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12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION

15 DOTCONNECTAFRICA TRUST,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND
20 NUMBERS, et al.,

21 Defendants.

Case No. CV 16-00862-RGK

Assigned for all purposes to the
Honorable R. Gary Klausner

**ICANN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

[Declarations of Akram Atallah,
Kevin Espinola, Jeffrey A. LeVee,
Christine Willett, and Moctar Yedaly
Filed Concurrently]

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INTRODUCTION

1
2 Plaintiff does not have grounds to support a preliminary injunction, primarily
3 for two reasons: First, Plaintiff signed a fully enforceable Covenant Not to Sue
4 (“Covenant Not to Sue”) that applies to every cause of action. Plaintiff argues that
5 the release should not apply to its causes of action that sound in fraud, but Plaintiff
6 has not pled any facts sufficient to maintain those causes of action. In any event,
7 Plaintiff has not sought injunctive relief on those causes of action and “only moves
8 for a preliminary injunction under its ninth cause of action against [defendant
9 Internet Corporation for Assigned Names and Numbers (“ICANN”)] for declaratory
10 relief.” (Mot. at 11.) Second, while Plaintiff’s ninth cause of action seeks a
11 declaration that ICANN did not follow the declaration of an independent review
12 panel (“IRP Panel”), the facts submitted with this opposition demonstrate that
13 ICANN’s Board adopted the declaration of the IRP Panel (“Declaration”) in full.
14 Plaintiff submits no evidence to the contrary and, instead, makes a confusing
15 argument that is contrary to the express terms of the IRP Panel’s Declaration.

16 When Plaintiff submitted its application to ICANN to operate the generic
17 top-level domain (“gTLD”) .AFRICA (“Application”), Plaintiff knew there were
18 risks in that: (i) ICANN had reserved the right to determine not to proceed with
19 any new gTLD application; and (ii) because Plaintiff applied to operate a gTLD that
20 constituted a geographic region, Plaintiff was required to demonstrate that its
21 Application had the support or non-objection of 60% of the governments of Africa.
22 Plaintiff made the voluntary, commercial decision to submit its Application despite
23 these risks.

24 Because Plaintiff did not have the requisite support of African governments
25 when it submitted its Application, and because Plaintiff has not been able to garner
26 that support subsequent to submitting its Application, Plaintiff’s Application did
27 not pass evaluation. In response, Plaintiff filed a lawsuit asserting claims that are
28 not only directly contrary to the facts but, more importantly, are barred by the

1 comprehensive Covenant Not to Sue that Plaintiff agreed to when it submitted its
2 Application.

3 Much of Plaintiff's complaint arises out of an independent review process
4 ("IRP") proceeding that Plaintiff initiated against ICANN. ICANN's Bylaws
5 expressly provide for interested parties to initiate IRPs against ICANN in order to
6 test whether particular conduct of the ICANN Board was consistent with ICANN's
7 Articles of Incorporation and Bylaws. Although both sides submitted evidence on a
8 wide variety of issues, the IRP Panel issued a Declaration in Plaintiff's favor on a
9 single issue related to ICANN's decision to stop processing Plaintiff's application.
10 The IRP Panel recommended that ICANN resume processing Plaintiff's application,
11 thereby giving Plaintiff the opportunity to try to gather the support of 60% of the
12 countries of Africa, an opportunity Plaintiff did not previously have.

13 Days after the IRP Panel issued its Declaration, ICANN's Board adopted the
14 IRP Panel's recommendations in full. As a result, ICANN resumed the processing
15 of Plaintiff's Application and gave Plaintiff several more months to present
16 evidence that 60% of the countries of Africa supported or did not object to the
17 Application. In the end, Plaintiff did not submit proper evidence of that support.
18 Instead, Plaintiff told ICANN that it would continue to rely exclusively on the
19 "support" it submitted with its Application—support that had been expressly
20 withdrawn (or that never existed in the first place).

21 In short, this lawsuit is nothing more than a strategic attempt to hold up the
22 delegation of .AFRICA for operation by Plaintiff's competitor ZA Central Registry
23 ("ZACR"). As set forth above, Plaintiff cannot demonstrate any reasonable
24 likelihood of success on the merits, and its claims should not be allowed to further
25 delay the delegation of a gTLD that has been eagerly awaited by the African
26 community, which will suffer significant harm as a result of further delay.

27
28

BACKGROUND

ICANN and the New gTLD Program:

ICANN is a California non-profit public benefit corporation with its principal place of business in Los Angeles, California. (Compl. ¶ 2.) 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 Declaration of Akram Atallah (“Atallah Decl.”) ¶ 2; *Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795 F.3d 1124, 1127-28 (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 are referred to as generic top-level domains (“gTLDs”). *Name.Space, Inc.*, 795 F.3d at 1127. ICANN evaluates potential gTLD operators and recommends that gTLDs be added to the DNS. (Atallah Decl. ¶ 3.)

Throughout its history, ICANN has sought to expand the number of accessible gTLDs in the DNS in order to promote consumer choice and competition. In 2012, ICANN launched the “New gTLD Program,” which resulted in 1,930 applications for gTLDs, including Plaintiff’s Application and ZACR’s application for the .AFRICA gTLD. (Atallah Decl. ¶ 4.)

