLD, which will be conducted pursuant to procedures, policies and guidelines that have been in place for years. Putting aside the fact that Plaintiff failed to submit any evidence in support of its Motion, each of the factors this Court must consider in determining whether to grant Plaintiff’s Motion tip decidedly against Plaintiff and require denial of the Motion.

Most importantly, far from showing a reasonable possibility of success on the merits (as it must), Plaintiff has *no possibility of success* on the merits for several reasons. First, in the process of pursuing its .SHOP application, Plaintiff has agreed to no less than three releases discharging ICANN from all liability arising out of Plaintiff’s application and/or ICANN’s

evaluation of that application. As detailed below, the three separate releases make clear that Plaintiff “*release[s] and forever discharge[s] ICANN . . . from any and all claims and liabilities,*” that Plaintiff “*has no legal claims*” against ICANN, and that Plaintiff “AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.” These releases were not an underhanded attempt by ICANN to immunize itself from wrongdoing, but instead were standard terms and conditions accepted by sophisticated parties to ensure that ICANN could consider the thousands of applications for new TLDs without being tied up for years in litigation brought by unsuccessful applicants. Second, separate and apart from the releases, Plaintiff’s Complaint simply fails to allege any facts stating a cognizable claim against ICANN. Third, Plaintiff has no likelihood of success against ICANN in this Court because this Court, respectfully, lacks personal jurisdiction over ICANN, a California non-profit public benefit corporation with no meaningful contacts with Kentucky.

Beyond the merits of Plaintiff’s claims, Plaintiff’s Motion must be denied because the other injunctive relief factors weigh against a temporary restraining order. Specifically, Plaintiff has failed to demonstrate that it will suffer irreparable harm absent injunctive relief, Plaintiff has failed to demonstrate that others will not be injured if injunctive relief is ordered, and Plaintiff has failed to demonstrate that issuance of an injunction would be in the public interest.

Finally, Plaintiff filed its Complaint almost *three weeks ago*, but Plaintiff has yet to even serve the Complaint on ICANN despite knowing – and having known for months – that the auction will take place on January 27, 2016. This type of delay has none of the hallmarks of a plaintiff with legitimate claims and exigent circumstances entitled to the “extraordinary” remedy of injunctive relief.

For all these reasons, Plaintiff's Motion must be denied.

FACTUAL BACKGROUND

ICANN And Its Operations:

ICANN is a California non-profit public benefit corporation with its principal place of business in Los Angeles, California. Pursuant to a series of agreements over the years with the United States Department of Commerce, ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community, ensuring the DNS's continued security, stability, and integrity. (*See* Compl. Ex. 1 ("ICANN Bylaws"), Art. I, § 1; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV-12-8676-PA(PLAx) 2013 U.S. Dist. LEXIS 72790, *1 (C.D. Cal. Mar. 4, 2013), *aff'd* 795 F.3d 1124 (9th Cir. 2015).) The essential function of the DNS is to convert numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as "USCOURTS.GOV" and "ICANN.ORG." The ".GOV" and ".ORG" in these addresses, just like the more well-known ".COM," are referred to as top-level domains ("TLDs"). (Compl. ¶ 11.)

Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS in order to promote consumer choice and competition. To that end, in 2012, following earlier limited rounds, ICANN launched the "New gTLD Program," which resulted in nearly 2,000 applications for new generic top-level domains ("gTLDs"), such as the .SHOP gTLD that Plaintiff and many others seek to operate. (*Id.* ¶¶ 11-14, 18.)

ICANN has no company facilities, assets or real estate in Kentucky. ICANN is not registered to do business in Kentucky, does not solicit business in Kentucky, and does not have any phone number or mailing address in Kentucky. ICANN does not sell any goods or services in Kentucky, does not have a bank account in Kentucky, and does not have any employees in Kentucky. (Declaration of Akram Atallah ("Atallah Decl.") ¶ 3-10.)

The only plausible contact between ICANN and Kentucky is the same type of contact that ICANN has with the rest of the world – namely, ICANN operates a few websites on the Internet, specifically, <http://www.icann.org>, <http://www.iana.org>, and <http://www.internic.net>, which provide a wealth of information regarding ICANN’s Internet coordination activities, the people who work for ICANN, and the projects that ICANN has undertaken in connection with the Internet, including the New gTLD Program. (*Id.* ¶ 12.) Although these websites may allow individuals and entities to communicate with, or transmit information to, ICANN in California and elsewhere around the world, none of these websites are operated from servers physically located in Kentucky and ICANN does not offer anything for sale on its websites, in Kentucky or elsewhere. In fact, ICANN does not sell anything at all. (*Id.*)

Plaintiff’s Claims:

In 2000, Plaintiff submitted an application to operate the .SHOP gTLD, which was fully considered, but not approved, by ICANN (“2000 Application”). (Compl. ¶¶ 30-31.)¹ In its 2000 Application, Plaintiff acknowledged that it had “no legally enforceable right to acceptance or any other treatment of [its] application or to the delegation in any particular manner of any top-level domain that may be established in the authoritative DNS root.” (Declaration of Michael W. Oyler (“Oyler Decl.”), Ex. A ¶ B12; *see also id.* ¶ B6 (“there is no understanding, assurance, or agreement that this application will be selected for negotiations toward entry of an agreement with a registry operator”)) Plaintiff also expressly agreed in its 2000 Application to “**release[] and forever discharge[] ICANN . . .** from any and all claims and liabilities relating in any way to

¹ Plaintiff’s 2000 Application was part of ICANN’s proof-of-concept phase designed to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet. *Name.Space*, 2013 U.S. Dist. LEXIS 72790, at *2.; *Image Online Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV-12-08968-DDP (SCx) 2013 U.S. Dist. LEXIS 16896, at *2 (C.D. Cal. Feb. 7, 2013). This proof-of-concept phase was much more limited than the New gTLD Program.

