Jeffrey A. LeVee (State Bar No. 125863)
jlevee@JonesDay.com
Eric P. Enson (State Bar No. 204447)
epenson@JonesDay.com
Kathleen P Wallace (State Bar No. 234949)
kwallace@JonesDay.com
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NAME.SPACE, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV 12-8676-PA

Assigned for all purposes to Honorable Percy Anderson

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT ICANN'S MOTION FOR SUMMARY JUDGMENT

[Declarations of Louis Touton and Jeffrey A. LeVee; ICANN's Memorandum in Opposition to Name.space's Rule 56(d) Application; and ICANN's Objections to the Declaration of Paul Garrin Filed And Served Concurrently Herewith]

Hearing Date: Feb. 25, 2013
Hearing Time: 1:30 pm
Hearing Location: 312 N. Spring St.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In its 2000 application to operate 118 new top-level domains ("TLDs"), plaintiff name.space executed a release discharging ICANN from any claims relating to the application and ICANN's "establishment or failure to establish" the TLDs requested in name.space's application. ICANN moved to dismiss name.space's Complaint because, among other reasons, its allegations fell squarely within the scope of the release. On January 15, 2013, the Court converted the release portion of ICANN's motion to dismiss to a motion for summary judgment.

As a result, the following motions are now pending before this Court:

(i) ICANN's Rule 12(b)(6) motion to dismiss name.space's antitrust, intentional interference and unfair competition claims;

(ii) ICANN's Rule 12(b)(1) motion to dismiss name.space's trademark claims; and

(iii) ICANN's Rule 56 motion for summary judgment on all of name.space's claims based on the release.

ICANN urges the Court to consider ICANN's pending motions in this sequence because resolution of the first two motions in ICANN's favor would moot the Rule 56 motion. This would be consistent with the order Judge Pregerson issued on February 7, 2013 (a copy of which is attached as Exhibit A to the Declaration of Jeffrey A. LeVee) dismissing a similar complaint filed against ICANN by another disgruntled 2000 applicant. *Image Online Design, Inc. v. ICANN*, No. 2:12-cv-08968.

As to the Rule 56 motion, name.space now argues that its 2000 application is "separate and distinct" from the conduct giving rise to its claims. In so doing, name.space improperly attempts to re-write its claims via motion practice. But the fact is that the Complaint's substantive allegations, claimed injury and requested relief are all premised on name.space's 2000 application and ICANN's failure to establish the TLDs requested by name.space. Paragraph 90 of the Complaint makes

this clear: "ICANN's refusal to delegate name.space's gTLDs to the DNS under its 2000 Application has enabled and induced 2012 applicants to apply for delegation of those gTLDs as part of the 2012 Application Round." If the Court reaches the Rule 56 motion, it should be granted because no amount of discovery or amendment could save name.space's claims; they all relate to name.space's 2000 application and ICANN's failure to approve the TLDs sought in that application.

SUPPLEMENTAL FACTUAL SUMMARY

The allegations in name.space's Complaint demonstrate that name.space's claims relate directly to its 2000 Application and are thus barred by the release. Indeed, the evidence establishes that name.space had in mind the precise theories presented in its Complaint well before name.space executed the release in 2000.

In 1997, name.space sued Network Solutions, Inc. ("NSI"), the entity that administered the Internet's domain name system ("DNS") before ICANN, alleging that NSI held an unlawful monopoly over the root and that NSI had conspired with "Internet insiders or stakeholders" to control the creation and pricing of potential new TLDs. (Declaration of Jeffrey A. LeVee ("LeVee Decl."), ¶ 3, Ex. B.) A few years later (and after ICANN began its oversight of the DNS), the Second Circuit rejected name.space's DNS-based antitrust claims. *Name.space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573 (2d Cir. 2000).

