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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust;

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California corporation; ZA Central Registry, a South African non-profit company; and DOES 1 through 50, inclusive;

Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES**

Date: April 4, 2016
Hearing: 9:00 a.m.
Courtroom: 850

[Filed concurrently: Declaration of Sara C. Colón; Supplemental Declaration of Sophia Bekele Eshete; Evidentiary Objections to the Declarations of Christine Willet, Moctar Yedaly, Jeffrey LeVee, Kevin Espinola, & Akram Atallah]

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN")'s Opposition establishes that Plaintiff DotConnectAfrica ("DCA") is entitled to a preliminary injunction. ICANN makes **two central arguments**: First, ICANN points to the Prospective Release in its application that it required all applicants for a gTLD to execute. But the **Kentucky district court it relies on that upheld the release** involved a plaintiff who lacked counsel and made none of the arguments presented here. ICANN then cites and **relies on the wrong law** to sidestep California Civil Code § 1668, which bars prospective releases like the one here that provide **blanket prospective immunity** for all wrongful conduct. DCA has also shown a strong probability of defeating the release as unconscionable and procured by fraud. Second, ICANN misleadingly suggests that DCA lost the contest for .Africa because it did not submit the African Union Commission's ("AUC") withdrawal letter of its support. But ICANN fails to disclose that DCA advised ICANN of the AUC's alleged withdrawal in its initial application.

The real issues are: in light of ICANN's own internal rule that allows governments and their representatives to withdraw support only if conditions to that support are breached,[1] how is the AUC's post-hoc withdrawal even relevant as no conditions of its support were presented or breached? And, if ICANN required actual direct support of 60% of the African governments, how did Defendant ZA Central Registry ("ZACR"), ICANN's favored applicant, pass the endorsement stage when DCA presented substantial evidence of flaws in ZACR's endorsements? ICANN fails to address either point. **DCA therefore has a strong likelihood of success on the merits,** and, **at a bare minimum, has raised serious questions**

[1] It would be grossly unfair to an applicant who obtained support and invested money to apply and build infrastructure to be undercut just because the political winds shifted in an endorsing government or authority.

**going to the merits.**

ICANN does not argue that it will suffer prejudice from a preliminary injunction and presents no evidence contradicting DCA's showing that .Africa is a unique asset. **The balance of harms tilts dramatically in DCA's favor.** Instead, ICANN suggests in cursory fashion that ZACR might be hurt because it spent some money (as did DCA) and the continent of Africa might be hurt because of some undisclosed relationship of the gTLD with a foundation that might possibly raise some money from .Africa's exploitation. These vague and barely supported possible harms cannot preclude an injunction.

What ICANN's Opposition does **confirm is ICANN's continued favoritism towards ZACR**, which undercuts the fairness and even-handedness of the application process. A day *after* Plaintiff filed its application for a TRO, ICANN, in a desperate attempt to render that application moot, held an apparently previously unscheduled board meeting and resolved to "proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN." (Willet Decl. ¶14, Ex. C). After the Court issued the TRO, in a GAC meeting with the ICANN board, ICANN board member Mike Silber stated to an AUC member "you have the commitment from ICANN, the board and the staff to not let the litigation issues intervene and we will pursue the finalization of this issue with diligence and all appropriate measures to ensure that the interests of all parties are protected." (Colón Decl. ¶4). ICANN made similar comments at the London meeting during the IRP proceedings. ICANN favors ZACR even though DCA specifically called the adequacy of ZACR's application into question, and ICANN does not attempt to show in its Opposition that ZACR's application met the standards ICANN used to fail DCA. As the IRP panel held, "ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource." (Declaration of Sophia Bekele

Eshete, Dkt No.17 ("Bekele Decl."), ¶6, Ex. 2, ¶111; Ex. 1, ¶23 p.13). ICANN has not met this public charge. A preliminary injunction should issue.

