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ASSIGNED NAMES AND NUMBERS  
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

12  
13 DOTCONNECTAFRICA TRUST,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, *et*  
17 *al.*,

18 Defendants.

**CASE NO. BC607494**

Assigned to Hon. Howard L. Halm

**DECLARATION OF JEFFREY  
LEVEE IN SUPPORT OF ICANN'S  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

DATE: February 2, 2017  
TIME: 8:30 a.m.  
DEPT: 53

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1 **DECLARATION OF JEFFREY LEVEE**

2 I, Jeffrey LeVee, declare the following:

3 1. I am a partner of Jones Day, counsel to defendant the Internet Corporation for  
4 Assigned Names and Numbers (“ICANN”). I have personal knowledge of the matters set forth  
5 herein and am competent to testify as to those matters. I make this declaration in support of  
6 ICANN’s opposition to DotConnectAfrica Trust’s (“DCA’s” or “Plaintiff’s”) motion for a  
7 preliminary injunction.

8 2. I was counsel to ICANN when it was formed in 1998, and I have remained  
9 ICANN’s primary outside litigation counsel since that time. I represented ICANN in connection  
10 with the independent review process (“IRP”) initiated by DCA (“DCA IRP”), and throughout this  
11 litigation.

12 3. DCA’s CEO, Sophia Bekele Eshete, submitted a declaration to the IRP Panel. A  
13 true and correct copy of an excerpt of that declaration is attached hereto as **Exhibit G**.

14 4. Attached hereto as **Exhibit H** are true and correct copies of pertinent excerpts of  
15 the transcript from the December 1, 2016 deposition taken in this matter of DCA’s “person most  
16 knowledgeable,” Ms. Sophia Bekele Eshete.

17 5. In May 2015, a two-day final hearing was held in the *DCA* IRP. On July 9, 2015,  
18 the IRP Panel issued a 63-page final declaration (“Declaration”). Paragraphs 92-117 (pages 39-  
19 54) detail the IRP Panel’s findings regarding the merits of DCA’s claims. The IRP Panel’s  
20 discussion is devoted exclusively to the Board’s acceptance of the GAC’s Advice. The IRP Panel  
21 concludes that ICANN’s Board did not act consistently with ICANN’s Articles and Bylaws in  
22 accepting the GAC’s Advice. (¶ 115.) With respect to all of DCA’s other claims, the IRP Panel  
23 reaches no conclusion except to state in Paragraph 117 that:

24 [Plaintiff] had criticized ICANN for its various actions and decisions throughout  
25 this IRP and ICANN has responded to each of these criticisms in detail.  
26 However, the Panel, having carefully considered these criticisms and decided that  
27 the above [i.e., its finding regarding the GAC’s Advice] is dispositive of this IRP,  
[] does not find it necessary to determine who was right, to what extent and for  
what reasons in respect to the other criticisms and alleged shortcomings of the  
ICANN Board identified by DCA Trust.

28 6. The IRP Panel recommends that “ICANN continue to refrain from delegating the

1 .AFRICA gTLD and permit [Plaintiff s] application to proceed through the remainder of the new  
2 gTLD application process” (*id.* ¶¶133, 148-149). The IRP Panel concludes that DCA is the  
3 prevailing party and orders ICANN to pay DCA’s costs. (¶¶ 139, 146, 150.)

4 7. The IRP Panel made no findings whatsoever that could be construed to remove or  
5 eliminate the Guidebook requirement that an application for a gTLD representing a geographic  
6 region (such as .AFRICA) must obtain the support or non-objection of at least 60% of the  
7 governments in that region. To the contrary, as the IRP Panel notes in Paragraph 46 (on page 14),  
8 DCA specifically asked the IRP Panel to give DCA “no less than 18 months to obtain  
9 Government support as set out in the [Guidebook] . . . or accept that the requirement is satisfied  
10 as a result of the endorsement of DCA Trust’s application by UNECA,” but the IRP Panel did not  
11 address DCA’s request at all. Ms. Bekele confirmed in deposition her understanding that nothing  
12 in the IRP Declaration addressed whether or not DCA had passed the requirement of obtaining 60  
13 percent governmental support, and she further confirmed that the IRP Panel did not find that  
14 DCA could “skip” that evaluation. *See* Ex. H at 203:4-7.

15 8. In its briefs to the IRP Panel, ICANN argued that IRP panel declarations were not  
16 binding on ICANN’s Board. ICANN’s argument was based, in part, on the fact that the only  
17 previous IRP declaration to have been issued (as of that time) expressly found that IRP panel  
18 declarations are not binding.<sup>1</sup> The *DCA* IRP Panel disagreed, however, and in a 14 August 2014  
19 declaration on procedural issues (“Procedural Declaration”), the IRP Panel determined that its  
20 declaration would be binding on ICANN’s Board. The portions of the Procedural Declaration  
21 that address this point are reproduced at paragraph 23 (pages 5-6) of the IRP Panel’s Declaration.

22 9. Most importantly, however, the question of whether the IRP Panel’s Declaration  
23 was considered binding in conjunction with the *DCA* IRP became a moot point when ICANN’s  
24 Board elected to adopt *all* of the findings and recommendations in the IRP Panel’s Declaration.  
25 A copy of the resolution by ICANN’s Board adopting the IRP Panel’s Declaration is attached to  
26 the concurrently-filed Declaration of Akram Atallah.

27 \_\_\_\_\_  
28 <sup>1</sup> A true and correct copy of an excerpt of this previous IRP declaration is attached to the  
concurrently-filed declaration of Akram Atallah.

1           10.       DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County  
2 Superior Court. After the Superior Court denied DCA's request for a temporary restraining order,  
3 ICANN timely removed the case to federal court, invoking diversity jurisdiction. On March 1,  
4 2016, DCA moved for a preliminary injunction, which the federal court granted on April 12, 2016  
5 on the basis of an admitted factual error and before DCA admitted in deposition that the entire  
6 basis on which the district court had granted the injunction – that the IRP Panel had allowed DCA  
7 to skip the geographic review requirement – was false.

8           11.       Following remand, DCA again moved for preliminary injunction based on its ninth  
9 cause of action. The Court denied that motion on December 22, 2016 based on "the reasoning  
10 expressed in the oral and written arguments of defense counsel." Attached hereto as **Exhibit I** is  
11 a true and correct copy of the Court's December 22, 2016 Minute Order denying DCA's  
12 application for preliminary injunction.

13           12.       Attached hereto as **Exhibit J** is a true and correct copy of relevant portions of the  
14 transcript of the December 22, 2016 hearing on DCA's Motion for Preliminary Injunction.

15           13.       The Court confirmed the broad basis for this Order at the January 4, 2017 hearing  
16 on DCA's *ex parte* TRO application, when the Court stated that its ruling was indeed based on all  
17 defense arguments, just as the Court had written in its order. These arguments included that DCA  
18 did not establish irreparable harm or succeed in showing that the balance of harms favors DCA;  
19 that DCA has no likelihood of success on the merits as to its ninth cause of action; and that the  
20 Covenant contained in the Applicant Guidebook barred DCA's claim.

21           14.       Attached hereto as **Exhibit K** is a true and correct copy of the April 16, 2010 letter  
22 from Deputy Chairperson Erastus Mwencha of the AUC to Sophia Bekele.

23           15.       Attached hereto as **Exhibit L** is a true and correct copy of the April 17, 2010 letter  
24 from Sophia Bekele to AUC Chairperson Jean Ping.

25           16.       Attached hereto as **Exhibit M** is a true and correct copy of the January 26, 2011  
26 letter from Sophia Bekele to AUC Chairperson Jean Ping and Abdoulie Jannie, United Nations  
27 Under-Secretary General and Executive Secretary of UNECA.

28           17.       Attached hereto as **Exhibit N** is a true and correct copy of the December 30, 2011

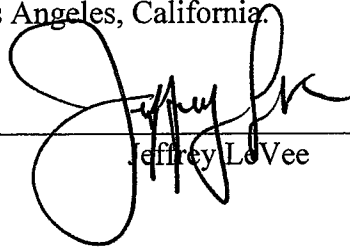
1 letter from Sophia Bekele to John Shinkaiye, Chief of Staff, Bureau of the Chairperson at the  
2 AUC.

3 18. Attached hereto as **Exhibit O** is a true and correct copy of the July 20, 2015 letter  
4 from Sandra Baffoe-Bonnie, Secretary of the Commission and Legal Advisor at UNECA, to the  
5 Dr. Elham Ibrahim, Commissioner for Energy and Infrastructure at the AUC.

6 19. Attached hereto as **Exhibit P** is a true and correct copy of the district court's order  
7 in *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx)  
8 (C.D. Cal. Nov. 28, 2016).

9  
10 I declare under penalty of perjury under the laws of the United States and the State of  
11 California that the foregoing is true and correct.

12 Executed this 19<sup>th</sup> day of January 2017, in Los Angeles, California.

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15 \_\_\_\_\_  
16 Jeffrey LeVee

15 NAI-1502392980v1

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# **EXHIBIT G**

International Centre for Dispute Resolution

**CASE No. Case 50-20-1300-1083**

Between

**DOTCONNECTAFRICA TRUST (DCA TRUST),**  
Claimant

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),**  
Respondent

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**WITNESS STATEMENT OF SOPHIA BEKELE ESHETE**

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I, SOPHIA BEKELE ESHETE, of Walnut Creek, California, hereby make the following statement:

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust ("DCA") for rights to .AFRICA, a new generic top-level domain name ("gTLD"), to the Internet Corporation for Assigned Names and Numbers ("ICANN").
2. I am the founder and executive director of DCA and a champion for DCA's application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN's breaches of its Bylaws,

Articles of Incorporation, and the New gTLD Guidebook due to its improper cooperation with the African Union Commission (“AUC”), the backer of the competing application for the .AFRICA gTLD submitted by UniForum S.A., now known as ZA Central Registry (“ZACR”).<sup>1</sup> ICANN basically drew a road map for the AUC to prevent any other applicant from obtaining rights to .AFRICA by advising the AUC that it could reserve .AFRICA for its own use as a member of ICANN’s Governmental Advisory Committee (“GAC”). ICANN then accepted the GAC’s advice—engineered by the AUC following ICANN’s road map—to block DCA’s application for .AFRICA. In my view, this entire process was highly improper and most irregular.

**I. PERSONAL AND PROFESSIONAL BACKGROUND**

3. I was born in Addis Ababa, Ethiopia, the third of six children, to Ato Bekele Eshete and Sister Muluaem Beyene. My father was a prominent and successful businessman who was involved in diverse businesses in Ethiopia and was the founder and board member of United Bank and United Insurance, one of the largest financial institutions in Ethiopia. My mother was a career nurse. Growing up, I idolized my mother, who was kind, compassionate and deeply religious. At the same time, I listened to my father talk about his businesses to friends and family at home, where I learned a lot from him about the business world and learned the value of independence, networking, and risk-taking. I came to the U.S. after completing my secondary school education. I earned my bachelor’s degree in business analysis and information systems from San Francisco State University and a master’s of business administration in management of information systems from Golden Gate University.

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<sup>1</sup> For the sake of consistency, I refer to the applicant competing with DCA for .AFRICA as ZACR in my statement.

4. When I finished my bachelor's degree, I was recruited by Bank of America ("BoA") to serve as an information auditing and security professional. As a senior information technology audit consultant, I led, planned and executed medium to complex control reviews of production application systems for various technical platforms and I served as lead auditor for BoA's Capital Markets activities in San Francisco, New York, Chicago and Latin America. My responsibilities included auditing computer systems to ensure that data inputs and outputs were consistent (similar to how an auditor would examine a company's cash flows), performing and overseeing corporate governance and risk management functions, providing training and support to BoA employees on system security and technology related issues and coordinating and implementing pilot projects, including developing working standards, models and programs within various audit divisions.

5. Approximately five years later, I moved to UnionBanCal, to reengineer and manage UnionBanCal's audit division. In the role of senior information technology audit specialist, I reported directly to the audit director in UnionBanCal's Corporate Audit Risk Management Division. My main role was to set up a new information technology auditing unit and team. I provided strategies and action plans for streamlining existing auditing processes and procedures, improving existing audit programs, developing new audit programs and recommending technical and business specifications for implementing a local area network within the division. I also mentored and supervised auditors and executed technology and integrated audits locally and within the holding bank located in New York, as well as supported external auditors (*e.g.*, Deloitte & Touche) on audit projects. About one year later, I moved to PricewaterhouseCoopers ("PwC") to manage the information technology audit portfolio of one of the firm's largest

banking accounts, Barclay's Bank. After spending one year at PwC in the role of senior technology advisory consultant, I started my own companies.

6. In 1998, I founded and became the chief executive officer of tech start-ups CBS International ("CBS"), based in California, and affiliate SbCommunications Network plc ("SbCnet"), based in Addis Ababa. CBS primarily offers services in the areas of technology and business consulting and internet solutions. Using Africa as a base, I launched affiliate SbCnet, which specializes in systems and technology integration and support services. Both companies are part of an initiative to support the transfer of technology and knowledge to enterprises in emerging markets. Clients include global, multinational, continental and national organizations in both the private and public sectors.

7. In 2004, I shifted my focus back to the U.S. to help meet the challenges arising from the major corporate governance scandals taking place, such as Enron and WorldCom. I advised U.S.-based clients, including Intel Corp., NASDAQ, Genetech, BDO Sieldman LLP and the Federal Reserve Bank, on corporate governance and risk management within the context of information technology, including on complying with the requirements of Sarbanes-Oxley. I also advised clients on corporate relations and communications programs.

