

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

6 Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
7 NAMES AND NUMBERS

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN FRANCISCO**

11 SURAJ KUMAR RAJWANI, an individual,
12
13 Plaintiff,

14 v.

15 B52 MEDIA LLC, a Limited Liability
Company; JONATHAN W. BIERER as
16 personal representative of the Estate of
Lonnie Borck; INTERNET CORPORATION
FOR ASSIGNED NAMES AND
17 NUMBERS, a Corporation; eNOM, Inc., a
Corporation; WHOIS PRIVACY
18 PROTECTION SERVICE, INC., a
corporation and DOES 1 THROUGH 100,
19
20 Defendant.

CASE NO. CGC-16-554684

**DECLARATION OF AMANDA
PUSHINSKY IN SUPPORT OF
DEMURRER AND REQUEST FOR
JUDICIAL NOTICE**

[Notice of Demurrer and Demurrer,
Memorandum of Points and Authorities,
Request for Judicial Notice, and
[Proposed] Order filed concurrently
herewith]

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

Complaint Filed: October 6, 2016

RESERVATION ID: 05250629-06

21
22
23
24
25
26
27
28

1 DECLARATION OF AMANDA PUSHINSKY

2 I, Amanda Pushinsky, declare:

3 1. I am attorney licensed to practice law before all courts of the State of California
4 and am one of the attorneys of record for defendant Internet Corporation for Assigned Names and
5 Numbers ("ICANN"). I have personal knowledge of the facts stated herein, and if called to do so
6 as a witness, I could and would competently testify to them. I make this declaration in support of
7 ICANN's Request for Judicial Notice and Demurrer to Second Amended Complaint.

8 2. Attached hereto as **Exhibit A** is a true and correct copy of "Domain Name
9 Registration Process," available at <https://whois.icann.org/en/domain-name-registration-process>.

10 3. Attached hereto as **Exhibit B** is a true and correct copy of "About Change of
11 Registrant," available at <https://www.icann.org/resources/pages/ownership-2013-05-03-en>.

12 4. Attached hereto as **Exhibit C** is a true and correct copy of "What Does ICANN
13 do?," available at <https://www.icann.org/resources/pages/what-2012-02-25-en>.

14 5. Attached hereto as **Exhibit D** is a true and correct copy of "ICANN FAQs,"
15 available at <https://www.icann.org/resources/pages/faqs-2014-01-21-en>.

16 6. Attached hereto as **Exhibit E** is a true and correct copy of relevant portions of
17 ICANN's Bylaws, as amended October 1, 2016, *available at*
18 <https://www.icann.org/resources/pages/governance/bylaws-en>.

19 7. Attached hereto as **Exhibit F** is a true and correct copy of "About Unauthorized
20 Transfers and Changes of Registrant," available at
21 <https://www.icann.org/resources/pages/unauthorized-2013-05-03-en>.

22 8. Following Plaintiff's initiation of this lawsuit in October 2016, counsel for ICANN
23 communicated on several occasions, by phone and email, with counsel for Plaintiff, Jeff Kirk at
24 O'Conner and Associates. In these communications, counsel for ICANN explained that ICANN
25 was not an "necessary party" to the litigation, and therefore should not be joined as such, because
26 ICANN has no ability or authority to transfer the "funding.com" domain name. In response to
27 these communications, Mr. Kirk provided ICANN an extension to respond to the Second
28 Amended Complaint ("SAC") while he investigated ICANN's position.

1 9. On January 12, 2017, Mr. Kirk sent an email to counsel for ICANN stating that
2 because ICANN was mentioned in the contract between Plaintiff and defendant B52 Media
3 regarding the sale of the disputed domain name, Plaintiff would not dismiss ICANN from the
4 case.

5 10. Accordingly, pursuant to Code of Civil Procedure Section 430.41, on February 21,
6 2017, counsel for ICANN informed Mr. Kirk that ICANN intended to file a demurrer, and
7 requested a meet and confer. A meet and confer was scheduled for February 22, 2017 at 2:30 p.m.

8 11. Prior to the meet and confer, counsel for ICANN sent Mr. Kirk an email
9 summarizing ICANN's grounds for a demurrer, and providing multiple documents supporting
10 ICANN's position that ICANN is not a "necessary party" to the litigation because ICANN cannot
11 effectuate a transfer of a domain name, and therefore cannot provide the relief requested by
12 Plaintiff. Mr. Kirk responded that he would confer with his client, and suggested the meet and
13 confer be rescheduled to February 23, 2017.

14 12. On February 23, 2017, at 2:30 pm, counsel for ICANN conferred by telephone
15 with Mr. Kirk regarding the basis for ICANN's demurrer. Mr. Kirk indicated he would discuss
16 the matter with his client, and provided ICANN an open extension to respond to the SAC.

17 13. On March 8, 2017, ICANN provided Mr. Kirk with a declaration from Akram
18 Atallah, the President of the Global Domains Division of ICANN. The declaration states that
19 registrars are the entities that are able to transfer domain names such as "funding.com" from one
20 registrant to another, not ICANN, and that ICANN does not have the power or authority to
21 transfer domain names. Mr. Kirk responded on March 8, 2017, stating that he would review the
22 declaration.

23 14. Having heard no further response from Mr. Kirk several weeks later, counsel for
24 ICANN emailed Mr. Kirk to check on the progress of his review of the declaration. Mr. Kirk did
25 not respond.

26 15. On April 4, 2017, counsel for ICANN called Mr. Kirk to check on the status of his
27 review. Mr. Kirk indicated he was busy with another matter, and would require a few additional
28 weeks to review the contents of the declaration.

1 16. On April 17, 2017, Mr. Kirk filed a Case Management Statement, and attached a
2 stipulation entered into by Plaintiff, defendant eNOM, Inc., and defendant WHOIS Privacy
3 Protection Service, Inc. The stipulation stated that eNOM, Inc. was the registrar for
4 "funding.com," and that eNOM would transfer the domain name to Plaintiff upon order of the
5 Court (the action ICANN was joined as a "necessary party" to perform, even though it cannot). A
6 true and correct copy of the Case Management Statement and Stipulation is attached hereto as
7 **Exhibit G.**

8 17. On April 25, 2017, counsel for ICANN contacted Mr. Kirk to check on the
9 progress of his review of the Akram Atallah declaration. Counsel for ICANN also pointed out
10 that Plaintiff now had a stipulation from the registrar of "funding.com" promising to transfer the
11 domain name. Mr. Kirk sent an email on April 26, 2017 stating that he would respond the
12 following week. However, Mr. Kirk never responded.

13 18. Accordingly, pursuant to Code of Civil Procedure Section 430.41, on May 19,
14 2017, counsel for ICANN notified Mr. Kirk by email that ICANN intended to file a demurrer, and
15 requested a meet and confer.

16 19. On May 30, 2017 at 11:00 a.m., counsel for ICANN met and conferred by
17 telephone with Mr. Kirk regarding the bases for ICANN's demurrer. The parties did not reach an
18 agreement resolving the objections raised in the demurrer.

19
20 I declare under penalty of perjury under the laws of California that the foregoing is true
21 and correct to the best of my knowledge. This declaration was executed on June 2, 2017 in Los
22 Angeles, California.

23
24 

25
26 Amanda Pushinsky

27 NAI-1502505617v1