On October 1, 2000, just months after the Second Circuit dismissed name.space's antitrust suit, name.space submitted an application to ICANN seeking to operate 118 TLDs. (Declaration of Louis Touton ("Touton Decl.") at ¶ 2, Ex. A.) In its October 1 application, however, name.space's CEO, Paul Garrin, crossed out critical language, and wrote "DO NOT AGREE" with respect to paragraph B.6, which stated that the application fee was non-refundable, that ICANN had the right to reject all applications and that there were no assurances that any TLD "will ever be created in the future." (*Id.*) ICANN immediately responded to name.space's altered application by informing name.space that its application would not be

considered by ICANN absent name.space's complete agreement on all terms. (*Id.* at ¶ 3, Ex. B.) ICANN's letter to name.space made clear that name.space's acceptance of all terms, including the release at issue in this Motion, was a prerequisite to ICANN considering name.space's application. (*Id.*)

A day later, Mr. Garrin wrote ICANN to further amplify his concerns with the application, questioning how the application fee was set and "the fairness of the fee" to small businesses. (*Id.* at ¶ 4, Ex. C.) Mr. Garrin also stated that the "prevailing opinion" of his investors was that the application fee was "best spent paying salaries at Name.Space rather than funding an uncertain agenda of ICANN, especially when all indications point to the possibility that ICANN seeks to restrict rather than expand the number of TLDs." (*Id.*) This was not the first time name.space had voiced these grievances: on September 27, 2000, Mr. Garrin posted in an ICANN Internet forum his view that the fee set by ICANN was "excessive and raises the barrier of entry" for small businesses and that ICANN's Board was "dominated" by large, corporate interests. (LeVee Decl., ¶ 4, Ex. C.)

Despite these long-running complaints and conspiracy theories, which are no different than those asserted in this action, on October 6, 2000, name.space submitted to ICANN a fully executed version of the application, accepting all terms contained therein (the "2000 Application"). (Touton Decl. at ¶ 5, Ex. D.) As set forth below, 2000 Application's release bars name.space's claims against ICANN.

ARGUMENT

I. The Release Is Unambiguous And Name.Space's Claims, As Pled, Fall Within The Scope Of The Release.

In the 2000 Application, name.space discharged ICANN from any and all claims and liabilities relating in any way to: "(a) any action or inaction by on or behalf of ICANN in connection with [the 2000] application or (b) the establishment or failure to establish a new TLD." (Touton Decl. at ¶ 5, Ex. D.) Because name.space's claims, as pled, relate to name.space's 2000 Application as well as

ICANN's "failure to establish" the TLDs name.space sought in 2000, each of name.space's claims is barred.

A. Name.space's Claims Relate To Its 2000 Application.

The first provision in the release bars claims relating to "any action or inaction by on or behalf of ICANN in connection with [the 2000] application." (*Id.*) Name.space does not contend that this language is ambiguous. As such, the plain language of the release governs. Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit….").

The Complaint's allegations, name.space's alleged injury and its requested relief all directly relate to name.space's 2000 Application. Indeed, name.space's Complaint is entirely premised on the theory that name.space derived certain rights from its 2000 Application and that ICANN conspired to impinge these rights and block the unique business model set forth in name.space's 2000 Application. For example, name.space's Complaint alleges that:

- It has rights to the TLDs sought in name.space's 2000 Application because the application is still pending (Compl. ¶¶ 5 ("name.space relied on representations from ICANN that its 2000 Application remained pending"); 53 ("ICANN never rejected name.space's 2000 Application, but neither advanced name.space's 2000 Application for delegation nor awarded name.space the authority to operate any of name.space's TLDs over the DNS."); 54 ("In fact, to this day, on information and belief, name.space's 2000 Application is still pending."));
- ICANN conspired to impinge the rights arising from name.space's 2000 Application (*Id.* at ¶¶ 72 ("ICANN did not prevent 2012 applicants from applying for delegation of TLDs that were already included in other applicants' pending 2000 applications."); 6 ("Rather than adopting a procedure to account for the pending 2000 Application," ICANN adopted an anticompetitive procedure in 2012); 73 (the 2012 Application Round did not have "adequate safeguards in place to protect the 2000 applicants' rights in their proposed or already operating TLDs.");