8. In the course of my career, I have obtained and I continue to maintain various professional certifications, including Certified Information Systems Auditor or "CISA," Certified Control Specialist or "CCS," and Certified in the Governance of Enterprise Information Technology or "CGEIT." These certifications are issued to professionals who demonstrate knowledge and proficiency in the field of information systems auditing and security, and enterprise information technology governance principles and practices.

9. I am also a founding member and executive director of the San Francisco Bay Area chapter of the Internet Society (“ISOC”), which serves the ISOC’s purpose of promoting open access to the Internet for all persons by focusing on local issues and representing the interests of those who live or work in the San Francisco Bay Area. In addition, I am a co-founder of the Internet Business Council for Africa (“IBCA”), the aim of which is to promote the involvement and participation of the African private/non-governmental sector (and the global private sector involved in Africa) in the global information and communication technology and Internet community, and also to provide an avenue for them to participate in global Internet governance.<sup>2</sup>

10. In 2008, I formed DCA to pursue applying for and obtaining a .AFRICA gTLD. Through my involvement in the Internet domain name systems (“DNS”) industry, I got the idea to apply for .AFRICA and recognized the potential benefits to the people of Africa of operating a .AFRICA gTLD for charitable purposes. In 2012, DCA applied for .AFRICA through the New gTLD Program.

## **II. EARLY INVOLVEMENT WITH ICANN AND INTERNET GOVERNANCE MATTERS**

11. Since 2005, I have been very active in the DNS industry, which encompasses website design and hosting, building servers and hosting domain names, managing and registering domain names and setting up email addresses. In 2005, I was elected as the first African to serve on ICANN’s Generic Names Supporting Organization Council (“GNSO”), a policy advisory body that advises the ICANN Board of Directors (the “Board”) on global public policies that guide the development of the Internet, including the gTLD policy and processes affecting such TLDs as .asia, .com, .net, .org, and others.

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<sup>2</sup> Internet Business Council for Africa, <http://theibca.org/>.

12. In my initial statement of interest to ICANN, I declared my interest in issues facing emerging economies relating to information and communications technology and the Internet as well as my interest in pursuing an initiative to obtain a .AFRICA continental domain name.<sup>3</sup> Later, my statement of interest evolved to encompass the many projects I worked on at the GNSO, including my efforts to obtain the .AFRICA gTLD.

13. During the two years that I served on the GNSO, ICANN was actively engaged in a global Internet expansion project to introduce new gTLDs. As a member of the GNSO, I helped develop the rules and requirements for the New gTLD Program and participated in discussions about how to “standardize” the rules to ensure that the process for awarding new gTLDs would be fair, transparent and equitable. When we were formulating the rules and requirements, we tried to craft the requirements in such a way as to ensure that the application process would be open and competitive, and that applications would be evaluated on the basis of objective criteria.

14. During my service on the GNSO, I was also instrumental in initiating policy dialogue over internationalized domain names (“IDNs”). I led an active campaign to introduce IDNs under which new IDNs in Arabic, Cyrillic, Chinese and other non-Latin alphabets would become available, thereby providing non-English/non-Latin language native speakers an opportunity to access and communicate on the Internet in their native languages. In furtherance of this goal, I helped form an IDN working group within ICANN to bring the global voices of the IDN stakeholders to ICANN. I was then nominated to chair ICANN’s IDN Working Group at the GNSO and was highly influential in drafting the IDN policy guidelines.<sup>4</sup> Our group, which later organized itself as the International Domain Resolution Union (“IDRU”), is credited with

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<sup>3</sup> Sophia Bekele Statement of Interest, ICANN, <https://mex.icann.org/node/4985>.

<sup>4</sup> Sophia Bekele, ICANNWiki, [http://icannwiki.com/index.php/Sophia\\_Bekele](http://icannwiki.com/index.php/Sophia_Bekele).

pioneering the IDN TLD globally.<sup>5</sup> These new IDNs have been introduced by ICANN through the current New gTLD Program.<sup>6</sup>

### **III. NEW gTLD PROGRAM**

15. One of ICANN's key responsibilities is to introduce and promote competition in the registration of Internet domain names, while ensuring that the domain name system is secure and stable. For the first several years of ICANN's existence, TLDs were very few in number and were limited by ICANN. The New gTLD Program is a response to demands by Internet stakeholders that ICANN permit the expansion of new top-level domain names into the root zone (*i.e.*, the top-level Domain Name System zone maintained by ICANN). The New gTLD Program is meant to allow an unlimited number of new TLDs in order to enhance competition for and to promote consumer choice in domain names. It evolved, in large part, out of the work ICANN's GNSO performed between 2005 and 2007 to explore introducing new gTLDs, work in which I was directly involved as a member of the GNSO Council at that time.

16. In 2005, the year I was elected to the GNSO, I and other members of the GNSO began the process of developing the parameters for introducing new gTLDs. The process involved detailed discussions and debate about what the rules and requirements should be for new gTLDs, including what technical, operational and financial standards should apply. During this process, we were mindful of the balance between ICANN's objective of expanding the universe of Internet domain names and protecting the security and stability of the system. In 2008, relying on the work of the GNSO, ICANN's Board adopted the GNSO's recommendations for introducing new gTLDs. Ultimately, these recommendations and input from various Internet

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<sup>5</sup> Letter from David Allen, Exec. Director IDRU, to Sophia Bekele, Exec. Director, DCA (5 Dec. 2010), *available at* <http://origin.library.constantcontact.com/download/get/file/1102516344150-330/TAS-IDRU+endorsement++DCA.pdf>.

<sup>6</sup> *ICANN in Beijing, China: IDNs to win big in the new gTLD process*, Tандаа Биашара (17 Apr. 2013), <http://tandaabiashara.com/icann-in-beijing-idn-to-win-big-in-the-new-gtld-process/>.

stakeholders was brought together in 2011 in ICANN's gTLD Applicant Guidebook (the "AGB") and the launch of the New gTLD Program.

#### **IV. THE DOTCONNECTAFRICA INITIATIVE AND THE DOTCONNECTAFRICA TRUST**

17. While serving on the GNSO Council, I came across discussions being held on new geographic TLDs like .asia and .lat, as well as .EU under the country-code TLD ("ccTLD") program. Being from Africa and in light of my activities in Africa at the time, I asked my colleagues at the GNSO why a ".AFRICA" did not exist. Part of the diligence I performed to ensure that my efforts to obtain a .AFRICA gTLD would not overlap with the work of others, included making inquiries into registered TLDs potentially relating to .AFRICA. After confirming that no one was championing it among the African participants in ICANN, that there was no African participation in GNSO sessions nor any sign that anyone appeared to be interested in .AFRICA as a new gTLD, I turned my focus to securing the .AFRICA TLD.

##### **a. Creation of the DotConnectAfrica Initiative and Formation of DCA**

18. I first proposed developing .AFRICA as a new gTLD in 2006, in a presentation given to the African members of the ICANN Board. The following year, I gave a presentation on the topic to different African organizations of the ICANN community during the ICANN 28 meeting in Lisbon, Portugal.<sup>7</sup> Soon thereafter, I led the .AFRICA initiative under a new start-up, envisioning connecting the dots in Africa under one umbrella and calling the initiative "DotConnectAfrica." In February 2008, I wrote to the Board to notify ICANN of the "DotConnectAfrica Initiative"<sup>8</sup> and in June of 2008, at the ICANN 32 meeting in Paris, I made

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<sup>7</sup> Presentation to the ICANN Africa Group ICANN 28 meeting in Lisbon, Portugal (2007), *available at* <http://www.slideshare.net/Nyosef/dotafrica>.

<sup>8</sup> Letter from Sophia Bekele, Executive Coordinator (.Africa), to P. Dengate Thrush, Chairman, ICANN (13 Feb. 2008), *available at* <http://www.scribd.com/doc/99725682/Letter-of-Notification-for-ICANN-for-Applying-for-Delegation-of-Dotafrica-TLD-Chairman-ICANN>.

# **EXHIBIT H**

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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)  
 DOTCONNECTAFRICA TRUST, )  
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 Plaintiff, )  
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 vs. ) No. BC607494  
 )  
 INTERNET CORPORATION FOR )  
 ASSIGNED NAMES AND NUMBERS )  
 and DOES 1 through 50, )  
 inclusive, )  
 )  
 Defendants. )  
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\*\*\*CONTAINS HIGHLY CONFIDENTIAL  
ATTORNEYS' EYES ONLY SECTION\*\*\*

VIDEOTAPED DEPOSITION OF PERSON MOST QUALIFIED OF  
DOTCONNECTAFRICA TRUST  
SOPHIA BEKELE ESHETE  
Los Angeles, California  
Thursday, December 1, 2016  
Volume I

Reported by:  
Melissa M. Villagran, RPR, CLR  
CSR No. 12543  
Job No. 2479429  
PAGES 1 - 290



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Page 3

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13 Julian Shine

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15 Also Present:

16 John O. Jeffrey, Attorney at Law

17 ICANN, General Counsel

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INDEX (CONTINUED)

HIGHLY CONFIDENTIAL ATTORNEYS' EYES ONLY SECTION

251-256

INFORMATION REQUESTED

(None.)

INSTRUCTION NOT TO ANSWER

(None.)

1 Los Angeles, California, Thursday, December 1, 2016

2 9:42

3

4 THE VIDEOGRAPHER: We are on the record at

5 9:42 a.m. on December 1st, 2016. This is the 09:42:17

6 video-recorded deposition of the person most

7 qualified for DotConnectAfrica Trust. My name is

8 Julian Shine, here with court reporter Melissa

9 Villagran. We are here with Veritext Legal

10 Solutions at the request of counsel for defendants. 09:42:34

11 This deposition is being held at 555 South

12 Flower Street in Los Angeles, California.

13 Caption of this case is DotConnectAfrica

14 Trust versus Internet Corporation For Assigned Names

15 and Numbers and does 1 through 50, inclusive, case 09:42:51

16 number BC 607494.

17 Please note that audio and video recording

18 will take place unless all parties agree to go off

19 the record. Microphones are sensitive and may pick

20 up whispers, private conversations, and cellular 09:42:57

21 interference.

22 I am not authorized to administer an oath. I

23 am not related to any party in this action, nor am I

24 financially interested in the outcome in any way.

25 If there are any objections to proceeding, 09:43:19

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Veritext Legal Solutions

877-955-3855

Exhibit H

1 please state them at the time of your appearance,  
2 and we will begin with appearances with the noticing  
3 attorney.

4 MR. LE VEE: I'm Jeff LeVee, Jones Day.

5 Counsel for ICANN.

09:43:31

6 MS. PUSHINSKY: Amanda Pushinsky, Jones Day,  
7 counsel for ICANN.

8 MR. KESSELMAN: David Kesselman, counsel for  
9 Intervener, ZACR.

10 MR. BROWN: Ethan Brown on behalf of

09:43:39

11 DotConnectAfrica Trust.

12 MR. JEFFREY: John Jeffrey, ICANN general  
13 counsel.

14 THE VIDEOGRAPHER: Thank you.

15 The witness will be sworn in and counsel may  
16 begin the examination.

09:43:47

17 THE DEPOSITION OFFICER: Please raise your  
18 right hand.

19 Do you solemnly swear that the testimony you  
20 are about to give will be the truth, the whole  
21 truth, and nothing but the truth, so help you God?

22 THE DEPONENT: Yes.

23 ///

24 ///

25 ///

Page 11

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SOPHIA BEKELE ESHETE,

having been administered an oath, was examined and testified as follows:

EXAMINATION

BY MR. LE VEE:

Q Would you state your name and spell your last name for the record.

A My name is Sophia Bekele, and my last name is spelled as B-e-k-e-l-e.

09:44:09

Q Have you been deposed before?

A No.

Q Have you had an opportunity to spend a few minutes with your lawyer discussing the procedures of a deposition?

09:44:21

A Yes.

Q And as I recall you listened in on portions of the depositions that have already been taken in this case of the two ICANN witnesses; correct?

A Just one.

09:44:33

Q Oh, just one?

A Yes.

Q Okay. I forgot. For Mr. Attalah.

A Yes.

Q Okay. Real briefly, we are here today

09:44:38

1 pursuant to a Deposition Notice for the person most  
2 qualified for plaintiff DotConnectAfrica. I'm going  
3 to mark the exhibit in a second.

4 And do you understand that you are here  
5 testifying as the person most qualified in 09:44:52  
6 conjunction with representing DotConnectAfrica  
7 Trust?

8 A Yes.

9 Q Okay. I'll be asking you questions; you'll  
10 be providing answers. If at any time you don't 09:45:01  
11 understand my question, please ask for me to  
12 clarify.

13 One of the most important things is that we  
14 don't speak over each other. So when I'm speaking,  
15 you're listening, and when you're speaking, I'm 09:45:15  
16 listening, because the court reporter is taking down  
17 everything that each of us says. It makes it more  
18 difficult for her to be able to do that if we are  
19 speaking simultaneously.

20 And we'll break every hour or so. If you 09:45:28  
21 need to break other than that, I'm happy to do so.  
22 So just raise your hand and say, Can we take a  
23 break? And the answer will almost always be yes.

24 A Okay.

25 Q Do you have any questions before we start 09:45:45

1 remember what the comment was?