In connection with the New gTLD Program, ICANN published the Guidebook, which sets forth all of the requirements and the criteria by which new gTLD applications are evaluated. (Compl. ¶ 13; Declaration of Kevin Espinola (“Espinola Decl.”) ¶ 4.) The Guidebook was developed as part of a years-long, bottom-up process during which numerous versions were published for public comment and revised based on comments received. (*Id.*) Plaintiff was well positioned to, and did, participate in this process: Plaintiff’s CEO has testified that she was actively involved in the ICANN community and that as a member of ICANN’s Generic Names Supporting Organization she “helped develop the rules

1 and requirements for the New gTLD Program.” (LeVee Decl. Ex. A at 10 (¶ 13).)
2 Plaintiff submitted a written public comment regarding the Guidebook, expressing
3 its support for the New gTLD Program. (Espinola Decl. ¶ 5.) Plaintiff did not
4 submit any written public comments regarding the Covenant Not to Sue. (*Id.*)

5 Module 6 of the Guidebook sets forth the terms and conditions for the New
6 gTLD Program that all applicants, including Plaintiff, acknowledged and accepted
7 by submitting a gTLD application. Among those terms is the Covenant Not to Sue
8 barring all claims and lawsuits against ICANN or its Affiliated Parties (as defined
9 in Guidebook Module 6) arising out of ICANN’s or those Affiliated Parties’
10 evaluation of any new gTLD application:

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

1 (Declaration of Sophia Bekele Eshete (“Eshete Decl.”) Ex. 3 (“Guidebook”) at 436
 2 (¶ 6) (bold emphasis added), ECF. No. 17-3.) Module 6 also makes clear that
 3 ICANN has the absolute discretion to “determine not to proceed with any and all
 4 applications for new gTLDs.” (*Id.* at 434-35 (¶ 3).)

5 Although all gTLD applicants agreed not to file lawsuits against ICANN
 6 related to their applications, an applicant dissatisfied with the manner in which
 7 ICANN evaluated its application is not left without recourse. ICANN’s Bylaws
 8 provide for several accountability mechanisms to ensure that ICANN operates in
 9 accordance with its Articles of Incorporation (“Articles”), Bylaws, policies and
 10 procedures. (Atallah Decl. ¶ 6.) One of these is the IRP, whereby an aggrieved
 11 applicant can ask independent panelists to evaluate whether an action of ICANN’s
 12 Board was consistent with ICANN’s Articles and Bylaws. (*Id.*)¹

13 **Plaintiff’s Application for .AFRICA:**

14 1. In 2012, Plaintiff and ZACR each submitted an application to operate
 15 the .AFRICA gTLD, thereby accepting and acknowledging the Guidebook,
 16 including the Covenant Not to Sue and all of the above-identified terms, conditions,
 17 procedures, and policies. (Willett Decl. ¶ 3.) Because Plaintiff’s and ZACR’s
 18 applications represent the name of a geographic region, the Guidebook required that
 19 each obtain and provide documentation of support or non-objection from at least 60%
 20 of the governments in that region. (Guidebook at 170-72 (§ 2.2.1.4.2).) The
 21 Guidebook provided that a Geographic Names Panel established by a third-party
 22 vendor would verify the relevance and authenticity of an applicant’s documentation
 23 of support. (*Id.* at 173-75 (§ 2.2.1.4.4).) In the event that more than one application
 24 is supported by the same government or public authority, and that government or
 25 public authority so requests, the applications are placed in a “contention set” that is
 26

27 ¹ In response to public comments regarding the Guidebook, ICANN modified the
 28 language of the Covenant Not to Sue to clarify that these accountability
 mechanisms would be available to applicants. (Espinola Decl. ¶¶ 6-7.)

1 resolved via an auction or other processes (since only one registry operator can
 2 operate a gTLD consisting of the exact same letters). (*Id.* at 715 (§ 2.2.1.4.4).)
 3 Otherwise, assuming that the applicants do not reach a resolution amongst
 4 themselves, their applications will be rejected. (*Id.*)

5 Applications for .AFRICA were submitted in the spring of 2012. Plaintiff
 6 submitted with its Application what it called a letter of support it had obtained in
 7 2009 (three years earlier) from the African Union Commission (“AUC”). (Willett
 8 Decl. ¶ 7; Eshete Decl. Ex. 6, ECF No. 17-6.) However, in August 2010, Plaintiff
 9 had received a letter from the AUC (and all of the African governments that were
 10 its members) that formally withdrew the AUC’s support for Plaintiff. (Willett Decl.
 11 ¶ 7; Eshete Decl. Ex. 7. ECF No. 17-7.)² Accordingly, when Plaintiff submitted its
 12 Application, Plaintiff lacked the necessary support from the African continent that
 13 the Guidebook required.³

14 The Guidebook provides that ICANN’s Governmental Advisory Committee
 15 (“GAC”)⁴ may issue advice to ICANN concerning any application for a new gTLD.
 16 (Guidebook at 251-52 (§ 3.1).) If the GAC issues “consensus advice” against a
 17 particular application, this creates a “strong presumption for the ICANN Board that
 18 the application should not be approved.” (*Id.* at 252 (§ 3.1).) Plaintiff’s
 19 Application had passed all required reviews but for the Geographic Names Review
 20

21 ² The AUC’s decision to withdraw its support for Plaintiff followed a grant of
 22 authority via a declaration from African ministers in charge of Communication and
 23 Information Technologies for their respective governments in 2010. Thereafter, the
 24 AUC launched an open request for proposal (“RFP”) and selected ZACR to
 operate .AFRICA to the extent its application passed evaluation and prevailed in
 contention. Plaintiff was invited, but chose not to, participate in the RFP and
 submitted its own competing application. (Declaration of Moctar Yedaly ¶¶ 7-10.)