- ICANN crafted the 2012 Application Round in a way designed to force name.space to relinquish its rights in the 2000 Application (*Id*. at ¶¶ 71 ("ICANN is attempting to use the 2012 Application Round to force previous applicants from the 2000 Application Round to submit to this new dispute resolution process."); 70 (applying in the 2012 Application Round would require name.space to "waive any claim it had to its 2000 Application."));
- Name.space's alleged injury arises directly from ICANN's failure to approve the 2000 Application (*Id*. at ¶ 90 ("ICANN's refusal to delegate name.space's gTLDs to the DNS under its 2000 Application has enabled and induced 2012 applicants to apply for delegation of those gTLDs as part of the 2012 Application Round.")); and
- Name.space is entitled to approval of its 2000 Application (*Id*. at ¶ 75 (name.space "continues to seek delegation of its 118 gTLDs from its 2000 Application."); LeVee Decl., ¶ 5, Ex. D (demanding that "ICANN grant name.space's outstanding application from ICANN's 2000 TLD Application Round and delegate the 118 gTLDs set forth in the application"); *id*. at ¶ 6, Ex. E ("At a minimum, the 118 gTLDs submitted in name.space's 2000 application should be considered as part of the 2012 Application Round without requiring name.space to pay additional application fees.")).

Name.space now runs from these allegations because they make clear that the 2000 Application is a critical element supporting all of its claims. (Opp'n at 7-8.)[1] But name.space cannot re-plead its Complaint through argument or motion practice.

[1] Indeed, much of name.space's argument in opposition to ICANN's motion for summary judgment is exactly the opposite of what name.space actually alleged in its Complaint. *Cf., e.g.,* Opp'n at 8:16-17 (representing that name.space's claims are premised on facts that arose after the 2000 Application Round was "completed") *with* Compl. ¶ 5 ("name.space relied on representations from ICANN that its 2000 application remained pending"); *Cf.* Opp'n at 7:25-8:3 (representing that name.space does not assert that ICANN acted unlawfully when it did not approve name.space's 2000 Application) *with* Compl. ¶ 90 (alleging injury purportedly derived from ICANN's failure to approve name.space's 2000 Application).

Nor can name.space create a genuine issue of material fact to survive summary judgment by ignoring the facts alleged in its own Complaint. *Block v. City of Los Angeles*, 253 F.3d 410, 419 n.2 (9th Cir. 2001) ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of the facts."). Because name.space's claims relate directly to the 2000 Application, those claims are barred.[2]

B. Name.space's Claims Relate To ICANN's "Failure To Establish" The TLDs Requested By Name.space In 2000.

The second provision in the release bars claims relating to ICANN's "establishment or failure to establish a new TLD." (Touton Decl., ¶ 5, Ex. D.) This provision provides an additional and independent basis for dismissing name.space's claims, because name.space's claims relate to ICANN's "failure to establish" the TLDs name.space sought in its 2000 Application. Name.space's injury allegations make this explicit. (Compl. ¶ 90 ("ICANN's refusal to delegate name.space's gTLDs to the DNS under its 2000 Application has enabled and induced 2012 applicants to apply for delegation of those gTLDs as part of the 2012 Application Round.").) Moreover, name.space's trademark and interference claims are entirely premised on the theory that name.space will be injured if ICANN permits other entities to operate the TLDs that name.space applied for in its 2000 Application. (Compl. ¶¶ 120-131, 133-143, 160-165, 167-172.)

Name.space's Opposition offers nothing new on this issue.[3] Name.space

[2] Name.space states that "ICANN must show that *every* possible allegation in the Complaint involves the 2000 Application such that the 2000 release language applies to it." (Opp'n at 9.) This is not the law, and name.space provides no legal support for this position.