2 A Yes. It came to my attention later on.

3 Q Okay. And my understanding is that DCA

4 submitted some comments on various versions of the

5 guidebook; is that correct? 09:49:33

6 A It could be.

7 Q Do you remember one way or the other?

8 A I don't know which particular part, but we

9 were active participants in the --

10 Q In the development of the guidebook? 09:49:43

11 A Yes.

12 Q Okay. Do you remember whether DCA commented

13 on any portion of Module 6?

14 A No.

15 Q No -- 09:49:52

16 A We did not.

17 Q Did not. Okay.

18 And you understood that Module 6 was part of

19 the application?

20 A Yes. 09:49:59

21 Q Okay. Did you -- do you recall reading

22 through Module 6, Paragraph 6, and having any

23 understanding at the time you submitted the

24 application of what the paragraph meant?

25 A Not really. 09:50:17

1 A But I'm -- I have attended a lot.

2 Q Okay. And so you mentioned also that you  
3 have -- that -- that you submitted some public  
4 comments in conjunction with the development of the  
5 guidebook. 09:55:46

6 Were those submitted on behalf of DCA, or  
7 were those submitted on behalf of you personally?

8 A I think most of it was on behalf of me as a  
9 community participant.

10 Q Okay. And do you recall was it more than 09:55:58  
11 five comments? More than ten? Do you recall -- I'm  
12 not asking you for a specific number because I know  
13 it was a few years ago, but roughly how many public  
14 comments you've submitted?

15 A I don't remember really. 09:56:10

16 Q Okay. More -- do you know if it was more  
17 than five?

18 A I don't remember.

19 Q Okay. And when I'm referring to public  
20 comments, you understand that what I'm referring to 09:56:19  
21 is that ICANN would post on it's Web site drafts --

22 A Yes.

23 Q -- of portions of the guidebook, or in some  
24 instances, an entire draft of the guidebook and make  
25 available to the public the ability to comment. 09:56:32

1           And that's what you're referring to?

2           A    Yeah.

3           Q    Okay.  And you understood when you submitted  
4   your application that you were agreeing that DCA  
5   would be bound by the terms of -- of the whole           09:56:59  
6   guidebook?

7           A    Yes.

8           Q    Okay.

9            Okay.  I'm going to change topics, and I -- I  
10   want to talk to you for a while about the role of           09:57:09  
11   the African Union Commission.

12            Are you aware of any reason why the African  
13   Union Commission could not itself have applied for a  
14   new gTLD?

15           MR. BROWN:  Objection; calls for a legal           09:57:27  
16   conclusion.

17           THE DEPONENT:  I can't speak on behalf of  
18   African Union.

19   BY MR. LE VEE:

20           Q    Oh, no.  I'm not asking you to speak on           09:57:34  
21   behalf of the commission.  I'm asking are you aware  
22   of any reason under the guidebook that the AUC as an  
23   entity could not have been an applicant for a new  
24   gTLD?

25           A    I think ICANN has a better relationship.  You   09:57:47

1 struggling a little bit.

2 THE DEPONENT: Okay.

3 MR. BROWN: So I really need to get you to  
4 slow down.

5 THE DEPONENT: Slow down. 10:01:54

6 MR. BROWN. -- take your time. It's not a  
7 race.

8 It's a little bit difficult because it's not  
9 a normal conversation.

10 THE DEPONENT: It seems like. 10:02:03

11 BY MR. LE VEE:

12 Q I've marked the interrogatory answers that  
13 I'm referring to as Exhibit 33.

14 (Exhibit 33 was marked for  
15 identification by the deposition 10:02:11  
16 officer and is attached hereto.)

17 THE DEPONENT: Where are we looking at here?

18 BY MR. LE VEE:

19 Q Yeah. I'm going to see if I can find in  
20 particular the answer, but . . . 10:02:24

21 So I think it is page 7. And it's -- I think  
22 it's referring to Paragraph 3 on page 7.

23 A Yeah.

24 Q Okay. And so your contention is that,  
25 allowing the AUC to retain rights, intellectual 10:03:01

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1 property rights violates Specification 2, Part B,  
2 Section 3 of the guidebook?

3 A Right.

4 Q Okay. And you say in the very last sentence  
5 of Paragraph 3 (as read):

10:03:16

6 "By giving all rights to  
7 intellectual property and data  
8 received in the register agreement to  
9 AUC, ZACR violated the gTLD program  
10 guidelines."

10:03:28

11 Now, are you referring to Specification 2,  
12 Part B, Section 3 or something else?

13 A Yeah.

14 Q You're referring to Specification 2, Part 3,  
15 Section 3?

10:03:42

16 A Two Part B and 3 of the gTLD.

17 Q Okay. The -- the provision that you -- that  
18 is referenced on line 20 of that page?

19 A Yeah, it appears that way. Yes, it is.

20 Q And -- and my question is, is there anything  
21 else in the guidebook that you're aware of that, in  
22 your opinion, prevents ZACR from agreeing that the  
23 AUC continue to have intellectual property rights?

10:03:57

24 MR. BROWN: Calls for a legal conclusion,  
25 document speaks for itself, improperly calls for

10:04:15

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1 conclusions.

2 MR. LE VEE: You can go ahead and answer  
3 unless he instructs you not to.

4 THE DEPONENT: Agree to this.

5 BY MR. LE VEE: 10:04:24

6 Q I'm sorry?

7 A I agree to this, that the document is what it  
8 is.

9 Q Okay. So nothing else that you can point to  
10 as you sit here today? 10:04:30

11 A No.

12 Q Correct. Okay.

13 Now I have a double negative.

14 It is correct that there's nothing else that  
15 you can point to as we sit here today? 10:04:39

16 A Yes.

17 Q Okay. Thank you.

18 MR. LE VEE: I'm going to mark as Exhibit 34  
19 a document that is entitled "Communique - dotAfrica  
20 gTLD." 10:05:36

21 (Exhibit 34 was marked for  
22 identification by the deposition  
23 officer and is attached hereto.)

24 BY MR. LE VEE:

25 Q Have you seen this document before? 10:05:47

Page 30

1 A I -- I said I may have drafted the letter.

2 Q Okay.

3 A Yes.

4 Q And it -- there -- the letter says -- well,  
5 it's dated August 27, 2009. 11:50:40

6 So were you surprised that somebody signed  
7 the letter after you had heard from Moctar that the  
8 AUC was not going to sign the letter?

9 A Moctar is not a representative of AUC in the  
10 context of this. 11:50:56

11 Q When you say "not a representative," he -- he  
12 is not someone who was authorized to sign such a  
13 letter?

14 A Yes.

15 Q Okay. And -- and was Jean Ping authorized to 11:51:06  
16 sign such a letter?

17 A I believe so. He represents the -- his  
18 office represents the African Union.

19 Q Was -- was Mr. -- do you know somebody named  
20 Mwencha? 11:51:15

21 A Yes.

22 Q M-w-e-n-c-h-a? He was the deputy chairman of  
23 the AUC, right?

24 A Right.

25 Q Would he have been authorized to sign such a 11:51:25

1 letter?

2 A I'm not sure.

3 Q You don't know?

4 A I don't know.

5 Q So the reason I -- I say that is I'm going to 11:51:31  
6 show you in a couple minutes other letters he has  
7 written. It looks like he signed the letter on  
8 behalf of Jean Ping.

9 A Okay.

10 Q Do you know one way or the other? 11:51:44

11 A He could, yeah.

12 Q Okay. But you don't know?

13 In other words, he could --

14 A I'm not an AUC person, so I cannot speak on  
15 behalf of who should be signing letters. 11:51:54

16 Q Okay. And you do not know who actually  
17 signed?

18 A Jean Ping signed.

19 Q Well, it's -- it's over Jean -- Jean Ping's  
20 signature, but you didn't see Jean Ping sign it, 11:52:04  
21 correct?

22 A If it comes out of his letterhead, African  
23 Union --

24 MR. LE VEE: Okay. I'm going to ask my  
25 question back. 11:52:12

1           Let's take a look at Exhibit 46, which is a  
2 letter from you in January 2011.

3           (Exhibit 46 was marked for  
4 identification by the deposition  
5 officer and is attached hereto.)

01:29:31

6 BY MR. LE VEE:

7 Q Is this your signature on the third page?

8 A Yes.

9 Q Okay. And is it a letter you wrote to --

10 A Jean Ping.

01:30:05

11 Q -- Jean Ping and also to Abdoulie,  
12 A-b-d-o-u-l-i-e, Janneh, J-a-n-n-e-h of --

13 A UNECA.

14 Q -- UNECA. Yes. Okay.

15 And then in the third paragraph you say -- or 01:30:16  
16 second paragraph, you say (as read):

17           "Our DCA has within the past year  
18 received endorsements from both the  
19 UNECA and the AU; however, the  
20 endorsement received from the AU has 01:30:33  
21 remained somewhat contentious. From  
22 an article in the Computer World Kenya  
23 online magazine, we learn that the AU  
24 will be directly involved in the  
25 .Africa debate. Please see attached

01:30:47

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1           for your immediate reference."  
2           You wrote that, right?  
3        A    Uh-huh.  
4        Q    And you -- you didn't say that you had -- you  
5 actually knew from a press release and other things       01:30:56  
6 that the AU had announced that it was going to be  
7 involved in the .Africa initiative, right?  
8        A    Yes.  
9        Q    Okay. Then you say (as read):  
10           "The endorsement initially bestowed               01:31:10  
11 upon us by the AU chairperson was  
12 unfairly withdrawn by a letter  
13 purportedly written and signed by the  
14 deputy chairperson of the AU -- "  
15 Let me stop there.                                       01:31:24  
16 That -- those are the words you wrote, right?  
17        A    Yes.  
18        Q    Okay. (As read):  
19           "-- which in our estimation is not  
20 genuine since it goes against every                   01:31:29  
21 rule the administrator of procedure  
22 and protocol for letters signed by the  
23 deputy chairperson to countermand an  
24 earlier one granting a principal  
25 approval by the chairperson a present               01:31:37

1 MR. LE VEE: Okay.

2 DEPOSITION OFFICER: Thank you.

3 BY MR. LE VEE:

4 Q Take a look at Exhibit 47.

5 (Exhibit 47 was marked for 01:39:05

6 identification by the deposition

7 officer and is attached hereto.)

8 BY MR. LE VEE:

9 Q This appears to be a letter you wrote to

10 Mr. Shinkaiye, S-h-i-n-k-a-i-y-e, which is -- 01:39:16

11 A Okay.

12 Q -- a name we discussed earlier today, dated

13 December 30, 2011.

14 You can take a minute to read the letter. I

15 just want to confirm first that this is the letter 01:39:24

16 you -- you wrote and sent to Ambassador Shinkaiye.

17 A Yes.

18 Q Okay. And in the first paragraph it says (as

19 read):

20 "We have been waiting patiently for 01:39:37

21 the past several months to receive an

22 official response from your office

23 regarding the need to properly redress

24 our wishes as conveyed at different

25 times for the official reinstatement 01:39:49

1 of our earlier endorsement received  
2 from the AU for the Dot Registry gTLD  
3 and registry."

4 Did I read that accurately?

5 A Yes. 01:39:58

6 Q Okay. And this is what you wrote to  
7 Ambassador Shinkaiye in December of 2011?

8 A Yes.

9 Are we done?

10 Q Yes, I'm done with that. 01:40:30

11 Let me ask you to take a look at Exhibit 48.

12 (Exhibit 48 was marked for

13 identification by the deposition

14 officer and is attached hereto.)

15 BY MR. LE VEE: 01:41:12

16 Q Do you recognize Exhibit 48?

17 A Yes.

18 Q What is it?

19 A It's an endorsement letter from UNECA.

20 Q Okay. And this is the UNECA endorsement 01:41:35

21 letter that you provided to ICANN with the DCA

22 application; is that correct?

23 A Yes.

24 Q Now, this letter does not refer to DCA, does

25 it? 01:41:46

1 MR. BROWN: Objection; document speaks for  
2 itself.

3 MR. LE VEE: I know it does.

4 THE DEPONENT: DCA was not formed at that  
5 time. 01:41:52

6 BY MR. LE VEE:

7 Q Okay. That was going to be my next question.  
8 Could you tell me the circumstances of your  
9 obtaining this letter?

10 A Uh-huh. 01:42:01

11 How?

12 Q Yes. First of all, did you draft it?

13 A Let's see. I think I drafted similar letter  
14 to the one like the AUC and they redrafted it.

15 Q Okay. And who is Mr. Janneh, J-a-n-n-e-h? 01:42:17

16 A He is the executive secretary of the UNECA.

17 Q Okay.

18 A Which is the highest office like the  
19 chairman's --

20 Q Okay. 01:42:29

21 A -- office of the AUC.

22 Q And -- and did you meet with Mr. Janneh, or  
23 did you have phone calls? Tell me the circumstances  
24 of your --

25 A I made a phone call from the United States. 01:42:35

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1 and I'm supposed to have my own endorsements,  
2 knowing what -- what it should be like. And --

3 Q Where does it say in the guidebook that it's  
4 improper to ask for help?

5 A It's -- it's proper to ask a bidding 01:50:16  
6 organization for assisting them to -- how to  
7 submit --

8 Q Where does it say in the guidebook --

9 A I don't know. I have been doing business  
10 globally, and I have outbidden many international 01:50:27  
11 bids, and we are not supposed to go back to the  
12 bidder in organization to ask for assistance.