## II. ARGUMENT

### A. DCA will prevail on the merits, and, at the least, raises serious questions going to the merits.

DCA meets both the "traditional test" and the "serious questions" test for a preliminary injunction. *See Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). DCA is likely to succeed on the merits because (1) the Prospective Release is void, (2) ICANN did not follow the IRP ruling, and (3) ICANN does not show that ZACR's and DCA's applications were reviewed under the same standards.

#### 1. ICANN's case law supporting the Prospective Release is not persuasive or precedential.

ICANN relies principally on the Prospective Release, referred to as the "Covenant not to Sue" in the Opposition, which it claims insulates it from any judicial review. ICANN's reliance on *Commercial Connect v. Internet Corp. for Assigned Names and Numbers*, No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky. Jan. 26, 2016), a district court decision from outside this circuit is entirely unpersuasive. There, plaintiff's lawyers withdrew and plaintiff made no effective arguments to challenge the Prospective Release. Plaintiff did not rely on California law and apparently never presented any of the arguments presented here – or any meaningful arguments at all.

ICANN's reliance on *Tunkl* is inapposite because the Prospective Release waives fraud and intentional violations of law and is therefore void regardless of whether it implicates public policy[2]: "A party [cannot] contract away liability for his

[2] In any event, DCA satisfies the test under *Tunkl* invalidating the Prospective Release. *See Tunkl*, *supra* at 98-101 (listing factors). First, ICANN's business is suitable for public regulation and was regulated by the U.S. government (Atallah Decl. ¶2). Second, ICANN's fair regulation of the Internet is of great importance and practical necessity. *See Id.* ("ICANN's mission is to coordinate...the global

fraudulent or intentional acts or for his negligent violations of statutory law, ***regardless of whether the public interest is affected*** (emphasis added)." *Reudy v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116 (N.D. Cal. 2007) (referencing Cal. Civ. Code §1668 (hereinafter "Section 1668")). *See also Health Net of California v. Department of Health Services*, 113 Cal.App.4th 224, 235; 239. **This is the law**, and ICANN fails to explain how the release overcomes it.[3]

2. The IRP does not validate the Prospective Release.

The IRP forum does not save the Prospective Release as ICANN refuses to recognize the process as binding. (Opp. at p.16:4-16). As the IRP Panel explained, "The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the 'ultimate guarantor' of ICANN accountability was

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Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier status" (internal quotations omitted)). Third, DCA's services are broadly offered as anyone can apply for gTLDs, and gTLDs allow all Internet users to access websites. Fourth, ICANN is the *only* entity that can grant the rights to gTLDs and holds all of the bargaining power (*See Id.* at ¶3). Fifth, DCA had no choice but to sign the release. ICANN claims that the public had input in the drafting of the Guidebook, but ignored its own advisory committee's (the GAC's) recommendation to eliminate the release (*See* Espinola Decl., Exs. D, E). Finally, ICANN controls applicant's property in the form of the $185,000 gTLD application fee. ICANN can unilaterally deny an application without refund or redress.

[3] *City of Santa Barbara v. Sup. Court,* is inapposite because it involved "an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for needs of such children," which the court found violated public policy. (41 Cal.4th 747, 777 (2007)). *Sanchez v. Bally's Total Fitness Corp,* 68 Cal.App.4th 62 (1998), is inapposite because the waiver excepted "claims arising out of the center's knowingly failing to correct a dangerous situation brought to its attention." (Id., at 65). *Sanchez* does not discuss Section 1668. Here, the release waives all liability, not just negligence.

only an advisory process, the benefit of which accrued only to ICANN." (Bekele Decl. ¶5 & 6, Ex. 1, ¶115; Ex. 2, p. 13). ICANN attempts to dodge this point by declaring that the binding nature of the IRP is a moot issue because ICANN has allegedly agreed to follow the IRP ruling. But, as explained in subsection 6, *infra*, that is not what happened here. (Atallah Decl. ¶¶ 7–10). More importantly, even if ICANN had voluntarily accepted the ruling, a dispute resolution procedure ICANN is free to disregard is hardly effective and certainly does not provide applicants with an effective method of redress.[4]

