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 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS
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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
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13 RUBY GLEN, LLC,
 14 Plaintiff,
 15 v.
 16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,
 18 Defendant.
 19
 20
 21

Case No. 2:16-cv-5505 PA (ASx)
 Assigned for all purposes to the
 Honorable Percy Anderson

**DECLARATION OF RUSS
 WEINSTEIN IN SUPPORT OF
 DEFENDANT ICANN'S
 OPPOSITION TO PLAINTIFF'S
 EX PARTE APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

1 **DECLARATION OF RUSS WEINSTEIN**

2 I, Russ Weinstein, declare as follows:

3 1. I am the Director of Global Domains Division Operations for the
4 Internet Corporation for Assigned Names and Numbers (“ICANN”), the defendant
5 in this action. I have personal knowledge of the matters set forth herein and am
6 competent to testify as to those matters. I make this declaration in support of
7 ICANN’s Opposition to Plaintiff Ruby Glen LLC’s (“Ruby Glen’s”) *Ex Parte*
8 Application For A Temporary Restraining Order.

9 2. Donuts Inc. (“Donuts”), the ultimate parent of Ruby Glen (*see* ECF 4),
10 submitted 307 applications for new gTLDs through various subsidiary companies
11 just like Ruby Glen. Donuts’ subsidiaries have thus far participated in eight
12 ICANN auctions for the contractual right to operate the respective new gTLDs, and
13 has prevailed in one of those auctions, for the new gTLD .SALON. The winning
14 price for .SALON was in the amount of \$5.1 million.¹

15 3. The rules governing ICANN’s auction process were developed in two
16 parts, a baseline set of rules to resolve the simpler “direct contention sets,” then a
17 set of rules to resolve the more complex “indirect contention sets.” Both sets of
18 rules were based on the New gTLD Applicant Guidebook (“Guidebook”) and
19 developed through ICANN’s multistakeholder process including an opportunity for
20 public comment. The auction that will take place on July 27, 2016 is to resolve the
21 .WEB/.WEBS contention set (“Contention Set”), which is classified as an “indirect
22 contention set.” Here, there are seven applicants for .WEB and one applicant for
23 .WEBS in the Contention Set. Through the course of other ICANN procedures and
24 mechanisms, the applicant seeking to operate .WEBS was included in this
25 Contention Set, thereby classifying it as an “indirect” contention set and making it
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27 ¹ See [https://gtdresult.icann.org/application-](https://gtdresult.icann.org/application-result/applicationstatus/auctionresults:downloadauctionreport/SALON)
28 [result/applicationstatus/auctionresults:downloadauctionreport/SALON](https://gtdresult.icann.org/application-result/applicationstatus/auctionresults:downloadauctionreport/SALON).

1 subject to the auction rules that pertain to indirect contention sets.

2 4. The rules governing ICANN new gTLD auctions were developed over
3 multiple years and through public comment. In 2013, ICANN launched webinars
4 regarding those auction rules, explaining their function and drafting process. In
5 December of 2013 through January of 2014, ICANN solicited public comments
6 regarding the auction rules governing direct contention sets.² Donuts submitted a
7 comment on the draft version of the auction rules for direct contention sets, and a
8 true and correct copy of that comment is attached hereto as **Exhibit A**. That
9 comment notes that “applicants . . . have sought throughout the New TLD
10 program[] an acceptable level of certainty and predictability at each stage of the
11 process.” Donuts also recommended limiting applicants’ ability to postpone
12 auctions. *Id.* The auction rules for direct contention sets were published in
13 February of 2014. After further discussion between ICANN and the ICANN
14 community, the auction rules for direct contention sets (and a Bidder’s Agreement
15 to which each bidder must agree) were updated again in April 2014.

16 5. After the rules for the direct contention sets were completed and
17 validated through use, the auction rules governing the more complex indirect
18 contention sets were developed. Similar to the development of direct contention
19 auction rules, ICANN conducted webinars regarding the draft auction rules for
20 indirect contention sets, explaining their function and drafting process and
21 published the draft for public comment in November 2014 through January 2015.
22 Donuts submitted two comments on the draft version of the auction rules for
23 indirect contention sets.³ In February 2015, the final version of the auction rules for
24 indirect contention sets (“Auction Rules”) was published, and a true and correct

25 ² See <https://www.icann.org/public-comments/new-gtld-auction-rules-2013-12-17-en>.

26 ³ See <https://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/msg00002.html>; <https://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/msg00005.html>.

1 copy is attached to the Zecchini Declaration as Exhibit J. Those rules will govern
2 the July 27, 2016 auction (“Auction”).

3 6. In order to participate in an ICANN new gTLD auction, each bidder
4 must sign a standardized Bidder Agreement. Ruby Glen signed a Bidder
5 Agreement, which contains the following provision:

6 Section 1.4 The Auction. The Bidder shall participate in the
7 Auction(s) for the relevant Contention Sets on the terms set forth
8 herein and under the Auction Rules. The Auction(s) shall be
9 conducted in accordance with the procedure set out in the Auction
10 Rules. The Bidder acknowledges that it has reviewed the Auction
11 Rules that will govern the participation of the Bidder in the Auction(s)
12 and that the Auction(s) will be administered by the Auction Manager.
**By this Agreement, the Bidder agrees to be bound by the Auction
Rules as published on ICANN’s website.**

13 True and correct copies of the fully executed version of Ruby Glen’s
14 Bidder Agreement, and a supplement thereto, are attached hereto as
15 **Exhibits B-C.**