(a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.” (*Id.* ¶ B14.2 (emphasis added).)

In 2012, ICANN began accepting another round of new gTLD applications in connection with the New gTLD Program. (Compl. ¶ 18.) Prior to submitting an application in the 2012 round, Plaintiff applied for and obtained from ICANN an \$86,000 credit towards the 2012 round application fee in recognition of the fees previously paid by Plaintiff in connection with its failed 2000 Application. By accepting this credit, Plaintiff confirmed that “[Plaintiff] was not awarded any string pursuant to the 2000 proof-of-concept round and that [Plaintiff] *has no legal claims* arising from the 2000 proof-of-concept process.” (Oyler Decl. Ex. B (emphasis added).)

In connection with the New gTLD Program launched in 2012, ICANN published a comprehensive Applicant Guidebook (“Guidebook”) setting out the application requirements and the criteria by which new gTLD applications would be assessed. (Compl. ¶ 14.) Although Plaintiff attaches selected portions of the Guidebook to its Complaint, Plaintiff fails to attach the most relevant portion that applies to, and dispenses with, its purported claims – Module 6. Module 6 sets forth the terms and conditions for the New gTLD Program, which all applicants, including Plaintiff, accepted and acknowledged by submitting a gTLD application. (Oyler Decl. Ex. C.) Among those terms and conditions is a waiver and release barring all claims against ICANN or its Affiliated Parties (as defined in Guidebook Module 6) arising out of ICANN’s or those Affiliated Parties’ evaluation of any new gTLD application:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD

application. ***APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .***

(*Id.* ¶ 6 (emphasis added).)

Module 6 also makes clear to all applicants that ICANN has the discretion to “determine not to proceed with any and all applications for new gTLDs.” (*Id.* ¶¶ 3,14.)

However, an applicant that is dissatisfied with the manner in which ICANN evaluated its application or the results of that evaluation, such as Plaintiff, is not left without recourse. ICANN’s Bylaws provide for several accountability mechanisms to ensure that ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. (*See generally* ICANN Bylaws, Arts. IV, V.) For example, an aggrieved applicant can file a “request for reconsideration,” which is an internal mechanism that asks the ICANN Board to re-evaluate certain Board or staff actions and inactions that the applicant believes are in violation of ICANN’s Articles of Incorporation, Bylaws, policies and procedures. (Oyler Decl. Ex. D at Art. IV, § 2.) In addition, an aggrieved applicant can file a “request for independent review,” which is another internal process that asks independent panelists to evaluate whether the ICANN Board’s actions were consistent with ICANN’s Articles of Incorporation and Bylaws. (*Id.* at Art. IV, §3.) Furthermore, ICANN has an independent Ombudsman that parties can ask to evaluate certain ICANN conduct to help ensure that members of the ICANN community are being treated fairly. (*Id.* at Art. V.)

In addition to these accountability mechanisms, the Guidebook also sets forth objection processes that have had the potential to identify and resolve situations where there are multiple applications seeking the same or similar gTLDs. For example, applicants may file “string

confusion objections” against other applications, alleging that “the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications.” (Compl. ¶ 21.) The Guidebook provides that string confusion objections will be administered by the International Centre for Dispute Resolution (“ICDR”). (Compl. ¶ 23.) If a string confusion objection is upheld by the ICDR on the basis that a new gTLD application is confusingly similar to another new gTLD application, the applications are placed in a “contention set.” (Compl. Ex. 5 § 4.1.2.) The Guidebook makes clear that applications contained in an otherwise unresolved contention set will be resolved by auction as a “last resort.” (*Id.* § 4.3.)

In 2012, Plaintiff submitted its application to ICANN to operate the .SHOP gTLD (“2012 Application”), accepting and acknowledging all of the above-identified terms, conditions, waivers, releases, policies and procedures. There were eight other applications for .SHOP. Further, Plaintiff actively participated in the procedures set forth in the Guidebook in pursuing its 2012 Application. For example, Plaintiff filed string confusion objections against 21 applications that Plaintiff claimed to be confusingly similar to its application for .SHOP. (*Id.* ¶ 37.) Plaintiff’s 2012 Application and the eight other applications for .SHOP are currently in a contention set that is set to be resolved in a January 27, 2016 auction. (Compl. ¶ 47; *see also* Compl. Ex. 4 §§ 4.1.3, 4.3.)