25 ³ Plaintiff also submitted a letter from UNECA, which later advised ICANN that its
 letter was not, in fact, a formal endorsement of Plaintiff’s Application pursuant to
 the terms of the Guidebook. (Willett Decl. ¶ 8; *id.* Ex. B.)

26 ⁴ The GAC, composed of members of national governments and distinct economies,
 27 “consider[s] and provide[s] advice on the activities of ICANN as they relate to
 28 concerns of governments, particularly matters where there may be an interaction
 between ICANN’s policies and various laws and international agreements or where
 they may affect public policy issues.” (Eshete Decl. Ex. 4 at 496 (Art. XI, § 2.1(a).))

1 when the GAC issued “consensus advice” that the Application should not proceed
2 (“Advice”). (Eshete Decl. Ex. A (“IRP Panel Declaration”) at 59 (¶ 112), ECF No.
3 17-1.) On June 4, 2013, ICANN’s Board accepted the GAC’s Advice, halting the
4 processing of Plaintiff’s Application. (Atallah Decl. ¶ 12; *id.* Ex. B.)

5 **Plaintiff’s IRP**

6 Plaintiff then filed an IRP request challenging, among other things, the
7 Board’s acceptance of the GAC’s Advice against Plaintiff’s Application. (IRP
8 Panel Declaration.) The IRP Panel declared Plaintiff to be the prevailing party and
9 recommended that ICANN “continue to refrain from delegating the .AFRICA
10 gTLD and permit [Plaintiff’s] application to proceed through the remainder of the
11 new gTLD application process.” (IRP Panel Declaration at 59, 63 (¶¶ 113-15, 133).)
12 Plaintiff argues that the IRP Panel also made a number of other findings related to
13 ICANN’s processing of Plaintiff’s and ZACR’s applications, but the IRP Panel
14 made no such findings. (LeVee Decl. ¶ 9; IRP Panel Declaration at 60 (¶ 117).)

15 As it has done with recommendations from every IRP panel to date,
16 ICANN’s Board promptly considered and adopted each of the IRP Panel’s
17 recommendations. On July 16, 2015, the Board resolved to “continue from
18 delegating the .AFRICA gTLD,” “permit [Plaintiff’s] application to proceed
19 through the remainder of the new gTLD application process,” and “reimburse DCA
20 for the costs of the IRP.” (Atallah Decl. ¶ 12; *id.* Ex. B.)

21 **The Processing of Plaintiff’s Application**

22 By July 31, 2015, ICANN returned Plaintiff’s application to processing.
23 (Willett Decl. ¶ 10.) The next step was for the Geographic Names Panel to
24 determine whether Plaintiff had submitted with its Application information
25 documenting the requisite 60% support or non-objection from the countries of
26 Africa. (*Id.*) As the panel had been preparing to do when Plaintiff’s Application
27 was removed from processing, it sent Plaintiff clarifying questions regarding the
28 documentation Plaintiff had submitted with its Application. (*Id.*; Eshete Decl. Ex.

1 15, ECF No. 17-15.) Plaintiff was given an opportunity to respond to those
2 questions. (Willett Decl. ¶ 10.) Instead of supplementing its documentation,
3 Plaintiff took the position that the documentation that it had submitted with its
4 Application in 2012 was sufficient. (*Id.*)

5 In October 2015, the Geographic Names Panel determined that Plaintiff's
6 Application did not have the requisite 60% support from African governments.
7 (Willett Decl. ¶ 11; Eshete Decl. Ex. 16, ECF No. 17-16.) The Guidebook provides
8 that in these situations, an applicant can be allowed an extended period of time to
9 try to obtain the requisite support or non-objection. (Guidebook at 174 (§
10 2.2.1.4.4).) ICANN thus gave Plaintiff more time to submit documentation of
11 support or non-objection from the countries of Africa. (Willett Decl. ¶ 11; Eshete
12 Decl. Ex. 16, ECF No. 17-16.) On January 28, 2016, the deadline to supplement its
13 documentation, rather than submitting any documentation of support or non-
14 objection from the countries of Africa, Plaintiff submitted a submitted a letter from
15 its lawyer and again took the position that the documentation that it had submitted
16 with its Application in 2012 was sufficient. (*Id.* ¶ 12.)

17 On February 17, 2016, ICANN published the Extended Evaluation report for
18 Plaintiff's Application. (Willett Decl. ¶ 13; Eshete Decl. Ex. 18.) It stated that the
19 Geographic Names Panel had determined that Plaintiff had not demonstrated the
20 requisite documented support. (Eshete Decl. Ex. 18, ECF No. 17-18.) As provided
21 by the Guidebook, ICANN stopped processing Plaintiff's Application. (Willett
22 Decl. ¶ 13; Guidebook at 174 (§ 2.2.1.4.4).)