ICANN fails to explain why the holdings in *Skrbina v. Fleming Cos.*, 45 Cal.App.4th 1353, 1366 (1996); *San Diego Hospice v. Cty. of San Diego*, Cal.App.4 1048, 1053 (1995); and *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992) (all dealing with releases in settlement agreements) should apply here. As the court in *Reudy* explained "the Special Master finds ***that when two parties settle a case and a consideration is given in which a plaintiff allows a defendant to continue on with its' alleged wrongful conduct, that conduct is no longer wrongful***, at least as to that particular defendant. Plaintiff in exchange for consideration is permitting that conduct to go forward in the future." *Id.*, at 1119 (emphasis added). There was no settlement here and no wrongful conduct ongoing when Plaintiff submitted its application. A settlement release is not analogous to the *Prospective* Release; if it were, it would obviate the need for Section 1668.

3. <u>The release is void regardless of DCA's claims.</u>

Because the release is void, the Court should sever it from the Guidebook, decline to apply it to any of DCA's claims, and adjudicate the motion for preliminary injunction. Cal. Civ. Code §1599; *Ulene v. Jacobson*, 209 Cal.App.2d 139, 142-143

[4] The scope of the IRP is limited to review of actions "inconsistent with the Articles of Incorporation or Bylaws." (Bekele Decl. ¶12, Ex. 4, p. 453 (Section IV.3.1)). Therefore, even under the Bylaws ICANN is free to engage in wrongful conduct without repercussion if it does not violate its own Articles and Bylaws.

(1962) ("To the extent that the challenged provisions are in violation of the governing statutory law, they are void.") ICANN argues that if the provision is unenforceable, it is only unenforceable as to DCA's claims sounding in fraud. (Opp. at p.15:12-14.) There is no authority for this proposition. Because the provision violates Section 1668 and is void as a matter of law, the Court should strike the entire provision from the Guidebook.

4. The release is unconscionable as DCA had no "bargaining power."

ICANN seemingly asserts that DCA had the opportunity to "negotiate" the Prospective Release because ICANN invited public comment. (Opp. p.12:19-13:7.) ICANN undermines its own argument by submitting criticism of the Prospective Release from its own advisory group, the GAC. *See* Espinola Decl., Exs. D, E ("The exclusion of ICANN liability …provides no leverage to applicants to challenge ICANN's determinations ...**The covenant not to challenge and waiver … is overly broad, unreasonable, and should be revised in its entirety**") (emphasis added). The GAC is composed of governments and distinct economies, and "consider[s] and provide[s] advice on the activities of ICANN ...particularly matters where there may be an interaction between ICANN policies and various laws...or where they may affect public policy issues." (Bekele Decl. Ex. 4, p. 496 (Art XI § 2.1(a)). **ICANN refused to eliminate the Prospective Release in the face of the GAC and other commenters' recommendations.** It is therefore disingenuous to imply DCA could have negotiated elimination of the release or used the comment process to avoid it.

5. The Prospective Release Was Procured by Fraud.

ICANN asserts "Plaintiff's Amended Complaint does not contain a single allegation of a representation by ICANN that IRP panel declarations are binding[.]" However, the IRP panel concluded that ICANN's Bylaws, Supplementary Procedures and testimony to the U.S. Senate suggest that an IRP is binding. (Bekele Decl. ¶5, Ex. 1, p. 13). Any applicant would have concluded the same. ICANN cannot explain how advertising a dispute resolution proceeding while hiding the

material fact that the ICANN board believes itself free to disregard its findings and rulings is not materially misleading and fraudulent.