Plaintiff filed this lawsuit on January 6, 2016, although Plaintiff still has not served ICANN with the Complaint. Plaintiff alleges three claims against ICANN for fraudulent misrepresentation, breach of contract, and breach of the covenant of good faith and fair dealing. (Compl. ¶¶ 48-66.) Plaintiff alleges that even though the Guidebook indicates that applications will be “evaluated with respect to the principles of ‘fairness, transparency and non-

discrimination,' both the application processes and the related dispute resolution procedures were fraught with a lack of transparency.'" (*Id.* ¶ 41.)

All of Plaintiff's claims are barred by the explicit waivers and releases because the asserted claims arise from ICANN's evaluation of Plaintiff's 2012 Application and, arguably, its 2000 Application. Aside from the waivers and releases, Plaintiff has failed to allege facts stating a cognizable claim against ICANN. Furthermore, there is no personal jurisdiction over ICANN in this Court, or any other court in Kentucky. For these reasons, and others set forth below, Plaintiff's Motion must be denied, and its Complaint must be dismissed ultimately.²

LEGAL STANDARD

In determining whether to issue a temporary restraining order, courts consider four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998). The grant of a temporary restraining order "is an extraordinary remedy, and the moving party carries the burden of proving that the circumstances clearly demand it." *Polyone Corp. v. Kutka*, 67 F. Supp. 3d 863, 868-869 (N.D. Ohio 2014). "Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000); *see also Michigan State AFLCIO v. Miller*, 103 F.3d 1240, 1249 (6th Cir. 1997) ("[A] preliminary injunction issued where there is simply no likelihood of success on the merits

² Once Plaintiff's Motion is resolved and once ICANN is served with Plaintiff's Complaint, ICANN reserves its rights and plans to file a motion to dismiss pursuant to Rules 12(b)(2) and, in the alternative, 12(b)(6) of the Federal Rules of Civil Procedure. ICANN also reserves its right to seek sanctions against Plaintiff and its counsel, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for filing this frivolous lawsuit.

must be reversed.”). Here, Plaintiff has failed to carry its burdens and its Motion must therefore be denied.

ARGUMENT

I. PLAINTIFF HAS PROVIDED NO EVIDENCE SUPPORTING ITS MOTION.

Plaintiff bears the burden of demonstrating its entitlement to the “extraordinary remedy” of a temporary restraining order. *Polyone Corp.*, 67 F. Supp. 3d at 868-69. Despite this, Plaintiff has proffered *no* evidence with its Motion demonstrating its entitlement to the relief it seeks. *Northeast Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1011 (6th Cir. 2006) (“[S]peculation is insufficient to satisfy plaintiffs' burden of demonstrating [the factors justifying an injunction sought by plaintiff].”) To be clear, Plaintiff’s Motion relies purely on the unsubstantiated – and inaccurate – allegations in the Complaint, rather than a declaration, documents or some other form of evidence. Specifically, Plaintiff offers no evidence demonstrating any possibility of success on the merits. Nor does Plaintiff provide any evidence demonstrating that it will suffer irreparable injury in the absence of an injunction, that the injunction would not cause substantial harm to others, or that the public interest would be served by the issuance of an injunction. *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 753; *see also Gonzales*, 225 F.3d at 625. For a simple lack of evidentiary support, Plaintiff’s Motion fails.

II. PLAINTIFF HAS NO POSSIBILITY OF SUCCESS ON THE MERITS.

Far from a strong likelihood of success on the merits, Plaintiff has *no likelihood* of success for several, independent reasons. First, all of Plaintiff’s claims are barred by the releases that Plaintiff accepted in connection with its 2012 Application and 2000 Application. Second, Plaintiff fails to allege – and cannot allege – facts supporting its claims against ICANN. Third, this Court has no personal jurisdiction over ICANN.

A. Plaintiff's Claims Are Barred By Valid And Enforceable Releases.

Under Kentucky law, a written release extinguishes any claim covered by its terms. We agree. *Peoples Bank of N. Kentucky, Inc. v. Crowe Chizek & Co. LLC*, 277 S.W.3d 255, 263 (Ky. Ct. App. 2008) (“A release is a contract enforceable by its plain terms.”); *Overberg v. Lusby*, 727 F. Supp. 1091, 1093 (E.D. Ky.) *aff'd*, 921 F. 2d 90 (6th Cir. 1990) (applying Kentucky law and dismissing a complaint with prejudice where an “unambiguous” general release barred all claims). Further, a general release acts as a complete bar to all existing or future claims, known or unknown, at the time of the release. *In re Merv Properties, L.L.C.*, 539 B.R. 516, 532 (B.A.P. 6th Cir. 2015) (applying Kentucky law and finding a general release of future, unknown claims enforceable); *3D Enters. Contracting Corp. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 174 S.W.3d 440, 448 (Ky. 2005) (upholding release of “all possible, potential, or actual claims, causes of actions, demands, or damages, both known and unknown, in contract or in tort” and noting that “[t]he fact that one party may have intended different results [] is insufficient to construe a contract at variance with its plain and unambiguous terms.”) (internal citations omitted). The law of ICANN’s home state, California, is the same: “a general release can be completely enforceable and act as a complete bar to all claims (known or unknown at the time of the release) despite protestations by one of the parties that he did not intend to release certain types of claims.” *San Diego Hospice v. Cnty. of San Diego*, 31 Cal. App. 4th 1048, 1053 (1995) (citing *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992)). Because a release acts as a complete bar to recovery, any claims covered by a release should be dismissed with prejudice. *Overberg*, 727 F. Supp. at 1093.