23 On March 3, 2016, ICANN's Board adopted a resolution lifting the stay on
24 the delegation of .AFRICA, which the Board had imposed in July 2015 pending
25 ICANN's full compliance with the Panel's recommendation that ICANN resume its
26 evaluation of Plaintiff's Application. (Willett Decl. ¶ 14.) ICANN is now nearly
27 prepared to delegate the .AFRICA gTLD for operation by ZACR. (*Id.* ¶ 15.)
28 However, in accordance with this Court's March 4, 2016 temporary restraining

1 order, ICANN has stayed the delegation pending the Court’s ruling on Plaintiff’s
2 motion for preliminary injunction. (*Id.*)

3 LEGAL STANDARD

4 A preliminary injunction is an “extraordinary remedy.” *Winter v. Natural Res.*
5 *Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). The Ninth Circuit has
6 summarized the Supreme Court’s clarification of the standard for granting
7 preliminary injunctions in *Winter* as follows: “[a] plaintiff seeking a preliminary
8 injunction must establish that he is likely to succeed on the merits, that he is likely
9 to suffer irreparable harm in the absence of preliminary relief, that the balance of
10 equities tips in his favor, and that an injunction is in the public interest.” *Am.*
11 *Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009);
12 *see also Cal Pharms. Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009).

13 Alternatively, “‘serious questions going to the merits’ and a hardship balance
14 that tips sharply toward the plaintiff can support issuance of an injunction,
15 assuming the other two elements of the *Winter* test are also met.” *Alliance for the*
16 *Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). A “serious question”
17 is one on which the movant “has a fair chance of success on the merits.” *Sierra On-*
18 *Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

19 ARGUMENT

20 **I. PLAINTIFF DOES NOT HAVE A REASONABLE LIKELIHOOD** 21 **OF SUCCESS ON THE MERITS.**

22 In order to demonstrate a right to injunctive relief, Plaintiff must demonstrate
23 that it is “likely to succeed on the merits of its claims” or, at the very least, that it
24 has raised “serious questions going to the merits” of its claims. Plaintiff cannot
25 meet either standard. Plaintiff’s claims are barred by a clear, unambiguous, and
26 enforceable Covenant Not to Sue, and the claims are not supported by any
27 evidence, but are instead based on demonstrably false factual allegations.
28

1 **A. Plaintiff's Claims Are Barred By Covenant Not To Sue.**

2 Even if Plaintiff's factual allegations related to the processing of its
3 Application had any merit (which they do not), Plaintiff's claims are barred by the
4 Covenant Not to Sue to which Plaintiff agreed. Indeed, as the district court in the
5 Western District of Kentucky held only weeks ago, the Covenant Not to Sue is
6 "clear and comprehensive" and bars claims "aris[ing] out of ICANN's review of [a
7 new gTLD application]" *Commercial Connect v. Internet Corp. for Assigned*
8 *Names & Nos.*, No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9-10
9 (W.D. Ky. Jan. 26, 2016).

10 **1. Plaintiff is a Sophisticated Business Entity That Knowingly**
11 **and Voluntarily Agreed to the Covenant Not to Sue.**

12 As a general matter, a written release extinguishes any claim covered by its
13 terms. *Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, "a
14 general release can be completely enforceable and act as a complete bar to all
15 claims (known or unknown at the time of the release) despite protestations by one
16 of the parties that he did not intend to release certain types of claims." *San Diego*
17 *Hospice v. Cty. of San Diego*, 31 Cal. App. 4th 1048, 1053 (1995) (citing *Winet v.*
18 *Price*, 4 Cal. App. 4th 1159, 1173 (1992)).

19 A party seeking to avoid the plain language of a written release for reason of
20 unconscionability bears the burden of demonstrating that the release is both
21 procedurally and substantively unconscionable. *McCaffrey Grp., Inc. v. Superior*
22 *Court*, 224 Cal. App. 4th 1330, 1348 (2014). A release is procedurally
23 unconscionable "if at the time the contract was formed there was 'oppression' or
24 'surprise.' Oppression exists if an inequality of bargaining power between the
25 parties results in the absence of real negotiation and meaningful choice. Surprise
26 involves the extent to which the supposedly agreed-upon terms are hidden in a
27 prolix printed form drafted by the party seeking to enforce them." *Stern v. Cingular*
28 *Wireless Corp.*, 453 F. Supp. 2d 1138, 1146 (C.D. Cal. 2006). A release is

1 substantively unconscionable only if its “terms are so one-sided as to shock the
2 conscience.” *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172 (9th Cir. 2003).

3 Plaintiff cannot meet its burden to prove that the Covenant Not to Sue is
4 unconscionable. Plaintiff is a sophisticated business entity that made the knowing
5 and voluntary commercial decision to invest \$185,000 (for the application fee alone)
6 in the opportunity to operate a gTLD. Applicants for gTLDs are required to
7 demonstrate that they are stable business entities that have the significant technical
8 and financial wherewithal required to operate a gTLD registry. (Willet Decl. ¶ 4;
9 *see also* Guidebook at 175-76 (§ 2.2.2.1; 2.2.2.2).) Applicants for new gTLDs
10 included some of the world’s largest companies, such as Google, WalMart,
11 JPMorgan Chase, and Amazon.com , and the applications were complex and
12 required substantial detail. (Willett Decl. ¶¶ 4-5.) Plaintiff’s Application included
13 an extensive, technical explanation of its plans for operating a gTLD registry. (*Id.* ¶
14 5; *id.* Ex. A.) Plaintiff also submitted evidence of substantial financial support for
15 its Application. (*Id.* ¶ 5.)