13 Q Forget international organization.

14 A That's my -- that's my experience.

15 Q Okay. So you've never applied for a 01:50:39  
16 top-level domain to ICANN prior to 2012, right?

17 A It's -- it is an international bid. No.  
18 There -- there was no open bid, so how would I know?

19 Q You've submitted one bid to ICANN in your  
20 life. 01:50:53

21 A Yeah, right.

22 Q Correct?

23 It was for .Africa, correct?

24 A Yes.

25 Q And in conjunction with that application, you 01:50:57

1 never asked ICANN for help in having a letter  
2 drafted to support your application?

3 A No, I didn't.

4 Q Okay. Now, when you saw the letter that the  
5 AUC ultimately sent to ICANN, did you notice that it 01:51:12  
6 had language significantly different than the letter  
7 you had from UNECA in Exhibit 48?

8 MR. BROWN: Objection; vague and ambiguous.

9 THE DEPONENT: It has some conditions in it,  
10 but not really. 01:51:32

11 BY MR. LE VEE:

12 Q It has more information?

13 A More information.

14 Q The AUC letter.

15 A Yes. 01:51:36

16 Q Yes.

17 Indeed, as we discussed, Exhibit 48 doesn't  
18 even identify the name of your organization that is  
19 the applicant because it didn't exist at that time,  
20 right? 01:51:46

21 A Uh-huh.

22 Q Is that a yes?

23 A Yes.

24 Q Okay.

25 A But that's not a ICANN clarification 01:51:54

1 A I don't remember.

2 Q And so you have not tried to get an updated  
3 letter from UNECA?

4 A No.

5 Q No. Okay. 01:55:36

6 A I didn't think this was outdated so.

7 Q Pardon?

8 A I didn't think an updated letter is required.

9 Q I understand your position.

10 A Yeah. 01:55:43

11 Q But ICANN asked you to update the letter,  
12 right?

13 A Only after -- during the extended evaluation.

14 Q Yes. ICANN asked you, and you did not ask  
15 UNECA for an updated letter? 01:55:55

16 A No.

17 Q Okay.

18 MR. LE VEE: I don't have a stapler. We'll  
19 get one at break.

20 But I'm marking as Exhibit 49 a two-page 01:56:27  
21 letter.

22 (Exhibit 49 was marked for  
23 identification by the deposition  
24 officer and is attached hereto.)

25 BY MR. LE VEE: 01:56:33

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1 Q Okay. Have you seen Exhibit 49 before?

2 A Yes.

3 Q Okay. And did you receive it on or about

4 July 20th, 2015?

5 It says -- it shows you as a CC. 01:57:40

6 A Okay. Yes.

7 Q Okay. Yes?

8 A Yes.

9 Q Okay. And it says -- it's written by

10 secretary of the commission and legal advisor. It 01:57:49

11 says (as read):

12 "I'm writing in connection with the

13 request made to the executive

14 secretary, Dr. Lopes."

15 Now let me stop there. 01:57:58

16 Has -- does UNECA have a new executive

17 secretary?

18 A Yes.

19 Q Subsequent to 2008, when Mr. Janneh signed

20 the letter? 01:58:08

21 A Yes.

22 Q Okay. And the new executive secretary today

23 is Dr. Lopes?

24 A Okay.

25 Q Or Lopez? Okay. 01:58:17

1 And then it says, in the second paragraph (as  
2 read):

3 "I understand from your letter  
4 that, in addition to ZACR, another  
5 competing entity, DotConnectAfrica, 01:58:27  
6 has submitted an application to obtain  
7 the same delegation as ZACR and that  
8 DCA is purporting to use a letter of  
9 support obtained from ECA in 2008 as  
10 an endorsement from ECA for it's 01:58:38  
11 application."

12 Do you see that?

13 A Yes.

14 Q Okay. And then at the very last paragraph on  
15 that page, it says (as read): 01:58:48

16 "ECA" -- referring to UNECA -- "as  
17 United Nations entity is neither a  
18 government nor a public authority, and  
19 therefore is not qualified to issue a  
20 letter of support for a perspective 01:59:00  
21 applicant in support of their  
22 application. In addition, ECA does  
23 not have a mandate to represent the  
24 views or convey the support or  
25 otherwise of African governments in 01:59:11

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1 matters relating to application for  
2 delegation of the gTLD."  
3 Do you see that?  
4 A Yes.  
5 Q So what she's saying is that the original 01:59:17  
6 letter that you got was not in fact an endorsement  
7 letter for purposes of an ICANN guidebook, correct?  
8 MR. BROWN: Objection; document speaks for  
9 itself.  
10 THE DEPONENT: That's what it says. 01:59:30  
11 BY MR. LE VEE:  
12 Q That's what she says?  
13 A That's what she says, yes.  
14 Q Okay.  
15 And after you got the letter, did you call 01:59:35  
16 somebody at UNECA and say, Hey, why are you doing  
17 this? You told me you had an endorsement?  
18 A No.  
19 Q Okay. And do you have any reason to believe  
20 that -- that the letter that we've marked as 01:59:44  
21 Exhibit 49 is a fraud?  
22 A Fraud? It is what it is.  
23 Q Okay. It is a letter sent by UNECA to --  
24 A By the secretary.  
25 Q Yes, to Dr. Ibrahim? 02:00:00

1 sufficient enough to satisfy the clarification  
2 questions that ICANN has asked.

3 Q Okay. And when ICANN told you in 2015 that  
4 the UNECA -- I'm sorry. Drop it. Strike again.

5 When ICANN told you in 2015 that the AUC 02:09:27  
6 letter was insufficient under the guidebook, did you  
7 contact the AUC to try to get a new letter?

8 A No.

9 Q And you instead took the position that the  
10 letter you had submitted in 2012 was sufficient, 02:09:42  
11 correct?

12 Did you know that ICANN had rejected the  
13 letter that the AUC had originally given to ZACR in  
14 2012?

15 A Yes. 02:09:56

16 Q Okay. When did you learn that?

17 A That they rejected it?

18 Q Yes.

19 A Because they authored another letter for  
20 them. 02:10:07

21 Q I know they did. But when did you learn that  
22 it had been rejected?

23 A I don't know if they rejected. When you  
24 writing an updated letter, obviously the other one  
25 is not sufficient. It's not about rejection. 02:10:13



1 Q Of the individual governments.

2 A -- countries.

3 Q Of the countries, yes.

4 Or that the panel require ICANN to accept the

5 UNECA letter as the support; correct? 02:55:57

6 A Right.

7 Q Okay. Now, the panel in it's final ruling

8 did allow you to proceed through the remainder of

9 the new gTLD application process, correct?

10 That's the words they used. 02:56:11

11 A Right.

12 Q But they didn't address whether they were

13 granting you a period of no less than 18 months to

14 obtain governmental support as set out in the

15 guidebook, right? 02:56:24

16 They -- they just didn't say anything about

17 that, right?

18 MR. BROWN: Document speaks for itself.

19 BY MR. LE VEE:

20 Q I mean -- 02:56:27

21 A They didn't say anything about that. It is

22 mute, muted.

23 Q Well, and they didn't say anything as to

24 whether the -- the requirement was satisfied as a

25 result of the letter from UNECA, correct? 02:56:43

1 A Can you say that again.

2 Q Yes.

3 The panel did not say that the requirement of  
4 geographic support was satisfied by your letter from  
5 UNECA? 02:56:59

6 A It is my understanding that ICANN had argued  
7 in the IRP that the panel did not address anything  
8 to do with endorsement issues. So the panel just  
9 left the endorsement issues out.

10 Q Correct. 02:57:16

11 So the panel simply did not address whether  
12 it had endorsements.

13 A Good or bad or either way, yeah.

14 Q Right.

15 And -- and so the panel was not saying in its 02:57:23  
16 declaration, it just simply did not address whether  
17 DCA had or had not passed the requirement of getting  
18 the 60 percent support from the continent of Africa?

19 A They just left it mute, I guess.

20 Q Okay. And so you are arguing today that DCA 02:57:42  
21 should not have to fulfill the 60 percent  
22 requirement, right?

23 A The individual endorsement requirements.

24 Q Right.

25 A What we're arguing is that we be treated the 02:57:55

1           That's -- that's what we asked for --

2           Q    Okay.

3           A    -- at that time.

4           Q    But just to be clear, nothing in the final

5   declaration says that you get to skip the geographic   02:59:22

6   review process, right?

7           A    Yes.

8           Q    Okay.  And so -- and you would not be

9   suggesting, would you, that an application for the

10   registry operator to operate a top-level domain that   02:59:39

11   is the name of a continent not have support of the

12   people of that continent, right?

13          A    You mean the government.

14          Q    The governments.

15                And you think that's a good thing, right?   02:59:53

16          A    Can you rephrase that question.

17          Q    I'll rephrase it.

18                Don't you think that it's appropriate that

19   whoever becomes the registry operator for the

20   .Africa top-level domain have support of the           03:00:08

21   governments in Africa?

22          A    That is not my requirement.  It is ICANN's

23   requirement.

24          Q    Yes.

25          A    I cannot insinuate that.  You know, could be   03:00:15



1 letter from the AUC or not?

2 A Right.

3 Q Okay. But you knew that the AUC had, at  
4 least purportedly, withdrawn that -- the letter of  
5 support that they had given to you, right? 03:04:07

6 A Yeah, but I didn't accept it, right?

7 Q I know you didn't accept it, but you knew  
8 there was a -- a question?

9 A And -- and ICANN did not make an issue out of  
10 it, so we are presuming that a decision that stopped 03:04:18  
11 as at the GAC, it had nothing to do with the  
12 endorsement issue because the endorsements were not  
13 evaluated and no results was -- was told to us,  
14 correct?

15 Q Right. 03:04:30

16 What -- so what I'm saying is you did not  
17 know -- because the geo review -- geographic process  
18 had not been finished with respect to DCA --

19 A Correct.

20 Q -- you didn't know whether the geo review 03:04:42  
21 panel, the ICC that was reviewing your application,  
22 had accepted the AUC letter or had looked or even  
23 had a copy of the withdrawal letter?

24 A Right.

25 Q You just didn't know? 03:04:54



1 I want to ask just a couple general  
2 questions.

3 When you applied for .Africa in 2012, you  
4 knew that you were not guaranteed the right to  
5 operate .Africa, correct? 03:59:32

6 A Well, I didn't think that way.

7 Q So you just hadn't -- you under --

8 A Obviously there is a competition. We -- I  
9 understood that.

10 Q Okay. And you understood that there was a 03:59:45  
11 chance that some other applicant would -- would  
12 ultimately be the applicant selected?

13 A There was a chance?

14 Q Yes.

15 A In fact, with the endorsements in my hand, I 03:59:55  
16 thought that we -- we would probably go into  
17 contention of some sort. I didn't think we would  
18 lose .Africa.

19 Q Okay. If it went into contention, then that  
20 would involve an auction; is that right? 04:00:07

21 A Right.

22 Q And it could either be done as a private  
23 auction or -- or ICANN-administered auction? Is  
24 that your understanding?

25 A Yeah. 04:00:15

1 MR. LE VEE: I've marked as Exhibit 62 a  
2 document that is entitled "Expression of Interest  
3 For the Operation of .Africa." It's on the  
4 letterhead of the African Union.

5 (Exhibit 62 was marked for 04:10:26  
6 identification by the deposition  
7 officer and is attached hereto.)

8 BY MR. LE VEE:

9 Q Have you seen this document before?

10 A It appears familiar. 04:10:28

11 Q Does this appear to be the document that you  
12 received from the AUC in which the AUC was  
13 soliciting RFP responses to operate the .Africa  
14 top-level domain?

15 A I didn't receive this. I just saw it on the 04:11:09  
16 Web site.

17 Q Okay.

18 And you -- did you look at it at the time?

19 A Yeah.

20 Q Okay. Did you provide a -- I know you didn't 04:11:17  
21 actually submit an RFP response, correct?

22 A No.

23 Q Okay. Did you have any communications with  
24 the AUC at the time regarding Exhibit 62?

25 A I don't remember. 04:11:29

Page 257.

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I, the undersigned, a Certified Shorthand Reporter of the State of California, Registered Professional Reporter, Certified Live Note Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [ ] was [ ] was not requested. I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: 12/5/2016



MELISSA M. VILLAGRAN

# **EXHIBIT I**

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE

S. SMYTHE

DEPUTY CLERK

HONORABLE  
1

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

Plaintiff

BROWN, HERI, SMITH & KHAN

Counsel

BY: ETHAN J. BROWN  
and KETE BARNE\$

Defendant

JONES DAY  
BY: JEFFREY A. LeVEE ✓  
and ERIN L. BURKE

Counsel

DOTCONNECTAFRICA TRUST  
VS.  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

170.6 JUDGE KWAN BY DEFENDANT

**NATURE OF PROCEEDINGS:**

**ALSO APPEARING:**

KESSELMAN BRANTLY STOCKINGER  
BY: DAVID W. KESSELMAN  
and AMY T. BRANTLY

**MOTION OF PLAINTIFF DOTCONNECTAFRICA TRUST,  
FOR PRELIMINARY INJUNCTION**

The motion of plaintiff DotConnectAfrica Trust for a Preliminary Injunction comes on for hearing.

The plaintiff is seeking to enjoin defendant Internet Corporation for Assigned Names and Numbers (ICANN) from issuing the .Africa generic top level domain (gTLD) until this case has been resolved.

The matter is argued at length and stands submitted.