In the process of pursuing its applications for .SHOP, Plaintiff acknowledged, accepted and agreed to several releases of ICANN. These releases bar all of Plaintiff’s claims. Most relevant and most recently, by submitting its 2012 Application, Plaintiff accepted and

acknowledged the terms and conditions set forth in Module 6 of the Guidebook, which explicitly includes the following waiver and release:

6. Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents] from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. ***APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . .***

(Oyler Decl. Ex. C ¶ 6 (emphasis added).)³

There is no question that Plaintiff’s purported claims arise out of ICANN’s “review of [Plaintiff’s] application” and “the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application.” (*Id.*) Plaintiff’s first purported claim against ICANN, for fraudulent misrepresentation, is based on Plaintiff’s allegation that “[t]he representations and promises concerning ***the gTLD application evaluation and process*** made by ICANN were not fulfilled as the application process proceeded.” (Compl. ¶ 50 (emphasis added).) Plaintiff’s second purported claim against ICANN, for breach of contract, is based on the allegation that ICANN “failed to implement objective and reliable criteria in ***its gTLD application evaluation processes.***” (*Id.* ¶ 58 (emphasis added).) And Plaintiff’s third purported claim against ICANN, for breach of the covenant of good faith and fair dealing, is based on the

³ Plaintiff claims that the current version of the Guidebook was published after Plaintiff submitted its 2012 Application. While there were several versions of the Guidebook, the waiver and release set forth in Module 6 of the current version of the Guidebook was also contained in Module 6 of the version of the Guidebook that was in effect when Plaintiff submitted its 2012 Application. See <http://newgtlds.icann.org/en/about/historical-documentation/matrix-agb-v9> (hosting archived versions of the Guidebook).

allegation that ICANN “deprived Commercial Connect of the benefits of the agreement as set forth in the Applicant Guidebook, namely, *a gTLD application, evaluation and selection process* founded on the principles of fairness, transparency and non-discrimination.” (Compl. ¶ 61 (emphasis added).) All of these claims arise out of the evaluation of Plaintiff’s 2012 Application and are therefore undeniably barred by the release in Module 6 of the Guidebook.

In addition, to the extent Plaintiff is asserting claims based on its 2000 Application, those claims were released *twice*. Plaintiff expressly agreed in its 2000 Application to “release and forever discharge ICANN . . . from any and all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.” (Oyler Decl. Ex. A ¶ B14.2.) And again, when Plaintiff requested that ICANN apply a credit to Plaintiff’s 2012 Application, Plaintiff confirmed that it “has no legal claims arising from the 2000 proof-of-concept process.” (*Id.* Ex. B.)

Faced with the exact same release language, and similar claims against ICANN by a disgruntled applicant, the District Court for the Central District of California ruled that “this release unambiguously applies to all claims Plaintiff may possess arising out of the 2000 Application Round” *Name.Space*, 2013 U.S. Dist. LEXIS 72790 at *13. Here, the conclusion should be the same as to Plaintiff’s claims regarding both the 2000 and 2012 application rounds.⁴ More specifically, because all of Plaintiff’s purported claims regarding its 2012 Application arise out of ICANN’s and its Affiliated Parties’ (as defined in Guidebook

⁴ It is important to note that the court’s decision in *Name.Space* to not apply the release from the 2000 application round to the plaintiff’s claims regarding the 2012 application round does not undercut ICANN’s position. *Name.Space*, 2013 U.S. Dist. LEXIS 72790 at *12-13. In *Name.Space*, the plaintiff did not apply in the 2012 application round, *Id.* at *6, and therefore did not agree to the release in Module 6 of the Guidebook. Here, Plaintiff participated in both rounds and agreed to the releases in both rounds.

Module 6) evaluation of that Application, those claims are barred by the release set forth in Module 6 of the Guidebook.

B. Plaintiff Does Not and Cannot Plead Its Fraud Claim with Specificity.

Separate and apart from the releases, Plaintiff's first claim against ICANN for fraudulent misrepresentation is insufficiently pled. (Compl. ¶¶ 48-54.) "[C]laims which sound in fraud, [] are subject to the heightened pleading standard of Fed. R. Civ. P. 9(b), which provides that '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.'" *Vanden Bosch v. Bayer Healthcare Pharms., Inc.*, 13 F. Supp. 3d 730, 735 (W.D. Ky. 2014). The Sixth Circuit requires a plaintiff "at a minimum, to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-162 (6th Cir. 1993) (internal quotation marks and citation omitted).

Here, Plaintiff alleges only that "by and through the publication of its Applicant Guidebook" ICANN made allegedly misleading statements about "the process by which gTLD applications would be evaluated and processed." (Compl. ¶ 49.) Plaintiff does not identify, with particularity, which statements in the Guidebook – an over 300-page document – were allegedly false or misleading. Nor does Plaintiff specifically allege how and why Plaintiff relied on the allegedly false statements and what injury resulted from that reliance. Plaintiff also fails to allege, with particularity, facts supporting the notion that ICANN had a fraudulent intent in drafting and publishing the Guidebook. *Coffey*, 2 F.3d at 161-162.