16 Plaintiff’s CEO, Sophia Bekele Eshete, is an experienced businesswoman:
17 the daughter of the founder of one of Ethiopia’s largest financial institutions, she
18 has an MBA and has worked for Bank of America and PricewaterhouseCooper.
19 (LeVee Decl. Ex. A at 6-9 (¶¶ 3-10).) She also testified to the Panel that she has
20 been “active in the DNS” industry, was “the first African to serv[e] on ICANN’s
21 Generic Names Supporting Organization Council,” and, most significantly, “helped
22 develop the rules and requirements for the New gTLD Program.” (*Id.* at 9-10
23 (¶¶ 11-13); *see also id.* at 11-12 (¶¶ 15-16).)

24 Plaintiff’s situation is therefore not in any way comparable to the
25 employment and consumer contexts in which courts have sometimes found releases
26 to be unconscionable. No entity is required to apply for a gTLD, and certainly no
27 entity has a “right” to do so. As Plaintiff acknowledges, it knew at the time that it
28 submitted its application there was no guarantee that it would be awarded .AFRICA.

1 (Eshete Decl. ¶ 7, ECF No. 17.) To the contrary, in the plainly labeled “Terms and
2 Conditions” of the Application (Module 6 of the Guidebook), ICANN explicitly
3 reserved the right to “determine not to proceed with any and all applications for
4 new gTLDs.” (Guidebook at 436 (¶ 3).) Those same “Terms and Conditions”
5 included the Covenant Not to Sue. (*Id.* at 434-35 (¶ 6).)

6 Plaintiff was also aware of the Guidebook requirement that it have
7 documented support or non-objection from at least 60% of African governments, a
8 requirement Plaintiff attempted to meet using the letter it has received from the
9 AUC in 2008. The evidence is clear that when Plaintiff submitted its application to
10 ICANN in 2012, Plaintiff knew that it had lost the support of the AUC and that a
11 competing applicant had that support (ZACR, which had prevailed in a public RFP
12 process). (Eshete Decl. Ex. Ex. 7, ECF No. 17-7; *see also* Declaration of Moctar
13 Yedaly (“Yedaly Decl.”) ¶ 9.)

14 Despite all this, Plaintiff chose to submit its Application for .AFRICA,
15 agreeing to the Covenant Not to Sue. Plaintiff has no basis now to repudiate its
16 entirely voluntary decision to submit its Application or to argue that the portions of
17 the Guidebook (the contract it alleges in its first cause of action that ICANN
18 breached) should not apply to it (and only it).

19 Nor does the fact that Plaintiff was not able to “negotiate” the terms of
20 Module 6 alter the result, as the case law cited below demonstrates. Further, the
21 terms of Module 6 – and, indeed, the entire Guidebook – were effectively
22 negotiated in multiple rounds of drafts of the Guidebook and the public comments
23 on those drafts. The entire ICANN community (including DCA) participated in the
24 formation of the Guidebook, and the community understood and accepted that
25 ICANN would not (and truly could not) subject itself to scores of lawsuits related to
26 its processing of gTLD applications.⁵ (*See* Espinola Decl. ¶¶ 4, 9; *Sanchez v.*

27 ⁵ ICANN repeatedly stated that its decision to include the Covenant Not to Sue
28 reflected its reasoned determination regarding the sort of risk to which ICANN—a

1 *Bally's Total Fitness Corp.*, 68 Cal. App. 4th 62, 67 (1998) (upholding a total
 2 release of claims in an adhesion contract involving a consumer, noting that the
 3 consumer plaintiff did not argue that the language of the release was “unclear and
 4 ambiguous” and that the defendant “rationally required a release . . . as a condition
 5 of” entering into the contract).) DCA submitted a written comment regarding one
 6 version of the Guidebook, but never submitted a written comment regarding the
 7 Covenant Not to Sue. (Espinola Decl. ¶ 5.)

8 The primary case Plaintiff cites for its position that a release was found
 9 unenforceable involved an adhesion contract in an employment context, a context
 10 far different than here. *See Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148
 11 (1990) (employer required release of employee claims arising out of on-the-job
 12 asbestos exposure). In fact, “courts have not been solicitous of businessmen in the
 13 name of unconscionability . . . probably because courts view businessmen as
 14 possessed of a greater degree of commercial understanding and substantially more
 15 economic muscle than the ordinary consumer.” *A&M Produce Co. v. FMC Corp.*,
 16 135 Cal. App. 3d 473, 489 (1982). Courts have repeatedly upheld releases in cases
 17 involving sophisticated business parties, even where one party arguably had greater
 18 bargaining power and where the release was non-negotiable. *O'Donoghue v.*
 19 *Superior Court*, 219 Cal. App. 4th 245, 258-59 (2013) (enforcing general release
 20 signed by lenders and holding that “the ‘adhesive aspect’ of a contract ‘is not
 21 dispositive’ on the issue of unconscionability,” especially where “the elements of
 22 surprise or misrepresentation are not present”) (citations omitted); *Captain Bounce,*
 23 *Inc. v. Business Fin. Servs.*, No. 11-cv-858 JLS (WMC), 2012 U.S. Dist. LEXIS
 24 36750, at *19 (S.D. Cal. Mar. 19, 2012) (“[T]he Court agrees with Defendants that
 25 the business-to-business context of the Agreements is relevant . . . Plaintiffs are

26 _____
 (continued...)

27 non-profit public benefit corporation—should reasonably subject itself as part of
 28 the New gTLD Program. (Espinola Decl. ¶¶ 9-10.)

1 sophisticated borrowers distinguishable from the consumer or employee plaintiff
2 who is a party to the typical unconscionable contract.”).