[3] In fact, name.space provides a nearly verbatim resuscitation of its argument in opposition to ICANN's motion to dismiss. Name.space's position is untenable for the reasons articulated in ICANN's reply in support of ICANN's motion to dismiss (Reply at 1-4), namely that the plain language of the release shows the release applied to conduct that would occur in the future and that a Section 1542 waiver is not required to waive future claims. In any event, Section 1542 is inapplicable here because name.space's alleged claims were not unknown to it at the time it executed the release, as described below.

does not, for example, address the circumstances surrounding its execution of the 2000 Application. That history makes clear that the release is prospective in nature and that name.space read and considered the terms of its 2000 Application, including the release. As set forth above, name.space's first application, in which Mr. Garrin carefully struck the language of paragraph B.6, was rejected by ICANN because acceptance of all terms, including the release, was a ***prerequisite*** to ICANN considering name.space's application. (Touton Decl. at ¶ 3, Ex. B ("If ICANN does not receive a completed and signed Unsponsored TLD Application Transmittal Form … Name.Space, Inc.'s application will not be considered complete and ICANN will return the application…."). Name.space relented and fully executed the 2000 Application a few days later. Thus, name.space knew that the release language applied to future conduct. And it is evident that name.space read the 2000 Application carefully and understood the import of its terms.

Name.space's proffered "evidence" does not create an issue of fact concerning the scope of the release. For instance, name.space's subjective intent when it executed the release – as outlined in Mr. Garrin's declaration – is irrelevant. California courts have long held that the subjective intent or understanding of a party is irrelevant to contract interpretation and cannot create an issue of fact for purposes of defeating summary judgment. *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 956, 960 (2003) ("*Founding Members*") (finding declarations "irrelevant under the objective theory of contracts" because "undisclosed statements regarding intent or understanding … are irrelevant to contract interpretation"); *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1022 n.2 (2011) (trial court correctly sustained defendant's objections to a declaration submitted in opposition to summary judgment because "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation.") (internal quotation marks and citation omitted). Thus, whether or

not name.space intended the release to apply to future TLD application rounds is irrelevant, inadmissible, and does not create an issue of fact concerning the scope of the release. *Founding Members*, 109 Cal. App. 4th at 956.[4]

Name.space's Opposition also cites to ICANN's 2012 Application Round guidebook, in which ICANN requests that applicants from the 2000 Application Round seeking to apply in the 2012 Application Round confirm that they had no legal claims arising from the 2000 Application Round in order to receive a discount on the application fee. (Opp'n at 17:1-13.) Name.space argues that this "would be completely unnecessary if the release language in the 2000 Application extended into the future." (*Id*. at 17:12-13.) But name.space mis-reads the guidebook's plain language: the guidebook makes clear that ICANN merely requested that applicants from the 2000 Application Round confirm what was already evident—that no claims exist relating to an applicant's 2000 Application or ICANN's establishment or failure to establish a new TLD. ICANN's requested confirmation was nothing more than a preventative measure seeking to avoid barred (and spurious) claims like those asserted here.

---

[4] Name.space also argues that ICANN could not have intended the release to apply to future conduct because ICANN did not raise the release in an entirely distinct and independent proceeding involving different parties, different issues, and a different TLD application. (Opp'n at 17:25-18:12.) Obviously, name.space's theories as to why ICANN did not assert the release in a different proceeding is pure speculation and does not create an issue of fact for purposes of defeating summary judgment. *Walker v. Rohrer*, No. Civ-S08-3034 WBS (KJM), 2010 WL 2740286, at *4 (E.D. Cal. July 9, 2010) ("Plaintiff's speculation does not create a disputed issue of fact."). Moreover, the claims asserted in the proceeding referenced by name.space are premised on an application submitted to ICANN in 2004 in connection with an entirely different TLD application round. Name.space's comparison is entirely inapposite.

Name.space's contention that the absence of a statement or reference to the 2000 release in the 2012 Guidebook is also easily dispatched. (Opp'n at 16:16-24.) Name.space's theories for why the 2012 Guidebook did not reference the 2000 release are also pure speculation and do not create an issue of fact for purposes of defeating summary judgment. *Id*; *see also Rousan v. Bankers Life & Cas. Co.*, No. 1:06-cv-06-1175 OWW (GSA), 2009 WL 1743630, at *11 (E.D. Cal. June 17, 2009) ("An issue of fact requires an actual conflict in the evidence, and cannot be created by speculation or conjecture.").