Nor is there reason to believe that Plaintiff would be able to cure the defects in its pleading. As discussed above, even were Plaintiff to allege that ICANN's evaluation of its 2012 Application was not in conformance with specific procedures set forth in the Guidebook, the

terms and conditions explicitly provide that ICANN may “make reasonable updates and changes to this applicant guidebook and to the application process . . . at any time.” (Oyler Decl Ex. C ¶ 14.)

C. ICANN’s Actions Are Authorized By The Guidebook.

Plaintiff’s second and third claims, for breach of contract and breach of implied covenant of good faith and fair dealing, are also deficient. Both claims are based on Plaintiff’s allegations that ICANN acted inconsistently with the terms of the Guidebook and/or “deprived [Plaintiff] of the benefits of the agreement as set forth in the Applicant Guidebook” in its handling of Plaintiff’s 2012 Application. (Compl. ¶¶ 50, 58, 61.) Even assuming arguendo that such allegations are true (which they are not), they do not support Plaintiff’s claims since the terms of Plaintiff’s 2012 Application allow ICANN the discretion to “make reasonable updates and changes to this applicant guidebook and to the application process . . . at any time” and even to “determine not to proceed with any and all applications for new gTLDs.” (Oyler Decl. Ex. C ¶¶ 3,14.) Moreover, the Guidebook makes clear that applications in an otherwise unresolved contention set will be resolved by auction as a “last resort,” which is precisely what Plaintiff complains about here. (Compl. Ex. 5 § 4.3.) According to Plaintiff’s own allegations, there has been no breach. *Metro Louisville/Jefferson Cty. Gov’t v. Abma*, 326 S.W.3d 1, 8 (Ky. Ct. App. 2009) (breach of contract claim requires a breach of the terms of the contract).

In *Image Online Design*, the court found that the breaches allegedly committed by ICANN were not actionable because they were permitted by the terms and conditions applicable to the 2000 application round. There, the plaintiff claimed that ICANN breached its agreement with the plaintiff because ICANN did not officially approve or reject the plaintiff’s application. *Image Online Design*, 2013 U.S. Dist. LEXIS 16896 at *6. The court, however, found that “the explicit terms of the Agreement contradict the notion that ICANN had an obligation to do

anything beyond considering [the plaintiff's] application.” *Id.* Here, the analysis is the same – ICANN complied with its obligations by processing and considering Plaintiff's 2012 Application in accordance with the procedures set forth in the Guidebook.

D. This Court Lacks Personal Jurisdiction over ICANN.

In addition to the releases and Plaintiff's failure to allege cognizable claims against ICANN, Plaintiff has no likelihood of success on the merits because this Court lacks jurisdiction over ICANN. For personal jurisdiction to exist in a diversity case, “two factors must be satisfied: the forum state long-arm statute, and constitutional due process.” *Miller v. AXA Winterthur Ins. Co.*, 694 F.3d 675, 679 (6th Cir. 2012). “The plaintiff bears the burden of establishing that jurisdiction exists. . . . [and] in the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction.” *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991).

Here, Plaintiff has not alleged any, much less sufficient, facts to support personal jurisdiction over ICANN in Kentucky under either the long-arm statute or the Due Process Clause. ICANN is a California-based corporation that has no offices, employees, or property in Kentucky and conducts no business in the State. For this reason alone, Plaintiff's Motion (and Complaint) should fail.

1. Plaintiff Has Not Satisfied Kentucky's Long-Arm Statute And ICANN Has Established That Plaintiff Cannot.

“In diversity cases, federal courts apply the law of the forum state to determine whether personal jurisdiction exists.” *Nationwide Mut. Ins. Co. v. Tryg Int'l. Ins. Co.*, 91 F.3d 790, 793 (6th Cir. 1996). Plaintiff has not identified which subsection of Kentucky's long-arm statute allegedly confers jurisdiction over ICANN and, in fact, no subsection does. (Compl. ¶ 8.) The

only provisions of Kentucky's long-arm statute that are possibly relevant in this case provide that a court may exercise personal jurisdiction over a defendant as to claims arising from the [defendant]:

1. Transacting any business in [Kentucky];
2. Contracting to supply services or goods in [Kentucky];
3. Causing tortious injury by an act or omission in [Kentucky][or];
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth”

Ky. Rev. Stat. Ann. § 454.210.

None of these provisions apply in this case.

a. ICANN Does Not “Transact” Any Business in Kentucky or Engage in Any Other “Persistent Course of Contact” in the State.

Section 1 of Kentucky's long-arm statute subjects a defendant to jurisdiction for claims arising out of that defendant “transacting” business in Kentucky. Ky. Rev. Stat. Ann. § 454.210(1). “[T]here is little precedent by Kentucky courts analyzing the phrase ‘transacting any business,’” but a federal district court, in construing the phrase, noted that “the term ‘transact’ is defined as ‘to carry on or conduct (business, negotiations, activities, etc.) to a conclusion or settlement.’” *Pixler v. Huff*, No. 3:11-cv-00207-JHM, 2011 U.S. Dist. LEXIS 133185, at *10 (W.D. Ky. Nov. 16, 2011) (citation omitted). Section 4 of the statute imposes an even higher standard, subjecting a defendant to jurisdiction only where the defendant “regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [Kentucky],” and only where the injury at issue arose out of that Kentucky-based conduct. Ky. Rev. Stat. Ann. § 454.210(1).