Note that the court advised counsel that he was lacking exhibit F to the declaration of Mokgabudi Lucky Masilela, with its summary of costs, which was conditionally placed under seal by prior order of court.

A copy was provided by the intervenor's counsel, and will be returned to counsel upon service of the court's ruling.

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<p align="center"><b>MINUTES ENTERED</b> 12/22/16 COUNTY CLERK</p>
--

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE

S. SMYTHE

DEPUTY CLERK

HONORABLE  
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Reporter

8:29 am

BC607494

Plaintiff

BROWN, HERI, SMITH & KHAN

Counsel

BY: ETHAN J. BROWN

and KETE BARNES

DOTCONNECTAFRICA TRUST

VS.

Defendant

JONES DAY

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

Counsel

BY: JEFFREY A. LeVEE

and ERIN L. BURKE

170.6 JUDGE KWAN BY DEFENDANT

**NATURE OF PROCEEDINGS:**

The court sets this matter for a case management conference on 1-23-17, 8:30 a.m., this department.

The court intends to set the matter for trial at that time, and asks that counsel begin checking their calendars for mutually agreeable dates.

Case Management Statements must be submitted before the conference.

LATER: The plaintiff's motion for the imposition of a Preliminary Injunction is denied, based on the reasoning expressed in the oral and written arguments of defense counsel.

Further, the court has considered the unopposed application of the defendant to file exhibit F to the Masilela declaration under seal, and it is so-ordered.

Clerk to give notice.

**CLERK'S CERTIFICATE OF MAILING**

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated 12-22-16 upon all parties/counsel named below by placing the document for collection and mailing so as to

<b>MINUTES ENTERED</b> 12/22/16 COUNTY CLERK
--

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE

S. SMYTHE

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

1

F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

Plaintiff

BROWN, HERI, SMITH & KHAN

Counsel

BY: ETHAN J. BROWN

and KETE BARNES

DOTCONNECTAFRICA TRUST

VS.

Defendant

JONES DAY

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

Counsel

BY: JEFFREY A. LeVEE

and ERIN L. BURKE

170.6 JUDGE KWAN BY DEFENDANT

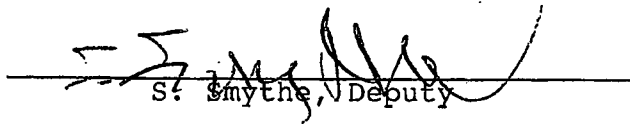
NATURE OF PROCEEDINGS:

cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 12-22-16

Sherri R. Carter, Executive Officer/Clerk

By:

  
S. Smythe, Deputy

Brown, Neri, Smith & Khan  
Attn.: Ethan J. Brown, Esq.  
11766 Wilshire Blvd., #1670  
Los Angeles, Calif. 90025

Jones Day  
Attn.: Jeffrey A. LeVee, Esq.  
555 S. Flower St., 50th Floor  
Los Angeles, Calif. 90071-2300

MINUTES ENTERED  
12/22/16  
COUNTY CLERK

9107787771

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE S. SMYTHE

DEPUTY CLERK

HONORABLE  
1

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

Plaintiff

BROWN, HERI, SMITH & KHAN

Counsel

BY: ETHAN J. BROWN  
and KETE BARNES

Defendant

JONES DAY

Counsel

BY: JEFFREY A. LeVEE  
and ERIN L. BURKE

DOTCONNECTAFRICA TRUST

VS.

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

170.6 JUDGE KWAN BY DEFENDANT

**NATURE OF PROCEEDINGS:**

Kesselman Brantly Stockinger LLP  
Attn.: David W. Kesselman, Esq.  
1230 Rosecrans Ave., #690  
Manhattan Beach, Calif. 90266

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Page 4 of 4 DEPT. 53

<b>MINUTES ENTERED</b> 12/22/16 <b>COUNTY CLERK</b>
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# **EXHIBIT J**

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES  
3 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE  
4

5 DOTCONNECTAFRICA TRUST, A MAURITIUS)  
6 CHARITABLE TRUST, )  
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PLAINTIFF, )  
VS. ) NO. BC607494  
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. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DECEMBER 22, 2016

15 APPEARANCES:  
16 FOR THE PLAINTIFF: BROWN, NERI, SMITH & KHAN, LLP  
17 BY: ETHAN BROWN, ESQ.  
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24 E.KETE@BNSKLAW.COM  
25 FOR THE DEFENDANT: JONES DAY  
26 BY: JEFFREY A. LEVEE, ESQ.  
27 ERIN L. BURKE, ESQ.  
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JLEVEE@JONESDAY.COM

(ADDITIONAL APPEARANCES ON THE NEXT PAGE)

SHAWNDA R. DORN, CSR NO. 11387, RPR, CCRR, CLR  
OFFICIAL REPORTER PRO TEMPORE

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APPEARANCES (CONTINUED):

FOR THE INTERVENOR: KESSELMAN, BRANTLY, STOCKINGER, LLP  
BY: DAVID W. KESSELMAN, ESQ.  
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(310) 307-4555  
DKESSELMAN@KBSLAW.COM  
ABRANTLY@KBSLAW.COM

1 CASE NUMBER: BC607494  
2 CASE NAME: DOTCONNECTAFRICA VS. INTERNET  
3 LOS ANGELES, CALIFORNIA THURSDAY, DECEMBER 22, 2016  
4 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE  
5 APPEARANCES: (AS HERETOFORE NOTED.)  
6 REPORTER: SHAWNDA R. DORN, CSR 11387  
7 TIME: 9:47 A.M.

8  
9 -000-

10  
11 THE COURT: ALL RIGHT. NUMBER ONE IS  
12 DOTCONNECTAFRICA TRUST VERSUS INTERNET CORPORATION FOR  
13 ASSIGNED NAMES AND NUMBERS. PLEASE STATE YOUR  
14 APPEARANCE.

15 MR. BROWN: GOOD MORNING, YOUR HONOR. ETHAN BROWN  
16 FOR THE PLAINTIFF.

17 MR. LEVEE: GOOD MORNING, YOUR HONOR. JEFF LEVEE  
18 AND ERIN BURKE FOR ICANN.

19 MR. KESSELMAN: GOOD MORNING, YOUR HONOR. DAVID  
20 KESSELMAN FOR INTERVENOR ZACR.

21 MS. BRANTLY: GOOD MORNING, YOUR HONOR. AMY  
22 BRANTLY FOR DEFENDANTS ZA CENTRAL REGISTRY.

23 THE COURT: IS THAT ZACR?

24 MS. BRANTLY: YES, ZACR.

25 MR. BARNES: GOOD MORNING, YOUR HONOR.  
26 ROWENNAKETE BARNES ON BEHALF OF PLAINTIFF DCA.

27 THE COURT: OKAY. ALL RIGHT. I THINK I'VE  
28 PROVIDED A TENTATIVE, WHICH YOU HAVE PROBABLY LOOKED AT.

1

1 ACTION 9, AND WE CAN'T WIN CAUSE OF ACTION 9. I THINK  
2 THAT IS A REALLY HYPERTECHNICAL AND OVERREACHING READ OF  
3 WHAT CAUSE OF ACTION NO. 9 DOES.

4 CAUSE OF ACTION NO. 9 COMES ON THE HEELS OF  
5 ALL OF THE OTHER ALLEGATIONS IN THE COMPLAINT OR AT LEAST  
6 THE FIRST EIGHT, YOU KNOW -- THE FIRST EIGHT CAUSES OF  
7 ACTION IN THE COMPLAINT. IT EXPRESSLY, AS ONE TYPICALLY  
8 DOES, PICK UP AN RE-ALLEGES BY REFERENCE THE PREVIOUS  
9 ALLEGATIONS IN THE COMPLAINT, INCLUDING THOSE THAT  
10 INCLUDE THE INTENTIONAL MISCONDUCT AND ALSO INCLUDE  
11 PARAGRAPHS SUCH AS -- I'LL JUST GIVE YOU AN EXAMPLE,  
12 PARAGRAPH 59, WHERE IT SAYS:

13 "ICANN INTENDED TO DENY THE  
14 APPLICATION ON ANY PRETEXTS."

15 THIS IS AFTER THE IRP RULING.

16 "FOR EXAMPLE, IN SEPTEMBER 2015  
17 ICANN'S GEOGRAPHIC NAME EVALUATORS ISSUED  
18 DCA CLARIFYING QUESTIONS REGARDING ITS  
19 ENDORSEMENTS WHICH IT INTENTIONALLY DIDN'T  
20 SEND IN THEIR INITIAL EVALUATION MORE THAN  
21 TWO YEARS AFTER THE IRP FINALLY DECLARED  
22 ICANN'S WRONGFUL SUSPENSION OF ITS  
23 APPLICATION AND THEN INDICATED THAT DCA'S  
24 RESPONSES TO THOSE QUESTIONS WERE  
25 INADEQUATE."

26 SO THE WHOLE PREMISE HERE OF THE COMPLAINT  
27 IS THAT DCA WENT THROUGH THIS IRP PROCESS. AT THE TIME  
28 THE ONLY COMPLAINT THAT IT EVER HEARD WAS THE GACC

1       ADVICE.  IT GETS SENT BACK DOWN.  ICANN CHOSE TO PUT IT  
2       BACK INTO GEOGRAPHIC NAMES, AND THEN IT IMMEDIATELY CAME  
3       UP WITH, IN OUR VIEW, PRETEXTUAL REASONS AS TO WHY IT  
4       COULD DENY IT SO IT DIDN'T HAVE TO COMPLETE THE PROCESS.

5                I THINK THAT'S ALL FAIRLY SUBSUMED WITHIN  
6       CAUSE OF ACTION NO. 9, AND I THINK YOUR HONOR RECOGNIZED  
7       THAT IN GOING THROUGH IN THE CONTEXT OF THE TENTATIVE THE  
8       -- BOTH, YOU KNOW, LOOKING AT THE IRP DECLARATION BUT  
9       ALSO LOOKING AT WHAT WAS DONE IN THE IMMEDIATE AFTERMATH  
10      OF THAT TO LATCH ONTO WHAT ARE PRETEXTUAL REASONS FOR  
11      DENYING THE APPLICATION.

12               YOU KNOW, ICANN MAKES A BIG PRESS TO FOCUS  
13      ON THE MCFADDEN DECLARATION.  THEY SAY, LOOK, YOU KNOW,  
14      THE MCFADDEN DECLARATION MAKES IT CLEAR THESE WERE  
15      COMPLETELY LEGITIMATE REASONS TO DENY THE APPLICATION.  
16      WELL, THE MCFADDEN DECLARATION, FRANKLY, ISN'T A VERY  
17      CREDIBLE DOCUMENT IN MY VIEW.  WE HAVEN'T HAD A CHANCE TO  
18      DEPOSE MR. MCFADDEN.  MR. MCFADDEN IS OVERSEAS.  I'M NOT  
19      SURE WHY THEY PICKED A CONSULTANT OVERSEAS, BUT HE'S HARD  
20      TO GET TO.

21               BUT HE SAYS -- FOR EXAMPLE, HE SAYS IF ONLY  
22      WE HAD KNOWN THAT, YOU KNOW, THE DCA APPLICATION OR THE  
23      DCA ENDORSEMENTS WERE WITHDRAWN, THIS WHOLE THING WOULD  
24      HAVE COME OUT DIFFERENTLY.  WELL, IN 2010 WHEN THE  
25      AFRICAN UNION SUBMITTED THEIR SUPPOSED, YOU KNOW,  
26      REVOCATION OF THE ENDORSEMENT, IT WAS COPIED TO ICANN.  
27      THAT WAS FOUR YEARS BEFORE THE EVALUATION, THE  
28      APPLICATION THAT DCA SUBMITTED.  IT DIDN'T INCLUDE THE

1 WITHDRAWAL LETTER, BUT IT INCLUDED A REFERENCE TO THE  
2 EXISTENCE OF THE WITHDRAWAL LETTER. SO IT WOULD HAVE  
3 BEEN EASY FOR ANYBODY TO ASK ABOUT IT IF THEY HAD ANY  
4 SORT OF QUESTION.

5 SO THERE WAS NO MYSTERY. THERE WAS NO  
6 MISREPRESENTATION. THERE WAS NO HIDING THE BALL ABOUT  
7 THIS SUPPOSED WITHDRAWAL. MY CLIENT TOOK THE POSITION  
8 FROM THE OUTSET THAT THIS WITHDRAWAL WAS NOT VALID FOR A  
9 BUNCH OF REASONS THAT ARE SET FORTH IN THE PAPERS.

10 BUT THE NOTION THAT ICANN SOMEHOW DIDN'T  
11 KNOW ABOUT THIS AND STILL, YOU KNOW, PROCESS THE  
12 APPLICATION FOR MULTIPLE YEARS BELIEVING THAT -- YOU  
13 KNOW, THAT THERE HAD BEEN NO WITHDRAWAL, FRANKLY, ISN'T  
14 VERY CREDIBLE.

15 MR. MCFADDEN ALSO GOES ON TO SAY IN HIS  
16 DECLARATION -- HE SAYS, LOOK, THESE LAWYERS WEREN'T EVEN  
17 CLOSE. DCA'S LETTERS, I MEAN, THEY JUST -- THEY FAILED  
18 ACROSS THE BOARD, I MEAN, NOT EVEN ANYWHERE IN THE  
19 VICINITY OF WHAT WE NEED TO PASS, RIGHT.

20 WELL, IF YOU ACTUALLY LOOK AT THEIR  
21 EXTENDED EVALUATION QUESTIONS, THERE IS FOUR CRITERIA  
22 THAT THE ENDORSEMENT LETTERS HAVE TO MEET. THEY MET  
23 CRITERIA NO. 1, WHICH THEY ADMIT. THEY ADMIT -- CRITERIA  
24 NO. 2, THEY ADMIT. THEY ADMIT CRITERIA NO. 3, WHICH THEY  
25 ADMIT. THOSE ARE ALL FRAMED AS MUSTS, AS YOUR HONOR  
26 RECOGNIZED. THOSE THREE REQUIREMENTS ARE ALL MUST  
27 REQUIREMENTS, MET THEM ALL.

28 THE ONLY ONE THAT THEY'RE HANGING THEIR HAT

1 ON IS THE CRITERIA NO. 4, WHICH IS FRAMED AS A "SHOULD";  
2 SO IT'S DISCRETIONARY, AS YOUR HONOR RECOGNIZED. AND  
3 WITH RESPECT TO THAT "SHOULD" REQUIREMENT, IT'S PRETTY  
4 EASY TO INFER FROM THE REST OF THE LANGUAGE OF THE  
5 ENDORSEMENT LETTERS, I THINK YOUR TENTATIVE SETS OUT,  
6 THAT THE CRUX OF IT, WHAT YOU ARE GETTING AT IN CRITERIA  
7 NO. 4, IS MET BY THE REMAINING LANGUAGE IN THE  
8 ENDORSEMENT LETTER.

9 SO, FRANKLY, MCFADDEN COMING OUT, YOU KNOW,  
10 IN A SITUATION WHERE WE'RE NOT ABLE TO DEPOSE HIM AND  
11 SAYING, YOU KNOW, THESE THINGS THAT, FRANKLY, AREN'T VERY  
12 -- I DON'T THINK ARE VERY CREDIBLE BASED ON THE RECORD  
13 BEFORE US, THE NOTION THAT HIS DECLARATION SOMEHOW MAKES  
14 CLEAR THAT, YOU KNOW, THE DCA APPLICATION, YOU KNOW, WAS  
15 DOOMED TO FAILURE FROM THE OUTSET, I THINK IS JUST -- YOU  
16 KNOW, I THINK IS JUST FLATLY WRONG.

17 YOU KNOW, AND LIKE I SAID, I WOULD SUBMIT  
18 TO YOU THEY'RE READING CAUSE OF ACTION NO. 9 TOO  
19 NARROWLY. ALL THAT'S GOING TO HAPPEN -- I MEAN, IF YOUR  
20 HONOR ACCEPTS THAT READING, WHICH I DON'T THINK IS THE  
21 RIGHT ONE, ALL THAT'S GOING TO HAPPEN IS WE'RE GOING TO  
22 BE BACK HERE IN A WEEK OR TWO WEEKS WITH A TRO UNDER A  
23 DIFFERENT CAUSE OF ACTION.

24 SO IF YOUR HONOR IS FUNDAMENTALLY PERSUADED  
25 THAT WE'VE PRESENTED A SUFFICIENT CASE THAT THE  
26 APPLICATION WAS DENIED ON A PRETEXTUAL BASIS, I DON'T  
27 THINK WE SHOULD BE GETTING HUNG UP ON, YOU KNOW, THE  
28 FOCUS ON CAUSE OF ACTION NO. 9 IN TRYING TO READ IT SUPER

1 NARROWLY BECAUSE, FRANKLY, WE COULD BRING THE EXACT SAME  
2 ARGUMENT UNDER A DIFFERENT CAUSE OF ACTION. WE DID IT  
3 UNDER NINE, THE SIMPLEST ONE TO DO.

4 THE COURT: WHAT DO YOU SAY ABOUT THAT?

5 MR. LEVEE: LET ME ADDRESS THAT FIRST. THE  
6 COMPLAINT CONTAINS A LOT OF CAUSES OF ACTION. BY FAR THE  
7 WEAKEST CAUSES OF ACTION ARE THE CAUSE OF ACTION  
8 INVOLVING FRAUD. I DON'T KNOW THAT I WANT TO TAKE YOU  
9 THROUGH IT AT THIS POINT, BUT THE FRAUD THAT IS ALLEGED  
10 IS MYTHICAL, DIDN'T HAPPEN. AND IF WE WERE LITIGATING  
11 THE FRAUD CAUSE OF ACTION UNDER A TRO OR PRELIMINARY  
12 INJUNCTION, WE'D HAVE A WHOLE DIFFERENT SET OF EVIDENCE  
13 BEFORE THE COURT.

14 I GAVE THE COURT NINTH CAUSE OF ACTION. I  
15 READ IT TO THE COURT. I REALIZE I DIDN'T INCLUDE  
16 PARAGRAPH 125, THE LAST PARAGRAPH, WHICH, AGAIN, SAYS:

17 "PLAINTIFF IS ENTITLED TO AN  
18 INJUNCTION REQUIRING ICANN TO ABIDE BY THE  
19 IRP RULING."

20 WE DID. WE ABIDED BY THE IRP RULING BY  
21 GOING THROUGH THE GEOGRAPHIC NAMES REVIEW AND NOT BY  
22 GIVING DCA A PASS. SKIP THE WHOLE QUESTION OF WHETHER IT  
23 HAS SUPPORT OF THE AFRICAN CONTINENT, WHICH IS -- TO  
24 ICANN WOULD MAKE NO SENSE, AND THE IRP PANEL NEVER  
25 ORDERED IT AS HIS CLIENT AGREED IN DEPOSITION. YES, THIS  
26 COMPLAINT DOES HAVE A CAUSE OF ACTION FOR FRAUD, BUT WHEN  
27 YOU READ THE NINTH CAUSE OF ACTION, THERE IS NO ALLUSIONS  
28 TO IT. YEAH, THEY INCORPORATE EVERYTHING ELSE BY

# **EXHIBIT K**



**AFRICAN UNION COMMISSION**  
Deputy Chairperson

REC/0017.223/10

16<sup>th</sup> April 2010

Dear Madam,

Referring to my letter BC/Y/727/08.09 sent to you on the 27<sup>th</sup> of August 2009 related to the above subject, I would like to inform you that following consultations with relevant stakeholders, the African Union Commission has reconsidered its approach in implementing the subject Internet Domain Name (DotAfrica) and no longer endorses individual initiatives in this matter related to continental resource.

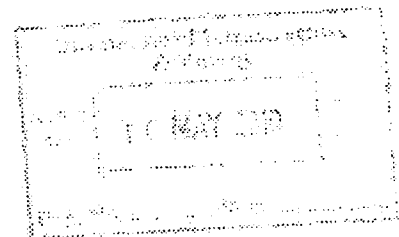
In coordination with the Member States and with relevant international organization such as ICANN, the Commission will go through open process that certainly will involve the private sector.

Please accept, Ms. Bekele, the assurances of my best consideration.

**Erastus J.O. Mwencha**  
Deputy Chairperson  
African Union Commission

To:  
Sophia Bekele  
United States of America  
Fax: (925) 835 1589,  
(251 11) 662 6909

Copy:  
Internet Corporation for Assigned Names and Numbers (ICANN)  
Marina del Rey, CA, USA  
4676 Admiralty Way, Suite 330  
Marina del Rey, CA 90292-6601  
United States of America  
Fax: +1.310.823.8649



# **EXHIBIT L**



Ref: dotafrica/2010/17/10

Africa's map in the digital inclusion!

17 April 2010

H.E. Jean Ping  
Chairperson of the African Union Commission  
African Union, Addis Ababa, Ethiopia

RE: The "Africa" initiative

Your Excellency,

Following your esteemed endorsement letter in 27 August 2009 ref: BC/Y/727/ 08.09, for our organization, we have made a significant commitment promoting the dotafrica initiative across the continent. The feedback and support we have received has been truly overwhelming.

Also in reference to the letter from your Deputy, Mr. Mwencha, dated 16 April 2010, we fully support the open process and we are quite confident based on our due diligence to date, to be one of the leading contenders.

Sincerely,

*Sbekele*

Sophia Bekele  
Executive Director  
Former Policy Advisor to ICANN  
DotConnectAfrica (DCA)  
[www.dotconnectafrica.org](http://www.dotconnectafrica.org)  
1/F River Court, 6 St Denis Street, Port Louis, Mauritius  
Fax: 230 208 9033, Tel: 230 208 9022

Cc: Internet Corporation for Assigned Names & Numbers  
Marina Del Ray, CA, USA  
4676 Admiralty Way, Suite 330  
Marina Del Ray, CA, 90292-6601  
United States of America, Fax: +1.310.823.8649

# **EXHIBIT M**



Africa's map in the digital inclusion!

Ref: dotafrica/2011/01/26

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26 January 2011

H.E. Monsieur Jean Ping  
Honourable Chairperson of the African Union Commission  
AU Commission Headquarters  
P. O. Box 3243  
Addis Ababa, Ethiopia

H.E. Mr. Abdoulie Janneh  
United Nations Under-Secretary General and  
Executive Secretary of the  
United Nations Economic Commission for Africa (UNECA)  
P. O. Box 3005  
Addis Ababa, Ethiopia

Your Excellencies,

**Subject: A Note of Official Complaint Regarding Certain Influence-Peddling Activities Being Perpetrated Against DotConnectAfrica (DCA) Organization, and Wrongful Withdrawal of Endorsement Letter Granted to DCA on account of Willful Negative Manipulation Against Our Efforts by Our Detractors**

We have decided to jointly address this Note to Your Excellencies for joint action since we believe that the actual responsibility of implementing actionable programs and policies that pertain to the overall good and success of the New African project rests squarely on both of you, as the respective heads of two important organizations that have the specific mandate to develop Africa for Africans.

Our DCA has within the past year received endorsements from both the UNECA and the AU, however, the endorsement received from the AU has remained somewhat contentious. **From an article published in the ComputerWorld Kenya on-line magazine, we learn that the AU will be directly involved in the Dot Africa debate. (Please see attached for your immediate reference).**

The endorsement initially bestowed upon us by the AU Chairperson was unfairly withdrawn by a letter purportedly written and signed by the Deputy Chairperson of the AU, which, in our estimation, is not genuine, since it goes against every rule of administrative procedure and protocol for a letter signed by the Deputy Chairperson to countermand an earlier one granting a principled approval by the Chairperson, a present already bestowed by a higher authority. Therefore, we still believe that our original endorsement that was given by the AU Chairperson remains valid. As a direct consequence, we no longer give credence to the letter that was purportedly issued in the name of the Deputy

Chairperson, which to all practical intents and purposes was manipulated by our detractors simply to deny us our original endorsement letter, by copying ICANN whereas the original endorsement letter was never copied to ICANN by the AU.

Moreover, in addition to the obvious invidious machinations against our avowed interest, as per the article attached, it is also obvious that our opponents are now using the Ghanaian ICT Minister to manipulate the ICANN, hoping to use this to manipulate the official thinking of the AU in a certain direction. DCA is not happy with this shameless influence-peddling that is being perpetrated by our detractors. A copy of our official rejoinder to the Computerworld Kenya publication is attached herewith for your perusal.

To this end, DCA wants to bring to the attention of Your Excellencies, as respective heads of two important organizations, that there appear to be a nexus of conspiracy against DCA and its principal promoter Ms. Sophia Bekele with Ms. Aida Opoku-Mensah and Mr. Nii Quaynor, both Ghanaian nationals, at the center of it. Sadly, we feel that we have not been welcomed by Ms. Aida. So far, she hasn't shown much interest in and enthusiasm for our initiation for whatever reason as evidenced by her lack of action and support to move it forward even though she was entrusted to handle this noble cause a long time ago, since our first letter to her in 2006 ; to which now DCA realized she only gave lip service to the Executive offices for our support, when in truth has expected a different outcome. We appeal to ECA's Executive offices and urge Ms. Aida herself to pass on this assignment to somebody who could be more enthusiastic and more devoted to move it forward immediately. We think that Ms. Opoku-Mensah can no longer be trusted to act impartially for the benefit of all African stakeholders, in particular to this very important project for Africa, to serve the interests of her Ghanaian compatriot.

We find that first, our opponents initial manipulation that was aimed at using the Francophone element to project Pierre Dandjinou into the ICANN Board failed. Therefore, they are now using their 'supposed Plan B', which is to use the Ghanaians, to wit, Nii Quaynor, and Aida Opoku Mensah to manipulate the Ghanaian Minister of ICT into nudging the ICANN to behave in certain direction. **Only such persons in privileged position, would use this shameless influence peddling scheme to tilt something in their favor, as the "dotafrica.org" company has been registered to Nii Quaynor for their version of dotafrica.**

In this article which is written in flagrant disregard for journalism ethics and decorum, they have devised a scheme to thwart public opinion to their version of a dotafrica proposal claiming a "community" model, while making assertion that DCA's proposal is for self interest; to everyone's surprise after many public claims by the same group in the past, that DCA's proposal is a carbon copy of their own, which was found to be an empty accusation without merit. **Additionally, they have attempted to give the impression that AU should be the arbitrator instead of ICANN in selecting the dotafrica registry, against international rules and procedures.** This has been embarrassing at the international platforms of ICANN's stakeholders, with only the African continent asking for exception while other geographic name applicants to include Latin America and Caribbean which are following ICANN rules; certainly making nepotism and grandfathering an acceptable norm in Africa for choosing partnerships rather than respect for the rule of law.

From what we and observer see, **this group have done nothing on the ground on .africa that they could show as proof of their positive commitment; neither do they have any solid endorsements from any serious stakeholder, any institutional support or even community acceptance aside from their own clique; Therefore, their plan is to continue to sabotage our AU endorsement along with their 'friends' and 'secret cabal' within the AU and UNECA.** This is likened to a scenario that not only do they

want to steal the car that we have been driving, but also surreptitiously demanding a legal "right" to the key to the car without even knowing or demonstrating that they ever purchased a car or proving that they can properly drive a car; which only a legally-mandated authority can do, which in this case is ICANN.

Therefore, DCA condemns such dishonorable tactics and so should the leadership of the African Union and UNECA whose endorsement and support is being undermined by these special interest groups that continue to sabotage the serious work and arduous sacrifices of DCA. Hence, we would like the leadership to strongly caution them to cease and desist on all these unwholesome and highly unethical practices that are not helpful to the perpetrators of these crimes against DCA and to these two highly respected organizations. We thought we reasoned the wise course of action to bring these matters to bring your good offices to bear on the situation so as to stop their hatred and traducement campaign against DCA.

Finally, we need not overstress the point that these negative activities performed by our detractors only serve the cause of undermining the African Renaissance efforts being put in place, and the vision and hard work of leaders such as yourselves. It is therefore not too much for us to request your kind and earnest intervention to reassure us all that these people should not be allowed to continuously act with impunity simply to serve parochial interests, but that they could be called to account now that their willful manipulations have been uncovered.

We thank your Excellencies in kind anticipation, as we hope that the matters that we have raised in this communication will be addressed squarely so as to reassure us of the faith that we have put in the judicious resolution of this matter.

The DCA would like to use this opportunity to reassure you of its highest esteem and consideration.

Yours sincerely,

*Sbekele*

Ms. Sophia Bekele, B.S., M.B.A., C.I.S.A, C.C.S, CGEIT  
Ex. gTLD Policy Advisor to ICANN (2005-07)  
Ex. AISI advisor to UNECA  
Executive Director (.Africa)  
sbekele@dotconnectafrica.org  
[www.dotconnectafrica.org](http://www.dotconnectafrica.org)

Attach: Copy, ComputerWorld Kenya: "African Union Joins .Africa Debate"  
Copy, DCA Commentary to ComputerWorld Kenya , submitted and published on external media

cc: ICT Minister of Mauritius  
ICT Minister, Kenya  
Ministry of Foreign Affairs, Ethiopia  
Office of the CEO, ICANN Corp. USA

## Commentary by DCA: African Union and the .Africa debate

Our attention has been drawn to a recent article on [computerworld.co.ke](http://computerworld.co.ke) re: African Union and the .Africa debate, by staff writer Ms Rebecca Wanjiku who inadvertently revealed a rather disturbing influence-peddling activities coupled with evidence of abuse of office.

The article makes it quite evident that there is an attempt at high-profile influence peddling that pervades the on-going debate and 'fights' on how the management of the .Africa tld (Dot Africa Top Level Domain) should be handled between and amongst the contenders, and what role is expected of the African Union as one of the principal Pan-African organization. The article also attempts to give the public an impression that AU should be the arbitrator instead of ICANN in selecting the dotafrica registry, against international rules and procedures.

Following the recent rejection and failed electoral bid by a certain cabal to enable their own candidate Pierre Dandjinou (quoted in the article) gain a seat on the ICANN Board, this 'cabal' has again constituted itself into an influence-peddling ring which somehow managed to inveigle the Ghanaian ICT Minister to write to ICANN, simply with the intention of steering and/or manipulating the ICANN Leadership to behave in a certain manner. It is therefore important to ask some pertinent questions: "What or who pushed the Ghanaian ICT Minister to write to ICANN? What inspired him to write to ICANN to portray another contender in somewhat negative light? What further proof do we now need to reveal to one and all that the 'influence peddlers' have pushed a government Minister of Ghana to abuse his office? Why the overt involvement in a matter that is of no direct concern to the Government of Ghana? Does the Government of Ghana now speak for the African Union, as to warrant this unnecessary intervention, yet evidently willful manipulation that was simply aimed at pushing ICANN in a certain direction? How come only the Ghanaian ICT Minister and not the ICT Ministers of the rest countries of Africa wrote to ICANN? If all African ICT Ministers write to ICANN, and this important body gets pulled in different directions, how could ICANN function independently without undue interference in its affairs and internal policy-making machinery? The questions are indeed many.

Even though we are not pointing any accusing fingers at anyone, it is well-known that Nii Quaynor has high-profile friends and contacts within the Ghanaian Government and Ghanaian contacts in intergovernmental organizations, and that [dotafrica.org](http://dotafrica.org) which is registered to him is wanting to be other contender in the dotafrica bid. Additionally, Nii has recently in public email accused DCA of wanting to privatize the dotafrica TLD, to which the Ghanaian Minister seem to have implied in his letter to ICANN; This following another untruthful accusation Nii threw in the same public note, on plagiarism of dotafrica model from his own, as well as registration of "connectdotafrica.org" domain in 2007, stating "who is copying who" which is now proved to be bogus, an empty accusation without merit. The community has learned as of his accusation date that "connectdotafrica.org" was not registered to anyone, however DCA has now registered it to protect our domain portfolio from such empty claims so as not to confuse the public. Another question to ask here is, how come then the ICT Minister of Ghana did not raise the same concern of privatization and self interest to the other proposal? How does Nii's model inadvertently become a "community" model, Mr. Vika has referred to in the same article.

Therefore one would not be overtly speculative in deducing that those who have constituted themselves into a nexus of opposition against DCA now seem to have entangled themselves in a web of confusion, influence-peddling, and blatant abuse of office. We would therefore like to strongly urge ComputerWorld Kenya, to act in the spirit of investigative journalism to dig deeper into the matter and help uncover the underlying truths behind this entire saga. Stop this negative campaign of traducement against DCA.

### Now to the other issues we have with the report.

It is unbalanced, non-factual, and perhaps due to inexperience of the writer, and her apparent unjustifiable haste to go to press, she forgot to verify information from the AU, and also forgot to seek the opinion of alternate stakeholders so as to present a balanced, and factually-accurate report that adheres to the canons of journalistic integrity, ethical principles, sanctity of public information, and fairness to all parties.

Therefore, overall, even though the report was somehow presented unfairly in order to damage our corporate interests, we feel victorious and encouraged that our enduring moral position has been again bolstered and vindicated.

*Written By Thomas Kamanzki,*

## Africa Union joins .africa debate

Rebecca Wanjiku

16.12.2010 kl 14:48 | Computerworld Kenya

The African Union (AU) has expressed interest in playing a key role in selecting the operator for the .africa and .afrique generic Top Level Domains (gTLDs).

The .africa domain is expected to target companies with continental operations, just like .eu and .asia. The AU is hoping to represent governments' interest in the selection process, the way the European Union was involved in .eu.

Two weeks ago, Ghana's ICT minister sent a letter to ICANN indicating that .afrique and .africa discussions should involve the AU to avoid potential hijack for "private use."

Various entities have expressed interest in managing new gTLDs but critics question whether they are motivated by profit or by a genuine desire to increase domain-name uptake in the region.

"On one side is the self-serving commercial interest that some entities are already championing; these are entities that are in it purely for the money; on the other side is a community-serving commercial interest that most of the African internet community prefers," said Vika Mpisane, president of the Africa TLD organization (AfTLD).

"For the community model, the overall aim is to use the profits made from .africa domain name fees not to enrich an individual, but to grow and sustain the African internet community through various projects such as research and training," he added.

The debate about which entity should run .africa has been hinged on hopes that it will be a source of profit, like the business done by registries in developed countries. But the slow pace of Internet growth in Africa is likely to dent those hopes.

"Although there is such heated debate on .africa, I am not certain everyone understands the stakes so far," said Pierre Dandjinou, Executive Director, Strategic Consulting Group. "It is not primarily about big business, at least for the first years of operation, but about a projection of an African image and branding."

The .africa domain could help current country code TLDs, which have suffered from slow uptake, according to some industry insiders. "Most African TLDs lack an aggressive communication and marketing strategy," added Dandjinou, who is also a past chair of AfriNIC.

"A .africa registry could open up possibilities for capacity development for ccTLDs managers who could also be retailers for .africa." The new .africa domain may fare better than the ccTLDs simply because of the name, adds the AfTLD's Mpisane.

"There is a feeling amongst the African internet community that while a substantial lot of ccTLDs struggle with increasing registration uptake, the .africa domain will be more exciting for African brands and people as the name 'Africa' is naturally more recognizable than names of individual African country names," said Mpisane, who is also the general manager of the za Domain Name Authority in South Africa. While the debate on commercial and community interests has dominated the discussions, Mpisane and Dandjinou feel that the US\$185,000 application fee required is likely to lock out interested applicants from the region. There are discussions within ICANN to reduce the fee.

# **EXHIBIT N**



Ref: dotafrica/2011/11/30

Africa's map in the digital Inclusion!

30<sup>th</sup> December 2011

H.E. Ambassador John Shinkaiye  
Chief of Staff  
Bureau of the Chairperson  
African Union Commission Headquarters  
P. O. Box 3243,  
Addis Ababa, Ethiopia

Your Excellency Ambassador Shinkaiye,



**Subject: *DotConnectAfrica's Prior Endorsement for the ICANN DotAfrica generic Top Level Domain (.africa gTLD) and the new African Union Commission RFP for the Operation of DotAfrica***

We have been waiting patiently for the past several months to receive an official response from your office regarding the need to properly redress our wishes as conveyed at different times for the official reinstatement of our earlier endorsement received from the AU for the DotAfrica gTLD and registry.

A few months ago, we were led to believe after reading a copy of the 'Briefing Note on DotAfrica' prepared by the AU Infrastructure and Energy Department – Information Society Division that the African Union Commission intended to apply directly to the Internet Corporation for Assigned Names and Numbers (ICANN) for the new DotAfrica gTLD. Again, in recent weeks we have learnt that the African Union Commission no longer wishes to apply for DotAfrica, but has instead chosen to outsource the operation of DotAfrica to a Consortium based on the guidelines contained in the AU Request for Proposals (RFP) for the Operation of DotAfrica.

Even though DCA had received an endorsement from the AU as early as 2009 which we believe was valid at the time it was first given to us, and in subsequent months thereafter, the issues became very controversial after the AU was advised by our opponents to apply directly for the ownership of DotAfrica which caused the ill-fated unsuccessful attempt to withdraw our endorsement. Interestingly, although our opponents have also floated different proposals for the DotAfrica initiative at different times, they now insist that the DotAfrica geographical gTLD should be operated and run for the benefit of their 'African Internet Community'. It is now apparent that this intention of taking over the DotAfrica geographic TLD for community use and ownership is now being achieved by the means of the new AU-sponsored RFP for the Operation of DotAfrica.

Accordingly, we wish to inform our unwillingness to participate in the new AU RFP process based on the following reasons:

1. We are not convinced that the current process is transparent and accountable, since the reasons earlier given, that is, the AU will apply for DotAfrica is no longer the case. We believe that the sort of

'expert advice' received by the AU has been manipulated to cause the AU to shift its position to "no longer wanting to apply", thereby satisfying the exact wishes of a vested interest group which stands to benefit most should their preferred Consortium be selected based on the RFP process to apply directly for DotAfrica. We think that under the official auspices of the AU, this group is using the RFP process to legitimize its surreptitious hijack of DotAfrica aTLD under false pretences that is, as earlier mentioned taking over a geographic gTLD for community use and ownership.

2. In a situation where the members of the AU Task Force on DotAfrica also happen to be the so-called leaders of the African Internet Community, who have not only floated separate proposals of their own for DotAfrica, but have also wrongly argued that a geographic Top Level Domain should be community-owned and operated, we do not trust that the outcome of the present RFP will be favourable to DCA. We have repeatedly alleged that the people overseeing the current process have tried to undermine our initiative in order to stop us from applying to ICANN through various acts of sabotage of our endorsements, including with the Corporate Council on Africa (CCA).
3. We think that the outcome of the RFP process has been pre-determined, since the Task Force members will perform the evaluation and award to the preferred bidding Consortium that they have pre-selected through nepotism, thereby evaluating and awarding to themselves. Participating in the new RFP process will provide our opponents the opportunity to further victimize DCA.
4. We believe that the time specified within the RFP from the date of submission of responses (8<sup>th</sup> December 2011) to when a winner will be announced (15<sup>th</sup> December 2011) is simply too short for any meaningful evaluation to be done; and given that a similar evaluation exercise by ICANN as detailed in the gTLD Applicant's Guidebook will take up to 5 months, this again suggests to us that the outcome of the RFP process is already pre-determined.
5. Finally, we believe that the process of applying for the DotAfrica geographical gTLD belongs to ICANN, and the RFP is an extraordinary process that allows the Task Force members to receive in advance, details of our bid strategy and other confidential corporate information before we submit our application to ICANN.

In conclusion, we think that it would be good for the AU Leadership to do what is right and just in the present circumstances, redress our case satisfactorily, and reinstate our endorsement to enable us go ahead with our application to ICANN.

DCA believes that the ICANN process alone should be used to determine who should be awarded the mandate for the operation of DotAfrica geographic Top Level Domain and the registry.

Thanking you in anticipation as we look forward to hearing from you.

Yours sincerely,

*Sbekele*

Ms. Sophia Bekele, B.S., M.B.A., C.I.S.A, C.C.S, CGEIT

Executive Director (.Africa)

DotConnectAfrica (DCA)

Ex. gTLD Policy Advisor to ICANN (2005-07)

Ex. AISI advisor to UNECA

[sbekele@dotconnectafrica.org](mailto:sbekele@dotconnectafrica.org)

[www.dotconnectafrica.org](http://www.dotconnectafrica.org)

cc: H. E. Monsieur J. Ping, Chairperson, AU Commission, Addis Ababa, Ethiopia  
H. E. Mr. Abdoulie Jannah, Executive Secretary, UNECA, Addis Ababa, Ethiopia  
Mr. Stephen Hayes, Corporate Council on Africa, Washington DC, USA

# **EXHIBIT O**



Date: 20 July 2015  
Ref: OES/15/09/0157)

Dear Dr. Ibrahim

Re: Request for Support to Dot Africa Project

I am writing in connection with the request made to the Executive Secretary, Dr. Lopes for his support to the African Union's (AU") efforts in getting the regional identifier top level domain "dotAfrica" delegated to ZA Central Registry ("ZACR"), the entity we understand is authorized by the AU to apply for and administer the DotAfrica top level domain.

I understand from your letter that in addition to ZACR, another competing entity, DotConnectAfrica ("DCA") has submitted an application to obtain the same delegation as ZACR, and that DCA is purporting to use a letter of support obtained from ECA in 2008 as an endorsement from ECA for its application.

We also note that in September 2011, ECA wrote to you in response to a letter you sent regarding the setting up of the structure and modalities for the implementation of the DotAfrica project and in that letter, ECA reaffirmed its continued commitment and support to the AU in the management of Internet-based resources in Africa.

As you are aware, one of ICANN's requirement for the application for delegation for geographic Top Level Domain ("gTLD") as detailed in ICANN's 2012 Applicant Guidebook, is a minimum of 60% support from *relevant governments or public authorities*, with no more than one government objection from any country from the region.

ECA as United Nations entity is neither a government nor a public authority and therefore is not qualified to issue a letter of support for a prospective applicant in support of their application. In addition, ECA does not have a mandate to represent the views or convey the support or otherwise of African governments in matters relating to application for delegation of the gTLD.

Dr. Elhan M.A. Ibrahim  
Commissioner  
Infrastructure and Energy  
African Union  
Addis Ababa

P.O. Box 5001, Addis Ababa, Ethiopia Tel: (251-11) 551 72 00 Fax: (251-11) 551 4418



United Nations  
Economic Commission for Africa

In this regard, the August 2008 letter referenced above is merely expressions of a view in relation to the entity's initiatives and efforts regarding internet governance, including efforts to obtain gTLD for Africa. It is ECA's position that the August 2008 letter to Ms Bekele cannot be properly considered as a "letter of support or endorsement:" within the context of ICANN's requirements and cannot be used as such.

I hope this clarifies ECA's position on the matter. Please feel free to contact me if you need any further clarification on tel: 0115443378 or [sbaffoe-bonnie@unece.org](mailto:sbaffoe-bonnie@unece.org)

Yours sincerely,

Sandra Baffoe-Bonnie  
Secretary of the Commission and Legal Advisor

Cc: Ms Sophia Bekele, DotConnectAfrica

# **EXHIBIT P**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

Case No. CV 16-5505 PA (ASx) Date November 28, 2016  
Title Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

**Proceedings:** IN CHAMBERS — COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) (Docket No. 30). ICANN challenges the sufficiency of the First Amended Complaint (“FAC”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Also before the Court is a Motion to Take Third Party Discovery or, in the Alternative, for the Court to Issue a Scheduling Order (“Motion to Begin Discovery”) filed by Plaintiff (Docket No. 32). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for November 28, 2016, is vacated, and the matters taken off calendar.

**I. Factual and Procedural Background**

Plaintiff filed its original Complaint on July 22, 2016. In its Complaint, and an accompanying Ex Parte Application for Temporary Restraining Order, Plaintiff sought to temporarily enjoin ICANN from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. According to the original Complaint, Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures required all of the applicants, in what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they could not do so, ICANN would conduct an auction and award the rights to operate the registry to the winning bidder.

According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) was unwilling to informally resolve the competing claims and instead insisted on proceeding to an auction. Plaintiff alleged in its original Complaint that NDC experienced a change in its management and ownership after it submitted its application to ICANN but that NDC did not provide ICANN with updated information as required by ICANN’s application requirements. On June 22, 2016, Plaintiff requested that ICANN conduct an investigation regarding the discrepancies in NDC’s application and postpone the auction. At least one other applicant

Exhibit P

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 16-5505 PA (ASx)

Date November 28, 2016

Title Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

seeking to operate the .web registry also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff's original Complaint asserted claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. The Court denied Plaintiff's Ex Parte Application for Temporary Restraining Order on July 26, 2016, and the auction went forward. Plaintiff filed its FAC on August 8, 2016.

According to the FAC, NDC submitted the winning bid in the amount of \$135 million at the auction. After NDC won the auction, a third-party, VeriSign, Inc. ("VeriSign"), which is the registry operator for the .com and .net gTLDs, announced that it had provided the funds for NDC's bid for the .web gTLD and that it would become the registry operator for the .web gTLD once NDC executes the .web registry agreement with ICANN and, with ICANN's consent, assigns its rights to operate the .web registry to VeriSign.

The FAC asserts the same five claims contained in the original Complaint. Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN's bylaws, Articles of Incorporation, and the ICANN Applicant Guidebook stating, for instance, that ICANN will make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," that ICANN will remain "accountable to the Internet community through mechanisms that enhance ICANN's effectiveness," and that no contention set will proceed to auction unless there is "no pending ICANN accountability mechanism." Plaintiff's unfair competition and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of

Exhibit P

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

Case No. CV 16-5505 PA (ASx)

Date November 28, 2016

Title Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION, APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

(FAC ¶ 21, Ex. C § 6.6 (capitalization in original).)

In its Motion to Dismiss, ICANN contends that the FAC fails to state any viable claims because Plaintiff has not plausibly alleged any breaches of ICANN's auction rules, Bylaws, and Articles of Incorporation. ICANN additionally asserts that the covenant not to sue bars all of Plaintiff's claims and that the FAC should be dismissed because Plaintiff has failed to join NDC as an indispensable party. Plaintiff's Motion to Begin Discovery seeks permission to propound third-party discovery directed to NDC and VeriSign prior to the parties participating in the Federal Rule of Civil Procedure 26(f) conference.

## II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the

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Federal Rules allow a court to dismiss a cause of action for “failure to state a claim upon which relief can be granted,” they also require all pleadings to be “construed so as to do justice.” Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 248–49 (9th Cir. 1997) (“The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.”) (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that “a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery.” Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a “plausibility standard,” in which the complaint must “raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction].” Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”) (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) (“All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.”) (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555, 127 S. Ct. at 1964–65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

### III. Analysis

ICANN seeks dismissal of the FAC based on, among other things, the covenant not to sue contained in the Application Guidebook. Plaintiff, however, claims that the covenant not to sue

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is unenforceable because it is void under California law and both procedurally and substantively unconscionable. Specifically, according to Plaintiff, the covenant not to sue violates California Civil Code section 1668, which provides: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code § 1668. Section 1668 “[o]rdinarily . . . invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence. Furthermore, the statute prohibits contractual releases of future liability for ordinary negligence when ‘the ‘public interest’ is involved or . . . a statute expressly forbids it.” Frittelli, Inc. V. 350 North Canon Drive, LP, 202 Cal. App. 4th 35, 43, 135 Cal. Rptr. 3d 761, 769 (2011) (quoting Farnham v. Superior Court, 60 Cal. App. 4th 69, 74, 70 Cal. Rptr. 2d 85, 88 (1997)). “Whether an exculpatory clause ‘covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.” Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066, 20 Cal. Rptr. 3d 562, 570 (2004) (quoting Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 456 (1975)).

The FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence. Nor does Plaintiff allege that ICANN has willfully or negligently violated a law or harmed the public interest through its administration of the gTLD auction process for .web. Nor is the covenant not to sue as broad as Plaintiff argues. Instead, the covenant not to sue applies to:

[A]ll claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application.

(FAC ¶ 21, Ex. C § 6.6.) Because the covenant not to sue only applies to claims related to ICANN’s processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which California Civil Code section 1668 applies. See Burnett, 123 Cal. App. 4th at 1066, 20 Cal. Rptr. 3d at 570. Additionally, the covenant not to sue does not leave Plaintiff

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without remedies. Plaintiff may still utilize the accountability mechanisms contained in ICANN's Bylaws. (See FAC ¶ 21, Ex. C § 6.6.) According to the FAC, these accountability mechanisms include "an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." (FAC ¶ 23.) Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue.<sup>1/</sup>

Plaintiff also contends that the covenant not to sue is both procedurally and substantively unconscionable. Under California law, the "party challenging the validity of a contract or a contractual provision bears the burden of proving [both procedural and substantive] unconscionability." Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1347, 182 Cal. Rptr. 3d 235, 247-48 (2015). "The elements of procedural and substantive unconscionability need not be present to the same degree because they are evaluated on a sliding scale. Consequently, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude the term is unenforceable, and vice versa." Id., 182 Cal. Rptr. 3d at 248.

"The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." Id. at 1347-48, 182 Cal. Rptr. 3d at 248. For purposes of procedural unconscionability, "California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. . . . In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." Id. at 1348, 182 Cal. Rptr. 3d at 249. Importantly, "showing a contract is one of adhesion does not always establish procedural unconscionability." Id. at n.9. In the absence of an adhesion contract, the "circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." Id., 182 Cal. Rptr. 3d at 248-49.

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<sup>1/</sup> The Court does not find persuasive the preliminary analysis concerning the enforceability of the covenant not to sue conducted by the court in DotConnectAfrica Trust v. ICANN, Case No. 2:16-cv-862 RGK (JCx) (C.D. Cal. Apr. 12, 2016).

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Here, even if the covenant not to sue contained in the Application Guidebook is a contract of adhesion, the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook “is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period,” militates against a conclusion that the covenant not to sue is procedurally unconscionable. (FAC ¶ 21, Ex. C, p. 1-2 (“Introduction to the gTLD Application Process”).) ICANN is a non-profit entity that, according to the FAC, “is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation . . . .” (FAC ¶¶ 10 & 13.) Plaintiff, for its part, is a sophisticated entity that paid a \$185,000 application fee to participate in the application process for the .web gTLD. (FAC ¶ 1.) Under the totality of these circumstances, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable.

“Substantive unconscionability is not susceptible of precise definition. It appears the various descriptions—unduly oppressive, overly harsh, so one-sided as to shock the conscience, and unreasonably favorable to the more powerful party—all reflect the same standard.” Grand Prospect Partners, 232 Cal. App. 4th at 1349, 182 Cal. Rptr. 3d at 249 (citations omitted). “[U]nconscionability turns not only on a ‘one sided’ result, but also on an absence of ‘justification’ for it.” Walnut Producers of Cal. v. Diamond Foods, Inc., 187 Cal. App. 4th 634, 647, 114 Cal. Rptr. 3d 449, 459 (2010) (quoting A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982)).

Plaintiff contends that the covenant not to sue is substantively unconscionable because of the one-sided limitation on an applicant’s ability to sue ICANN without limiting ICANN’s ability to sue an applicant. Plaintiff additionally asserts that the issue of the substantive unconscionability of the covenant not to sue is not susceptible to resolution at this stage of the proceedings because the FAC does not allege any facts providing a justification for ICANN’s inclusion of the covenant not to sue in the Application Guidebook. The Court disagrees. The nature of the relationship between applicants such as Plaintiff and ICANN, and the justification for the inclusion of the covenant not to sue, is apparent from the facts alleged in the FAC and the FAC’s incorporation by reference of the Application Guidebook. Without the covenant not to sue, any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue. As a result, the Court concludes that the covenant not to sue is not substantively unconscionable.

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**Conclusion**

For all of the foregoing reasons, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to California Civil Code section 1668. Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with prejudice. The Court declines to address the additional arguments contained in ICANN's Motion to Dismiss. Plaintiff's Motion to Begin Discovery is denied as moot. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

1 **PROOF OF SERVICE**

2 I, Diane Sanchez, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On January 20,  
6 2017, I served a copy of the within document(s):

7 **DECLARATION OF JEFFREY LEVEE IN SUPPORT OF ICANN'S OPPOSITION TO**  
8 **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

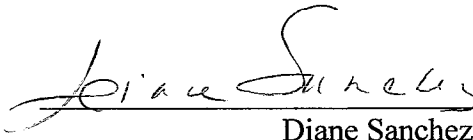
- 9  by placing the document(s) listed above in a sealed envelope with postage thereon  
10 fully prepaid, in the United States mail at Los Angeles, California addressed as set  
11 forth below.
- 12  by placing the document(s) listed above in a sealed Federal Express envelope and  
13 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery  
14 Service agent for delivery.
- 15  by personally delivering the document(s) listed above to the person(s) at the  
16 address(es) set forth below.
- 17  by transmitting via e-mail or electronic transmission the document(s) listed above  
18 to the person(s) at the e-mail address(es) set forth below.

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22 I declare that I am employed in the office of a member of the bar of this court at whose  
23 direction the service was made.

24 Executed on January 20, 2017, at Los Angeles, California.

25   
26 \_\_\_\_\_  
27 Diane Sanchez

28 NAI-1501037652v2