At bottom, name.space cannot deny that its claims and alleged injury are derived from ICANN's "failure to establish" the TLDs name.space sought in 2000. (Compl. ¶¶ 75 (antitrust claims); 94-118 (trademark, unfair competition, and tortious interference claims); 90 (injury).) As a result, these claims are barred.

II. Name.space's Alleged Claims Were Not Unknown To It At The Time It Executed The Release.

"It is well established that a general release is valid as to all claims of which a signing party has actual knowledge or that he could have discovered upon reasonable inquiry." *Fair v. Int'l Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir. 1990). All of the evidence before the Court shows that name.space was aware of the claims it asserts in this case when it executed the release in 2000.

First, ***before*** executing the 2000 Application, name.space knew that ICANN could award the TLDs that name.space requested in its 2000 Application to other entities. (*See* LeVee Decl., ¶ 7, Ex. F (TLD Application Process FAQ #22 (discussing the procedure "in the event of duplicate submission of a domain name by different parties").) Name.space thus was aware in 2000 of the very trademark and interference claims it asserts here because name.space's instant claims are expressly based on the theory that other entities will get to operate the TLDs that name.space applied for in 2000. (Compl. ¶¶ 120-131, 133-143, 160-165, 167-172.)

Second, ***before*** executing the 2000 Application, name.space complained that the application fee was "excessive and raises the barrier of entry," claimed that ICANN's Board was controlled by large, corporate interests, and complained that ICANN could restrict the number of TLDs it approved. (LeVee Decl., ¶ 4, Ex. C.) Each of these complaints is present in name.space's instant lawsuit. (Compl. ¶¶ 67 ("In order to apply in the 2012 Application Round, ICANN required applicants to pay a whopping $185,000 per TLD fee—over three times more than the 2000 Round."); 60 ("ICANN has ties to and benefits from payments from the select few industry players that are able to operate domain name registries."); 55 (ICANN

"approved only seven new TLDs").

Finally, in 1997, name.space sued NSI, the entity that administered the DNS before ICANN, alleging that NSI held an unlawful monopoly over the root and that NSI had conspired with "Internet insiders or stakeholders" to artificially control the creation and pricing of potential new TLDs. (LeVee Decl., ¶ 3, Ex. B.) These are precisely the claims name.space asserts against ICANN here. Ultimately, name.space knew when it signed the release in 2000 that it might have (and was releasing ICANN of) claims identical to those it had asserted against NSI.[5]

Because name.space was aware of the claims it asserts in this case when it executed the release in 2000, all of name.space's claims here are barred.[6]

III. Regardless Of Whether The Release Is Effective, Name.space's Claims Should Be Dismissed Under Rules 12(b)(1) and 12(b)(6).

Apart from the release, ICANN's motion to dismiss provides ample justification for dismissal of name.space's claims. As ICANN explained in its motion to dismiss and reply in support of that motion, each of name.space's claims

---

[5] Name.space fails to address its prior litigation history, despite having two opportunities to do so. Name.space instead concludes summarily that what it might have known at the time of its 2000 Application "constitutes a genuine issue of material fact." (Opp'n at 15 n.5.) Name.space, however, provides no supporting factual citation that might actually create a factual issue. Because ***all*** of the evidence in the record here shows that name.space was aware of the claims it now asserts ***before*** it executed the 2000 release, its claims are barred. *Fair v. Int'l Flavors & Fragrances, Inc.*, 905 F.2d 1114, 1116 (7th Cir. 1990).