Here, Plaintiff fails to allege that ICANN has conducted *any* business activity in Kentucky, or engaged in any other persistent course of conduct in the state. ICANN is a California non-profit public benefit corporation with its principal place of business in California. (Atallah Decl. ¶ 2.) ICANN has no employees, offices or agents in Kentucky. (*Id.* ¶¶ 3-5.) ICANN holds no business licenses in Kentucky. (*Id.* ¶ 9.) ICANN does not offer anything for sale to Kentucky residents. In fact, ICANN does not sell anything at all. (*Id.* ¶ 12.)

ICANN did enter into a contract with Plaintiff, a Kentucky resident, but “a contract with a Kentucky company d[oes] not alone support the exercise of jurisdiction over a non-resident Defendant under [Section 1 of Kentucky’s long-arm statute].” *Churchill Downs, Inc. v. NLR Entm't, LLC*, No. 3:14-cv-166-H, 2014 U.S. Dist. LEXIS 71672, at *18 (W.D. Ky. May 23, 2014). Here, ICANN did not negotiate with Plaintiff regarding the terms of the Plaintiff’s applications (whether in Kentucky or elsewhere), nor did the “subject matter of [Plaintiff’s applications]” have any connection to Kentucky. *Id.* (noting that in *Spectrum Scan, LLC v. AGM Cal.*, No. 3:07-cv-72-H, 2007 U.S. Dist. LEXIS 56974 at *2, 18 (W.D. Ky. Aug. 2, 2007), the court declined to exercise personal jurisdiction where “defendant did not initiate contact with the plaintiff, neither the contract's negotiations nor its execution took place in Kentucky, the subject matter of the contract was outside Kentucky, and the contract did not waive personal jurisdiction.”); *see also* Oyler Decl. Ex. F at 6 (*Zucchari v. Network Solutions, Inc.*, 11-cv-14-52-ML (S.D. Fla. Dec. 9, 2011) (the fact that ICANN had entered into contracts with two Florida residents was not enough to establish personal jurisdiction over ICANN under Florida’s long-arm statute).

Nor does the fact that ICANN maintains Internet websites that can be accessed by Kentucky residents if they so choose justify jurisdiction under Sections (1) or (4). The function

of ICANN's website is primarily to provide information about ICANN, the people who work for ICANN, and the projects that ICANN has undertaken in connection with the Internet, including the New gTLD Program. ICANN obtains no revenue from its website and does not use its website to advertise goods or services to Kentucky residents. *See Barker v. Patrick Collins, Inc.*, No. 3:12-cv-00372-CRS, 2013 U.S. Dist. LEXIS 158022 (W.D. Ky. Nov. 4, 2013) (defendant's operation of a website that generated significant revenue from Kentucky citizens did not justify personal jurisdiction under Kentucky's long-arm statute).

Other District Courts have found that ICANN's operation of its websites does not subject ICANN to personal jurisdiction in every place the websites can be accessed. For example, in *Economic Solutions, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. 4:00-cv-1785-DJS, 2001 U.S. Dist. LEXIS 25449, at *3, 6 (E.D. Mo. Feb. 22, 2001), the court found there was no personal jurisdiction over ICANN under the Missouri long-arm statute because ICANN's website, "operated from a single web server located in Marina del Rey . . . is not so fully interactive in the Court's view as to expose defendant to universal personal jurisdiction anywhere from which a posting might be made." Likewise in *Moore v. Econ, Inc.*, 7:07-cv-1153-RDP (N.D. Ala. Nov. 9, 2007), the court found that maintaining a website and responding to emails from Alabama residents did not establish personal jurisdiction over ICANN under Alabama's long arm statute. (Oyler Decl. Ex. E at 11-12, 16.)

b. ICANN Has Not Contracted to Supply Goods or Services in Kentucky or Committed a Tort in Kentucky.

Section 2 of Kentucky's long-arm statute subjects a defendant to jurisdiction if it "[c]ontract[s] to supply services or goods in [Kentucky]." Ky. Rev. Stat. Ann. § 454.210(2). Although Section 2 does not require that the contract "be made or executed in Kentucky . . . the contract [must] 'provide for the supplying of services or goods to be transported into, consumed

or used in Kentucky.” *Outdoor Venture Corp. v. Ronald Mark Assocs., Inc.*, No. 13-11-DLB, 2013 U.S. Dist. LEXIS 68993, at *8 (E.D. Ky. May 15, 2013) (quoting *Hinnners v. Robey*, 336 S.W.3d 891, 896 (Ky. 2011)). Here, Plaintiff has not alleged, and cannot allege, that ICANN entered into any contract to supply services or goods, much less a contract to supply services or goods to be transported into, consumed, or used in Kentucky.

Finally, Section 3 of Kentucky’s long-arm statute subjects a defendant to jurisdiction if it “[c]aus[es] tortious injury by an act or omission in [Kentucky].” Section 3 also is not applicable here, as there is no allegation (because there cannot be) that ICANN has performed *any* actions (or failed to perform any actions) within the state of Kentucky.