ICANN further purports to have adopted and followed the IRP ruling in full but this is demonstrably untrue. The Panel concluded the IRP is binding; ICANN continues to deny that. (Bekele Decl. ¶5, Ex. 1, ¶23, p. 6-7; Opp. at 16:4-16). The IRP is just an illusion ICANN provides to make it appear that it has a fair and real internal dispute process. It does not.

6. ICANN fails to show that it followed the IRP ruling or that it treated applicants consistently and fairly.

The IRP final declaration instructed that DCA be allowed to proceed through the "remainder" of the IRP proceeding. ICANN states that the board resolved to adopt the IRP's "recommendations." (Atallah Decl. ¶ 12). But ICANN does not (and cannot) declare under penalty of perjury that it followed the IRP ruling. ICANN asserts that "the net effect of the Declaration was that the IRP Panel wanted Plaintiff to have further opportunity to try to obtain support or non-objection from 60% of the governments of Africa." (Opp. at 17:16-19). This statement is not in the IRP Declaration, and ICANN provides no support for it.

The IRP Declaration states that "both the actions and inactions of the [ICANN] board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN." (Bekele Decl. ¶5, Ex. 1, ¶115, p.60; ¶148, p.67). When the IRP panel declared that DCA should be allowed to proceed through the "remainder" of the process, the IRP panel could not have meant that ICANN should be allowed to keep DCA's application in the initial evaluation phase, where ICANN's wrongdoing had already tainted the process. The GAC decision was effectively the end of the initial evaluation phase for DCA and it should have proceeded to the next step in ICANN's

review process, string contention[5]. Instead, ICANN **forced DCA to proceed through the geographic name panel** phase of the initial evaluation as if the GAC decision had never happened.

ICANN did not follow its own rules in rejecting DCA's endorsements. But instead of addressing the substance of DCA's point that the AUC and UNECA withdrawals are invalid under ICANN's rules, ICANN argues that its rules regarding withdrawal are inapplicable to DCA's endorsements because they were never valid in the first place. (Opp. at fn. 9). This is a circular argument: ICANN declares that the endorsements were not proper precisely because they were withdrawn. Under ICANN's own rules, withdrawal is proper only if there were some conditions between the applicant and the endorser that were not fulfilled. (Bekele Decl. ¶7, Ex. 3, p.172). There were no such conditions in either AUC's or UNECA's endorsement letters to DCA and therefore the withdrawal of support was improper. (Bekele Decl. ¶¶ 15& 16, Exs. 7 & 8). Additionally, the alleged withdrawal letter from the AUC came from an individual, Moctar Yadley, and not the chairman's office as the initial endorsement had been. (Bekele Decl. ¶15, Ex. 7). ICANN misleadingly complains in its opposition that DCA did not submit this letter with its application, but DCA did disclose its existence in its application, and explained its belief that it was not valid. (Bekele Supp. Decl. ¶2, Ex. 1 at p. 6). Moreover, UNECA's letter came *after* the geographic name panel review resumed so ICANN cannot argue that the letter was not valid at the time DCA submitted its application for .Africa. In fact, ICANN *admitted* in the IRP that UNECA was a proper endorser! (See Bekele Decl. ¶5, Ex.1, p.44 ¶90 (¶45)). It is ICANN's own determination, not UNECA's opinion of ICANN's rules, which should govern. UNECA was also clearly bowing to pressure from the Infrastructure and Energy division of the AUC to withdraw its support of DCA. In addition, similar to the AUC, the UNECA letter did not come from the Executive

[5] However, DCA maintains that ZACR's application should be disqualified.

Office who granted the original endorsement to DCA, but a low level employee. (Bekele Decl. ¶18, Ex. 10).