16 7. Many facets of the Auction process for the Contention Set are already
17 underway. For instance, by July 20, 2016, the Auction participants transferred their
18 Auction deposits into escrow accounts overseen by the Auction provider, which
19 may amount to as much as \$16 million in total. Likewise, on July 20, 2016, the
20 “blackout period” began, which is a period of time called for in the Auction Rules
21 during which auction participants are prohibited from communicating, or
22 cooperating, with one another in terms of the auction. Tomorrow, on July 26, 2016,
23 around 6:00 am Pacific time, the Auction provider will conduct a “mock auction” in
24 order to allow participants to test connectivity and familiarize themselves with the
25 system, if they are not already familiar with it. About an hour or so later on that
26 same morning, the Auction provider will open “early-bidding,” which allows
27 participants to submit their first round bids into the system in preparation for the
28 start of the Auction. These early-bids, however, will not be accepted until after the

1 Auction bidding officially begins at 6:00 am Pacific time on July 27, 2016.

2 8. After an auction concludes, a relatively complex and lengthy process
3 begins in order for ICANN to contract with the winning applicant to operate the
4 new gTLD, and culminates with the delegation of the gTLD into the root zone. The
5 shortest amount of time that has ever elapsed between the close of an ICANN
6 auction in the New gTLD Program and the delegation of a new gTLD into the root
7 zone is approximately four months. Usually, after an auction, there is a period of
8 processing time of between four months and 15 months before the new gTLD is
9 delegated into the root zone. This delay is due to a number of steps that must occur
10 after the auction concludes and prior to delegation, which include the following
11 steps.

12 9. Once bidding has concluded and a winner has been declared, the
13 winner has 20 business days to pay the balance of the winning price (all participants
14 submit deposits in advance of the auction, with the deposits made for the auction at
15 issue here being up to \$2 million for each application). During the 20 business day
16 payment period, the winner is sent an invitation to fill out a form that will be used
17 to help generate the Registry Agreement, which is the contract between the auction
18 winner and ICANN. An auction winner is expected to execute the Registry
19 Agreement within 90 days of the invitation to contracting (Guidebook 4.3.2).

20 10. After the Registry Agreement is executed, the registry operator will
21 undergo Pre-Delegation Testing, and complete Registry Onboarding (providing
22 ICANN with contact information for various roles at the registry operator and
23 providing some technical information to enable ICANN and registry operator
24 system integration) to request delegation of the gTLD into the root zone. The
25 registry operator has one year after the activation of the Registry Agreement to
26 request delegation of the gTLD, but could conceivably complete these activities in
27 about 45 days.

28 11. The Registry Agreement, which all auction winners must sign before a

1 gTLD is delegated into the root zone, includes an affirmation that all of the
2 information in the winning bidder's application for the new gTLD remains
3 accurate. If ICANN had any question as to the accuracy of the information in a
4 winning bidder's application, ICANN would not enter into a Registry Agreement
5 before ensuring that such concerns have been addressed.

6 12. If for whatever reason the winner of an auction for a new gTLD is
7 ineligible to enter into a Registry Agreement with ICANN, the second-highest
8 bidder will have that option at the price at which it had last bid. (Zecchini Decl. Ex.
9 J [Auction Rules at pp. 12-13].) Such a scenario has never occurred. If the second-
10 highest bidder chose to not move forward in place of the highest-bidder, or
11 otherwise became ineligible to do so, the third-highest bidder will have the option
12 at the price at which it had last bid. (Zecchini Decl., Ex. J [Auction Rules at at pp.
13 12-13].) Such a scenario has never occurred.

14 13. Any financial proceeds of new gTLD auctions initially flow to
15 ICANN. However, these auction proceeds have been fully segregated in separate
16 bank and investment accounts, and earmarked until the community develops and
17 the ICANN Board authorizes a plan for the appropriate use of the funds.⁴ The
18 ICANN community has indicated that it will create a Cross-Community Working
19 Group to develop a proposal for eventual consideration by the ICANN Board on the
20 manner in which the new gTLD auction proceeds should be allocated. During the
21 ICANN56 Public Meeting in Helsinki, a meeting took place on June 28, 2016 to
22 discuss the formation of that working group.⁵

23 14. Should the Auction at issue in this case be cancelled or terminated,

24 ⁴ See <https://newgtlds.icann.org/en/applicants/auctions/proceeds>; see also
25 [https://community.icann.org/display/NGAPDT/Draft+Documents?preview=/59644
26 825/59648456/CCWG%20Auction%20Proceeds%20-%20Draft%20Charter%20-%20
%20upd%2023%20June%202016.docx](https://community.icann.org/display/NGAPDT/Draft+Documents?preview=/59644825/59648456/CCWG%20Auction%20Proceeds%20-%20Draft%20Charter%20-%20upd%2023%20June%202016.docx).

27 ⁵ See [https://icann562016.sched.org/event/7NE0/cross-community-session-
28 charter-for-the-ccwg-on-auction-
proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no](https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no).

1 ICANN would suffer a monetary loss of at least \$10,000, in the form of a fee the
2 Auction provider would charge. There may be additional fees associated with the
3 escrow accounts used to facilitate the bidder's payments.

4 15. There is no technological barrier that would prevent the transfer of the
5 Registry Agreement for a gTLD from one registry operator to another after the
6 gTLD is contracted or even delegated into the root zone and in operation. In fact,
7 Section 7.5 of the Registry Agreement defines the rules and regulations regarding
8 the process for transferring a gTLD from one registry operator to another. ICANN
9 has a website dedicated to assisting registry operators through such a process.⁶ For
10 instance, Donuts has transferred more than 20 gTLDs to another party after
11 executing a Registry Agreement with ICANN, and Donuts has acquired several
12 gTLDs this way as well.

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⁶ See <https://www.icann.org/resources/change-of-control>.

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I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 25th day of July, 2016 at Los Angeles, California.

By: 
Russ Weinstein