3 **2. The Covenant Not to Sue Is Enforceable as a Matter of Law.**

4 Plaintiff argues that the Covenant Not to Sue is unenforceable pursuant to
5 Section 1688 of the California Civil Procedure Code. However, as to claims not
6 involving fraud or intentional violations of law, the California Supreme Court has
7 held that Section 1688 is limited to agreements that “involve the public interest.”
8 *City of Santa Barbara v. Sup. Court*, 41 Cal. 4th 747, 755-56; *Tunkl v. Regents of*
9 *Cal.*, 60 Cal.2d 92 (1963).

10 In *Tunkl*, the California Supreme Court laid out factors typifying transactions
11 that “affect the public interest”: (1) the business involved is of the type suitable for
12 public regulation; (2) the services it provides are of great importance and a practical
13 necessity to the public; (3) the services are broadly offered to the public; (4) as a
14 result of the essential nature of the service, the party obtaining the release had a
15 decisive bargaining advantage; (5) the exculpation of liability is in a contract of
16 adhesion; and (6) the transaction places the releasing party’s person or property in
17 the control of the released party, subject to the risk of negligence. *Tunkl*, 60 Cal. 2d
18 at 98-101.

19 The Covenant Not to Sue does not implicate these factors: First, no
20 government entity or regulatory scheme governs ICANN’s decisions to approve
21 TLDs or registries. (Atallah Decl. ¶ 3.) ICANN’s administration of the Internet’s
22 DNS , while an important function, is not the same as the basic necessary services
23 contemplated in *Tunkl* “such as medical, legal, housing, transportation or similar
24 services which must necessarily be used by the general public.” *Appalachian Ins.*
25 *Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 29 (1989) (internal quotation
26 marks omitted); *Tunkl*, 60 Cal. 2d at 99. Second, Plaintiff does not require a gTLD,
27 and is not entitled to one; the Guidebook makes clear that being the registry
28 operator of a gTLD is a privilege, not a right. Finally, unlike the patient in *Tunkl*

1 who placed his body in the exclusive control of the hospital, Plaintiff in no way
 2 placed its “person or property in [ICANN’s] control.” *Id.* at 100. To the contrary,
 3 Plaintiff retained complete control over its Application, made the decision to submit
 4 its Application, and could withdraw its Application from consideration at any time.
 5 In short, the agreement between ICANN and Plaintiff does not implicate the public
 6 interest in the way required to void the release under *Tunkl*.⁶

7 Finally, to the extent the Covenant Not to Sue is in any way unenforceable,
 8 its unenforceability should be limited to Plaintiff’s claims sounding in fraud. *See*
 9 *Roman v. Superior Court*, 172 Cal. App. 4th 1462, 1477 (2009) (where part of a
 10 contract is unenforceable, “the strong legislative and judicial preference is to sever
 11 the offending term and enforce the balance of the agreement”). But because
 12 Plaintiff’s Motion expressly limits its request for injunctive relief to the ninth cause
 13 of action for declaratory relief, (Mot. at 11), there is no basis for the Court to issue
 14 an injunction based on Plaintiff’s claims that sound in fraud.⁷

15 **B. The ICANN Board Followed The IRP Panel’s Declaration In**
 16 **Full, Rendering Plaintiff’s Ninth Cause of Action Moot And**
 17 **Not A Basis For Injunctive Relief.**

18 Plaintiff’s Motion relies exclusively on its Ninth Cause of Action (for

19 ⁶ Even if it could be argued that Plaintiff’s Application “affected the public
 20 interest,” the Covenant Not to Sue would still be valid because Plaintiff does not
 21 “identify a specific law or regulation potentially violated [by ICANN] so as to
 22 trigger application of section 1668.” *CAZA Drilling v. TEG Oil & Gas U.S.A., Inc.*,
 23 142 Cal. App. 4th 453, 475 (Cal. App. 2006). The only violation of law Plaintiff
 24 alleges is “unfair competition,” and Plaintiff does not even seek injunctive relief
 25 with respect to that cause of action. Ultimately, there is no basis for the Court to
 26 “intervene and remake the parties’ agreement” regarding who would “bear the risk
 27 of economic loss” in the event that Plaintiff’s Application was unsuccessful. *Id.* at
 28 475.

⁷ Further, Plaintiff’s fraud claims do not allege facts sufficient to state a claim.
 Where a claim is “grounded in fraud or [] sounds in fraud, [] the pleading of that
 claim as a whole must satisfy the particularity requirement of Rule 9(b).” *Vess v.*
Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (internal citations
 and quotation marks omitted). In other words, a plaintiff must identify “the time,
 place, and content of [the] alleged misrepresentation[s],” and the “circumstances
 indicating falseness” or the “manner in which the representations at issue were false
 and misleading.” *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-48 (9th
 Cir.1994) (internal citation and modifications omitted). None of Plaintiff’s claims
 contains allegations of specific fraudulent representations by ICANN.

1 Declaratory Relief), in which Plaintiff alleges that ICANN “did not allow
2 [Plaintiff’s] application to proceed through the remainder of the new gTLD
3 application process but instead forced [Plaintiff] to proceed through parts of the
4 process that it had already completed.” (Am. Compl. ¶ 121.) Plaintiff focuses on
5 two allegations: (i) that ICANN promised that IRP declarations would be treated as
6 binding; and (ii) that ICANN did not adopt the findings of the IRP Panel.

7 As to the first, Plaintiff’s Amended Complaint does not contain a single
8 allegation of a representation by ICANN that IRP panel declarations are binding,
9 much less the time, place or content of that representation. Plaintiff references
10 Module 6 of the Guidebook, but Module 6 is silent on the topic of whether IRP
11 declarations are binding. (Guidebook at 434-40 (Module 6).) Further, in the only
12 IRP that occurred prior to ICANN’s adoption of the Guidebook—*ICM Registry,*
13 *LLC v. ICANN*—the panel found that its declaration was “not binding, but rather
14 advisory in effect.” (Atallah Decl. ¶ 8; *id.* Ex. A at 7 (¶ 134).) As a result, the only
15 reasonable assumption for Plaintiff to have made when it submitted its Application
16 was that IRP declarations are not binding.

17 More importantly, irrespective of whether ICANN made any representations
18 that IRP declarations would be binding, ICANN adopted the IRP Panel’s
19 Declaration in full, meaning that, no matter what representations ICANN might
20 have made on the question of whether IRP declarations are binding, there could not
21 possibly have been any injury to Plaintiff in this regard. (Atallah Decl. ¶ 12; *id.* Ex.
22 B.) Specifically, the IRP Panel declared that ICANN’s Board had violated
23 ICANN’s Articles and Bylaws by accepting the GAC’s Advice that Plaintiff’s
24 Application should not proceed. The IRP Panel declared Plaintiff to be the
25 prevailing party in the IRP, awarded Plaintiff its costs, and recommended that
26 “ICANN continue to refrain from delegating the .AFRICA gTLD and permit
27 [Plaintiff]’s application to proceed through the remainder of the new gTLD
28 application process.” (IRP Panel Declaration at 67-68 (¶ 149).) On July 16, 2015,

1 one week after the IRP Panel issued its Declaration, ICANN’s Board adopted the
2 IRP Panel’s recommendations in full, resolving to “continue to refrain from
3 delegating the .AFRICA gTLD,” to “permit [Plaintiff’s] application to proceed
4 through the remainder of the new gTLD application process,” and to “reimburse
5 DCA for the costs of the IRP.” (Atallah Decl. Ex. B at 10.)

6 Contrary to what Plaintiff implies, the IRP Panel made no findings
7 concerning ICANN’s processing of either Plaintiff’s or ZACR’s applications
8 for .AFRICA. For the Court’s convenience, the Declaration is summarized in
9 paragraphs 6-12 of the concurrently-filed declaration of Jeffrey A. LeVee. In the
10 IRP, Plaintiff raised a number of claims relating to the processing of its own and
11 ZACR’s applications, ICANN responded to those claims, and the IRP Panel
12 expressly declined to make any findings with respect to those claims, noting that
13 because its finding as to the GAC’s Advice was “dispositive, [it was not] necessary
14 to determine who was right, to what extent and for what reasons in respect to the
15 other criticisms [alleged by Plaintiff].” (IRP Panel Declaration at 60 (¶ 117);
16 LeVee Decl. ¶ 9.)⁸ Accordingly, the net effect of the Declaration was that the IRP
17 Panel wanted Plaintiff to have further opportunity to try to obtain support or non-
18 objection from 60% of the governments of Africa, which is precisely what ICANN
19 gave Plaintiff time to obtain.

20 When Plaintiff’s Application was removed from processing due to the
21 Board’s acceptance of the GAC’s Advice in 2013, the Application was under
22 review by the Geographic Names Panel, which had not yet completed its evaluation.

23 ⁸ The Panel did not find that ICANN had aided one applicant at the expense of the
24 other, or that ICANN had somehow discriminated against Plaintiff in the processing
25 of its Application. The Panel also made no findings that possibly could be
26 construed to eliminate the Guidebook requirement that a gTLD application
27 representing a geographic region (such as .AFRICA) must obtain the support or
28 non-objection from at least 60% of that region’s governments. Elimination of this
critical requirement appears to be Plaintiff’s end-game, but nothing in the
Declaration supports it, and the notion that an entity would be permitted to operate
a gTLD that is the name of a geographic region without sufficient support from the
region is contrary to public policy and all notions of fairness.

1 (Willett Decl. ¶ 9.) Plaintiff had submitted the 2009 letter from the AUC and a
2 letter from the United Nations Commission for Africa (“UNECA”). (*Id.* ¶¶ 7-8)
3 Contrary to what Plaintiff now urges, neither the AUC nor UNECA supported
4 Plaintiff’s Application at the time it was submitted. As discussed above, the AUC
5 had sent Plaintiff a letter in 2010 – two years before Plaintiff submitted its
6 Application to ICANN – stating that it had rescinded its support. And according to
7 UNECA, the 2008 letter Plaintiff submitted with its Application (written three years
8 before the launch of the New gTLD Program) was “merely an expression of a view
9 in relation to the entity’s initiatives and efforts regarding internet governance,
10 including efforts to obtain [a] gTLD for .AFRICA . . . [and] c[ould] not be
11 considered as a ‘letter of support or endorsement’ within the context of ICANN’s
12 requirements and cannot be used as such.” (Willett Decl. ¶ 9; *id.* Ex. B.)

13 As of June 4, 2013, when the ICANN Board accepted the GAC’s Advice, the
14 Geographic Names Panel had determined that Plaintiff’s documentation was
15 insufficient and, in accordance with the Guidebook, was preparing to send Plaintiff
16 “clarifying questions.” (Willett Decl. ¶ 9.) Clarifying questions are sent where
17 documented support does not meet the criteria set forth in the Guidebook and are an
18 accommodation to provide applicants an opportunity to explain/supplement their
19 documentation. (*Id.*)

20 When Plaintiff’s Application was returned to processing, it was sent back to
21 exactly the same stage (as the IRP Panel had recommended), the Geographic
22 Names Panel review. The Application was not returned to the “beginning of the
23 process” as Plaintiff alleges (an argument for which Plaintiff provides no evidence).
24 (*Id.* ¶ 10; Mot. at 1; Am. Compl. ¶ 124.) Rather, the Geographic Names Panel
25 reviewed Plaintiff’s previously-provided documentation, gave Plaintiff two chances
26 to supplement its documentation, and ultimately determined that Plaintiff had not
27
28

1 provided sufficient documentation of support or non-objection. (*Id.* ¶¶ 11-13.)⁹

2 If an applicant fails to submit sufficient documentation of support or non-
3 objection, even with the chance to supplement its documentation, “the application
4 will be considered incomplete and will be ineligible for further review.”

5 (Guidebook at 174 (§ 2.2.1.4.4).) Accordingly, following the IRP Panel’s
6 Declaration, ICANN’s Board lifted its stay on the delegation of .AFRICA. (Willett
7 Decl. ¶ 14.) This was all entirely in accord with the IRP Panel’s recommendation
8 that Plaintiff’s Application be “permit[ted] . . . to proceed through the remainder of
9 the new gTLD application process.” (IRP Panel Declaration at 67-68 (¶ 149).)

10 In sum, ICANN complied in full with the Declaration. There is no basis for
11 declaratory relief because the only “controversy” between Plaintiff and ICANN is
12 based on Plaintiff’s misrepresentation of the IRP Panel’s findings. *Principal Life*
13 *Ins. Co. v. Robinson*, 394 F.3d 665, 669 (9th Cir. 2005) (court may exercise
14 jurisdiction over a claim for declaratory relief only where an “actual case or
15 controversy” exists). ICANN fully complied with those findings, ICANN gave
16 Plaintiff an extended opportunity to meet the conditions of the Guidebook, and
17 Plaintiff failed to do so. Even if Plaintiff had not released ICANN of this claim, the
18 claim provides no basis for the Court to issue a preliminary injunction.

19 **II. FURTHER DELAY IN THE DELEGATION OF .AFRICA WILL**
20 **PREJUDICE THE AFRICAN COMMUNITY.**

21 Plaintiff urges that “no harm occurs” if the .Africa gTLD is delegated. (Mot.
22 at 14.) But as described in the concurrently-filed declaration of Moctar Yedaly, the
23 Head of the Information Society Division of the AUC’s Infrastructure and Energy

24
25 ⁹ Plaintiff argues that the withdrawal of support from the AUC and UNECA
26 (support issued years before Plaintiff submitted its Application) was somehow
27 improper under the Guidebook, but the Guidebook section that Plaintiff cites relates
28 to valid expressions of support that are submitted with the Application. (Mot. at 13.)
Inasmuch as neither of those entities supported Plaintiff’s Application when it was
submitted, the Guidebook’s limitation on withdrawing support is irrelevant because
the support never existed at any relevant time.

1 Department, the AUC, on behalf of the governments of Africa, has for years been
 2 expressing its concern over the delay in the delegation of .AFRICA. As Mr.
 3 Yedaly explains, this delay has adversely affected the efforts of the African
 4 governments to participate in the Internet economy and to strengthen their
 5 information and communication technology sectors. (Modaly Decl. ¶¶ 6, 11-13.)
 6 In light of the clear, public statements from the governments of Africa, it is evident
 7 that any further delay of the delegation of .AFRICA would significantly prejudice
 8 and harm the African community.

9 **III. BY SEEKING MONETARY DAMAGES, PLAINTIFF HAS**
 10 **ACKNOWLEDGED THAT IT WILL NOT SUFFER**
 11 **IRREPARABLE HARM IF .AFRICA IS DELEGATED.**

12 Finally, Plaintiff has not demonstrated, as it must, that it will suffer
 13 irreparable harm in the absence of injunctive relief. *Am. Trucking Ass'n, Inc.*, 559
 14 F.3d at 1052. To the contrary, Plaintiff's Amended Complaint seeks compensatory
 15 damages, (FAC at 27, ECF No. 10), and its original Complaint estimated those
 16 damages as \$9,000,000, (Notice of Removal Ex. A ¶ 40, ECF No. 1).

17 By seeking damages, Plaintiff acknowledges that its interest in .AFRICA is
 18 financial in nature (gTLD registries earn revenue by selling second-level domain
 19 name registrations, e.g., www.support.africa). Because Plaintiff could be
 20 monetarily compensated for any damages arising out of its claims, it will not suffer
 21 irreparable harm if .AFRICA is delegated.

22 **CONCLUSION**

23 For the foregoing reasons, ICANN respectfully requests that the Court deny
 24 Plaintiff's motion and allow ICANN to proceed with the delegation of .AFRICA.

25 Dated: March 14, 2016

JONES DAY

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

27 Attorneys for Defendant
 28 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS
 ICANN'S OPPOSITION TO DCA'S MOTION FOR
 PRELIMINARY INJUNCTION