Finally, ICANN did not treat DCA and ZACR equally. (Bekele Decl. ¶3, Ex. 2). Although DCA raised this point and presented substantial evidence, ICANN's Opposition conspicuously fails to address it. The individual country endorsements ZACR relies upon were written in support of the AUC's initiative to get .Africa name "reserved", not in support of ZACR. (Bekele Decl. ¶ 34). Many of the letters submitted by ZACR as an endorsement do not even mention ZACR by name. (*Id.*). ICANN actually ghostwrote ZACR's endorsement from the AUC, but did not afford DCA this same privilege. (Supp. Bekele Decl. ¶3, Ex. 2). Whether ICANN should have considered AUC as an endorser at all for ZACR is also questionable given the agreement between ZACR and the Infrastructure Division of the AUC to assign AUC any rights to .Africa that ZACR were to obtain. (Bekele Decl., ¶32, Ex. 20, p.617(7)). ICANN says nothing about this, effectively admitting its truth.

ICANN also seems to argue that ZACR's application was somehow more legitimate because the AUC chose to support it after a request for proposal ("RFP") held by the AUC. However, the AUC's RFP is irrelevant to ICANN's selection process and imposed extraneous requirements outside the rules of the ICANN's guidebook. DCA and ZACR submitted the same type of application and should have been evaluated under identical standards and treated consistently.

ICANN improperly allowed the AUC, effectively an applicant for .Africa through ZACR, to influence DCA's application after the IRP. ICANN invited ZACR to opine on the IRP Declaration. (Colón Dec. ¶5, Ex. 3). In violation of ICANN's rules, ZACR wrote to the chairperson at ICANN in order to lobby for its view on how ICANN should handle the post IRP processing of DCA's application. (*See id*; Bekele Decl. ¶7, Ex. 3, p.179 [Section 2.2.4]). This letter prejudiced ICANN's post IRP evaluation of DCA's application. ICANN's recent conduct after the filing of the TRO is equally improper. *Infra* at Section I, p.2.

Accordingly, DCA is likely to succeed on its claim for declaratory relief that ICANN failed to follow its own Articles, Bylaws and rules and the IRP's ruling.

**B. The balance of hardships tips overwhelmingly in DCA's favor**

In its opposition ICANN's only argument as to why DCA will not suffer irreparable harm in the absence of injunctive relief is that DCA has requested compensatory damages. (*See* Opp. at 20:11- 20). This is a red herring. The fact that DCA has requested compensatory damages in no way suggests that it can be compensated for *all* or *any* harm – as ICANN suggests – arising from the wrongful delegation of .Africa to another entity. The request for compensatory damages is simply an alternative request for relief. The .Africa gTLD is a unique asset available only through ICANN (ICANN does not deny any of this), the control over which cannot be fully compensated by money. *See Blackwater Lodge & Training Ctr., Inc. v. Broughton*, No. 08-CV0926 H (WMC), 2008 U.S. Dist. LEXIS 49371, at *28 (S.D. Cal. Jun. 17, 2008) (granting a temporary restraining order when Plaintiff alleged monetary harm and other harms). ICANN concedes that it will suffer no harm if it is enjoined from granting .Africa as it utterly fails to address the issue in its Opposition.

Further, there is no "critical public interest that would be injured by the grant of preliminary relief." *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). ICANN presents only conclusions and beliefs as to harm the continent of Africa will suffer. (*See* Mocdaly Decl. ¶¶6, 11-13). But, these statements are conclusory and lacking in foundation.

## III. CONCLUSION

Accordingly, DCA requests that the Court grant its motion.

Dated: March 21, 2016

**BROWN NERI & SMITH LLP**

By: /s/ Ethan J. Brown
Ethan J. Brown
*Attorneys for Plaintiff*
DOTCONNECTAFRICA TRUST

## CERTIFICATE OF SERVICE

I, Ethan J. Brown, hereby declare under penalty of perjury as follows:

I am a partner at the law firm of Brown, Neri & Smith LLP, with offices at 11766 Wilshire Blvd., Los Angeles, California 90025. On March 21, 2016, I caused the foregoing **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on March 21, 2016

/s/ Ethan J. Brown