In sum, Plaintiff has not alleged facts sufficient to satisfy Kentucky’s long-arm statute. Without going any further, Plaintiff’s Complaint against ICANN fails for want of personal jurisdiction under Kentucky’s long-arm statute.

2. Plaintiff Has Not Satisfied The Due Process Clause And ICANN Has Established That It Cannot.

Even if Plaintiff had satisfied the requirements of Kentucky’s long-arm statute, Plaintiff has not demonstrated that this Court’s exercise of personal jurisdiction over ICANN satisfies the constitutional test for jurisdiction, i.e., that ICANN has sufficient “minimum contacts [with Kentucky]. . . such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, (1984) (citation omitted); *see also Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). “Depending on the type of minimum contacts in a case, personal jurisdiction can either be specific or general.” *Reynolds v. Int’l Amateur Athletic Fed’n*, 23 F.3d 1110, 1116 (6th Cir. 1994); *see also Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414-15. Here, Plaintiff has not, and cannot, establish either.

a. The Court Does Not Have General Jurisdiction Over ICANN.

In order to establish general jurisdiction, Plaintiff must establish that ICANN has “contacts in Kentucky [] “so 'continuous and systematic' as to render [ICANN] essentially at home in the forum State.” *Rickett v. Smith*, No. 1:14-cv-70-JHM, 2014 U.S. Dist. LEXIS 154200 at *11 n.1 (W.D. Ky. Oct. 30, 2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

Such contacts plainly do not exist in this case. ICANN has no employees, assets, bank accounts, real property, personal property, offices, or other facilities in Kentucky. (Decl. ¶¶ 3-8.) ICANN is not licensed to do business in Kentucky, does not have a registered agent for service of process in Kentucky, and has no phone numbers or mailing addresses in Kentucky. (*Id.* ¶ 9.) Finally, ICANN’s website, which is operated from web servers physically located in Southern California and Virginia, does not offer anything for sale anywhere. (*Id.* ¶¶ 12.)

ICANN thus has none of the contacts with Kentucky that are relevant to the general jurisdiction inquiry. *Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 416; *Nat’l Enquirer, Inc.*, 670 F. Supp. at 967. That Kentucky residents may access ICANN’s website is far from sufficient to satisfy the rigorous “continuous and systematic” test for general jurisdiction. *Goodyear Dunlop Tires Operations*, 131 S. Ct. at 2851; *see also Barker v. Patrick Collins, Inc.*, 2013 U.S. Dist. LEXIS 158022, at *6 (allegations that defendant operated a website that derived significant revenue from Kentucky citizens did not constitute “anything resembling the kind of ‘continuous and systematic’ contacts necessary to justify the assertion of general jurisdiction”); *Economic Solutions, Inc.*, 2001 U.S. Dist. LEXIS 25449, at *6 (ICANN’s website insufficient to satisfy due process standards for personal jurisdiction); Oyler Decl. Ex. E at 16-17 (*Moore*, 7:07-cv-1153-RDP) (website insufficient to establish general jurisdiction over ICANN).

b. The Court Lacks Specific Jurisdiction Over ICANN.

“Specific” jurisdiction arises “out of a party’s activities in the forum state that are related to the cause of action alleged in the complaint.” *Sloss Indus. Corp v. Eurisol.*, 488 F.3d 922, 925 (11th Cir. 2007). The Sixth Circuit employs a three-part test for determining whether specific personal jurisdiction exists:

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Air Prods. & Controls, Inc. v. Safetech Int'l, Inc., 503 F.3d 544, 550 (6th Cir. 2007) (quoting *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). “This ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous’ or ‘attenuated’ contacts or of the ‘unilateral activity of another party or third person.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted).

Here, the only alleged contact with Kentucky is ICANN’s operation of a website available to Kentucky residents. The Sixth Circuit has found that purposeful availment is shown only “if the website is interactive to a degree that reveals specifically intended interaction with residents of the state.” *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F.3d 883, 890-91 (6th Cir. Mich. 2002). The primary purpose of ICANN’s website is informational. (Atallah Decl. ¶ 12.) This is insufficient to confer specific personal jurisdiction over ICANN. *Economic Solutions, Inc.*, 2001 U.S. Dist. LEXIS 25449, *6 (ICANN’s website insufficient to satisfy due process standards for personal jurisdiction); Oyler Decl. Ex. E at 11-12 (*Moore*, 7:07-cv-1153-RDP) (Plaintiff’s email correspondence with ICANN did not establish specific personal jurisdiction

over ICANN). Moreover, Plaintiff's claims against ICANN do not "arise out of" ICANN's operation of its websites. Rather, Plaintiff's purported claims arise out of ICANN's evaluation of Plaintiff's 2012 Application, and perhaps its 2000 Application, which took place outside of Kentucky.

In short, Plaintiff has not alleged facts sufficient to satisfy the Due Process Clause. ICANN has established that it has no meaningful contacts with Kentucky such that the exercise of Kentucky jurisdiction over ICANN would be unreasonable.

III. THE OTHER INJUNCTIVE RELIEF FACTORS DO NOT WEIGH IN FAVOR OF PLAINTIFF'S MOTION.

As discussed above, Plaintiff provides *no* evidence supporting its entitlement to a temporary restraining order. This alone dooms its application. *Polyone Corp.*, 67 F. Supp. 3d at 868-869. Further, Plaintiff has *no possibility* of success on the merits of its claims. This too dooms its application. *Gonzales*, 225 F.3d at 625. Also important and dispositive, however, is the fact that the other injunctive relief factors similarly require denial of Plaintiff's Motion.

First, Plaintiff has offered no evidence demonstrating that it will suffer irreparable injury if the January 27 auction goes forward. *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 753. Even assuming that Plaintiff could state and prove a claim against ICANN (which it cannot do), there is no evidence showing that monetary damages would be insufficient to redress Plaintiff's injuries. Moreover, whatever theoretical injury Plaintiff may suffer, that injury will be the same regardless of whether the auction goes forward or not because Plaintiff has specifically chosen to not participate in the January 27 auction and has thereby essentially abandoned its 2012 Application, as Plaintiff's representative, Jeff Smith, confirmed during the Court's January 22, 2016 conference with the parties.

Second, the issuance of an injunction could arguably harm the eight other applicants in Plaintiff's contention set. *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 753. All eight applicants in the contention set submitted new gTLD applications to ICANN in 2012, paid a substantial application fee, and await the resolution of the contention set to determine if they will proceed to contracting for .SHOP. Coupling the potential harm to others with the fatal flaws in Plaintiff's claims, there is no justification for delaying resolution of the contention set.

Third, the issuance of an injunction would not be in the public interest. *Rock & Roll Hall of Fame & Museum, Inc.*, 134 F.3d at 753. The purpose behind the New gTLD Program is to increase competition in the DNS by increasing the number of available gTLDs. Delaying the delegation of .SHOP does not serve this interest. Moreover, the Guidebook has been in place for years and relied upon by many. To halt the timely and orderly progression of the procedures contained in the Guidebook, simply because Plaintiff has decided that it no longer wants to be bound by the terms, conditions and procedures therein, also does not serve the public interest.

CONCLUSION

Plaintiff's purported claims against ICANN suffer from numerous fatal deficiencies, and Plaintiff has not demonstrated any entitlement to the preliminary injunctive relief it seeks. For these reasons, ICANN respectfully requests that Plaintiff's Motion be denied.

Dated: January 25, 2016

Respectfully submitted,

/s/ Michael W. Oyler

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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION**

COMMERCIAL CONNECT, LLC,)
)
Plaintiff,)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
and INTERNATIONAL CENTRE FOR)
DISPUTE RESOLUTION,)
)
Defendants.)
)
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CASE NO.
3:16-CV-00012-JHM

**DECLARATION OF AKRAM ATALLAH IN SUPPORT OF SPECIAL APPEARANCE
OF INTERNET CORPORATION FOR ASSIGNED NAMES AND
NUMBERS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY
RESTRAINING ORDER**

I, Akram Atallah, declare and affirm as follows:

1. I am the President of the Global Domains Division for the Internet Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this action. I have personal knowledge of the matters set forth herein and am competent to testify to those matters. I make this declaration in support of Special Appearance of ICANN in Opposition to Commercial Connect, LLC’s (“Commercial Connect’s”) Motion for a Temporary Restraining Order.

Background on ICANN

2. ICANN is a non-profit public benefit corporation organized under the laws of the State of California. Its principal place of business is in Los Angeles, California. ICANN is responsible for the global coordination of the Internet’s domain name system unique identifiers. Background on the privatization of the Internet is available in a publication published by the Department of Commerce on June 5, 1998 entitled *Management of Internet Names and Addresses* and is available at 63 Fed. Reg. 31741 (1998).

ICANN’s Lack of Connection to Kentucky

3. ICANN does not have any office or other company facilities in Kentucky.
4. ICANN does not have any phone number or mailing address in Kentucky.
5. ICANN does not have any employee or staff member in Kentucky.
6. ICANN has not applied for any loan or opened any bank account in Kentucky.
7. ICANN has not owned any tangible personal property or real estate property or assets in Kentucky.
8. ICANN has not appointed any agent in Kentucky for service of process.
9. ICANN is not licensed to do business in Kentucky.
10. ICANN has never released any advertisement to the residents of Kentucky, nor has it released any advertisement in any magazine targeted at residents of Kentucky.
11. To the extent ICANN has witnesses who have knowledge of the facts alleged in Commercial Connect’s claims, all of those witnesses are in California.

12. ICANN maintains a few websites, <http://www.icann.org>, <http://www.iana.org>, and <http://www.internic.net>. These websites are operated from a web server physically located in Los Angeles, California. Their primary function is to provide information about ICANN, the domain name system, the people who work at ICANN, and projects that ICANN has undertaken in connection with the Internet, including the New gTLD Program. In addition, <http://www.icann.org> allows individuals and entities to communicate with, or transmit information to, ICANN in California. Nothing on the site specifically invites interaction from Kentucky residents. ICANN does not offer anything for sale on its websites—in fact, ICANN does not sell anything.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

This declaration was signed on January 25, 2016 in Los Angeles, California.



Akram Atallah