[6] Contrary to name.space's assertion, the release does not violate public policy. As explained in ICANN's reply in support of its motion to dismiss, ICANN does not argue that name.space's 2000 release discharges ICANN of all liability on all theoretically possible claims into perpetuity. Instead, ICANN contends that name.space released ICANN for claims relating to its 2000 Application and ICANN's "establishment or failure to establish a new TLD" in the DNS coordinated by ICANN, as the plain language of the release makes clear. The fact that the release bars name.space's identical antitrust claims does not render it void as against public policy. *See Richard's Lumber & Supply Co. v. U.S. Gypsum Co.*, 545 F.2d 18, 20 (7th Cir. 1976) ("A general release … is not ordinarily contrary to public policy simply because it involves antitrust claims."); *Three Rivers Motor Co. v. Ford Motor Co.*, 522 F.2d 885, 891-92 (3d Cir. 1975) (recognizing public interest in private antitrust enforcement, but explaining that "this public interest does not prevent the injured party from releasing his claim and foregoing the burden of litigation") (citation omitted).

fail as a matter of pleading, separate and apart from the release.

First, name.space's antitrust claims remain deficient. The conspiracy allegations fall short of the requirement that name.space allege facts such as a "specific time, place, or person involved in the alleged conspiracies." (Mot. at 9-13; Reply at 4-7.). The monopolization claims fail because ICANN is legally incapable of monopolizing the "TLD registry market," a market in which it does not compete, and because ICANN has not engaged in any exclusionary conduct. (Mot. at 14-17; Reply at 7-9.) And name.space's conclusory allegations regarding "antitrust injury" fail to support its antitrust claims, particularly where, as here, name.space's real complaint is that there is ***more*** competition today as a result of ICANN's conduct. (Mot. at 18-20; Reply at 9-10.)

Name.space's trademark claims remain unripe because name.space has failed to (and cannot) allege that ICANN has "used" name.space's alleged trademarks in commerce. (Mot. at 20-22; Reply at 10-12.) Notably, Judge Pregerson reached this precise conclusion in a similar case filed against ICANN by Image Online Design, Inc. ("IOD"). *Image Online Design, Inc. v. ICANN*, No. 2:12-cv-08968. Identical to name.space's claims, IOD had applied for a .WEB TLD in the 2000 Application Round, but ICANN did not approve the application. (LeVee Decl., ¶ 2, Ex. A at 3.) IOD, like name.space, alleged that ICANN engaged in trademark infringement by accepting applications for a .WEB TLD in the 2012 Application Round. (*Id.* at 10-19.) In granting ICANN's motion to dismiss, Judge Pregerson ruled that:

> IOD has not alleged use of the trademark or "immediate capability and intent" to infringe, and therefore the trademark infringement claim is not ripe for adjudication. Infringement is, at this stage, merely speculative. Without knowing, for instance, which party might be chosen to operate a potential .WEB TLD, IOD cannot know whether that party itself has a plausible claim to trademark in .WEB, whether ICANN will change its mind about using .WEB as a TLD, or whether there is confusion between IOD's registered mark and ICANN's use of .WEB. Prior to ICANN selecting an applicant, if any, to operate the TLD, the parties will not be able to build a factual record that will allow the court to answer

> any of these questions. No one has used the mark or has the immediate capability and intent to use the mark. Therefore the issue is not ripe.

(*Id.* at 11-12.) Judge Pregerson also held that IOD's trademark claims failed because "the mark .WEB used in relation to Internet registry services is generic and cannot enjoy trademark protection." (*Id.* at 16.) The result should be the same here.

Finally, name.space's interference claims are still deficient because name.space still has not identified a single contract or relationship that has been breached or disrupted by ICANN's acceptance of applications for new TLDs. Nor has name.space alleged facts plausibly suggesting that ICANN took steps intentionally "designed" to induce breach, or to disrupt, name.space's business relationships. (Mot. at 23-24; Reply at 12.) Judge Pregerson reached this conclusion on similar interference claims asserted by IOD. (LeVee Decl., ¶ 2, Ex. A at 20 ("IOD has not alleged any facts identifying the particular contracts, the actual disruption of these contracts, or any actual damage to IOD.").

CONCLUSION

ICANN respectfully requests that the Court find that all of name.space's claims are barred by the release and thus grant its motion for summary judgment, or, alternatively, dismiss name.space's claims for the reasons set forth in ICANN's motion to dismiss.

Dated: February 11, 2013

JONES DAY

By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS