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NAMES AND NUMBERS

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

11
12 DOTCONNECTAFRICA TRUST,

13 Plaintiff,

14 v.

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

17 Defendants.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

**ICANN'S STATEMENT OF
UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

[Notice of Motion and Motion,
Memorandum of Points and Authorities,
Declaration of Jeffrey A. LeVee, and
[Proposed] Order Filed Concurrently
Herewith]

Date: August 9, 2017

Time: 8:30 a.m.

Dept: 53

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

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STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to California Code of Civil Procedure Section 437c(b) and California Rule of Court 3.1350(d), Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits the following statement of undisputed material facts, together with references to supporting evidence, in support of its Motion for Summary Judgment ("Motion") against Plaintiff DotConnectAfrica Trust ("DCA").

ICANN submits this Statement of Undisputed Material Facts for purposes of the Motion only. References herein to Plaintiffs' allegations and positions in this action are not to be construed as an admission by ICANN of the truth of any such allegation or position.

ISSUE 1: The Covenant Bars DCA's Entire Complaint

	Moving Party's Undisputed Material Facts and Supporting Evidence	Opposing Party's Response and Supporting Evidence
1.	DCA applied for .AFRICA through the "New gTLD Program," which ICANN launched in 2012. <i>Declaration of Akram Atallah ("Atallah Decl."), ¶ 4 (Ex. D to LeVee Decl.); FAC ¶ 21).</i>	
2.	In connection with the New gTLD Program, ICANN also published the Guidebook, which dictates the requirements for New gTLD applications to be approved, and the criteria by which they are evaluated. <i>Declaration of Christine Willett ("Willett Decl."), ¶ 2 (Ex. C to LeVee Decl.); FAC ¶ 22.</i>	

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3.	<p>In order to submit an application for a new gTLD, each applicant was required to agree to be bound by the terms and conditions set forth in the Guidebook:</p> <p>By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.</p> <p><i>Willett Decl. ¶ 3 (Ex. C to LeVee Decl.); New gTLD Applicant Guidebook ("Guidebook") § 6 (Ex. B to LeVee Decl.).</i></p>	
4.	<p>DCA admitted that, by submitting its application for .AFRICA, DCA was agreeing to be bound by terms of the Guidebook.</p> <p><i>December 1, 2016 Deposition of Sophia Bekele ("Bekele Dep.") 17:18-20, 24:3-7. (Ex. A to LeVee Decl.)</i></p>	

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5.	<p>Module 6 of the Guidebook contains the Covenant Not To Sue ("Covenant"), which bars lawsuits against ICANN arising out of its evaluation of new gTLD applications:</p> <p>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 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. . . .</p> <p><i>Guidebook Module § 6.6 (Ex. B to LeVee Decl.).</i></p>	
6.	<p>Module 6 also makes clear that ICANN has the absolute discretion to "determine not to proceed with any and all applications for new gTLDs."</p> <p><i>Guidebook Module § 6.3 (Ex. B to LeVee Decl.).</i></p>	

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7.	<p>DCA's First Amended Complaint ("FAC") contains a total of ten causes of action against ICANN: breach of contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, and four claims for declaratory relief.</p> <p><i>FAC ¶¶ 62-107, 115-142.</i></p>	
8.	<p>DCA's first claim against ICANN, for breach of contract, is based on DCA's allegation that ICANN failed to "review Plaintiff's .AFRICA application in accordance with ICANN's Bylaws, Articles of Incorporation, and the new gTLD rules and procedures"</p> <p><i>FAC ¶ 68; see also generally ¶¶ 63-71.</i></p>	
9.	<p>DCA's second and third claims, for intentional and negligent misrepresentation, are based on DCA's allegation that "ICANN represented to Plaintiff that Plaintiff's application for .AFRICA would be reviewed in accordance with ICANN's Bylaws, Articles of Incorporation, and the new gTLD [rules and procedures]."</p> <p><i>FAC ¶¶ 74, 80; see also generally ¶¶ 75-79, 81.</i></p>	
10.	<p>DCA's fourth claim, for fraud and conspiracy to commit fraud, is based on the allegation that, in lieu of properly reviewing DCA's application, ICANN conspired to "improperly deny[] Plaintiff's application" and improperly accepted a competing application for .AFRICA.</p> <p><i>FAC ¶¶ 84-85; see also generally ¶¶ 86-93.</i></p>	
11.	<p>DCA's fifth claim, for unfair competition, is based on the same allegations underlying its first four claims.</p> <p><i>FAC ¶¶ 96,97.</i></p>	

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12.	DCA's sixth claim, for negligence, is based on ICANN's alleged "duty to act with proper care in processing Plaintiff's application," including an alleged duty to investigate the GAC's advice concerning DCA's application and an alleged duty not to consider or move forward with the competing application for .AFRICA. <i>FAC ¶¶ 101-07.</i>	
13.	DCA's complaint contains four claims for declaratory relief. In the first claim for declaratory relief (the eighth cause of action), DCA asks the Court: to "confirm" the IRP Declaration (which dealt with the processing of DCA's application). <i>FAC ¶118.</i>	
14.	DCA's second claim for declaratory relief (the ninth cause of action) asks the Court to require ICANN to "follow the IRP Declaration and allow [DCA's] application to proceed through the delegation phase of the application process." <i>FAC ¶124; see also generally ¶¶ 120-123.</i>	
15.	DCA's third claim for declaratory relief (the tenth cause of action) seeks a judicial declaration "that the registry agreement between ZACR and ICANN [is] null and void and that ZACR's application does not meet ICANN standards." <i>FAC ¶132; see also generally ¶¶ 127-129.</i>	
16.	DCA's fourth claim for declaratory relief (the eleventh cause of action) relates to the Covenant at issue in this motion, and seeks a judicial declaration that "the covenant not to sue is unenforceable, unconscionable, procured by fraud and/or void as a matter of law and public policy." <i>FAC ¶142; see also generally ¶¶ 134-140.</i>	

ISSUE 2: The Covenant Is Enforceable

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Moving Party's Undisputed Material Facts and Supporting Evidence	Opposing Party's Response and Supporting Evidence
Section 1668 Does Not Apply To The Covenant	
<p>17. The Covenant explicitly provides for the use of alternative dispute resolution mechanisms, referred to as accountability mechanisms in ICANN's Bylaws and Guidebook: "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." <i>Guidebook Module 6 § 6 (Ex. B to LeVee Dec.); see also FAC ¶ 138 (DCA's complaint admits the Covenant explicitly provides for the use of alternate dispute resolution mechanisms).</i></p>	
<p>18. Any applicant may invoke the various accountability mechanisms provided for in ICANN's Bylaws; ICANN is therefore not exempt from responsibility. <i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.).</i></p>	

The Covenant Is Not Procedurally Unconscionable

19. DCA is a sophisticated entity, one that claims to possess the significant technical and financial wherewithal required to operate a gTLD registry on behalf of an entire continent. DCA’s CEO has also been “active in the DNS” industry, has an MBA, and has worked for banks and auditors.

Guidebook Module 2 at 47-48 (§ 2.2.2.1; 2.2.2.2) (applicants for gTLDs are required to demonstrate that they are stable business entities that have the significant technical and financial wherewithal required to operate a gTLD registry) (Ex. B to LeVee Decl.); Willett Decl. ¶ 4 (Ex. C to LeVee Decl.); Bekele IRP Decl. ¶¶ 4-11 (Ex. H to LeVee Decl.).

20. The Guidebook was developed over many years, during which numerous versions were published for public comment beginning in late 2008.

Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).

21. DCA participated in the development of the Guidebook: its CEO was actively involved in the ICANN community beginning in 2005, and she helped to “formulat[e] the rules and requirements” for the New gTLD Program, including submitting public comments on drafts of the Guidebook.

Bekele IRP Decl. ¶ 13 (Ex. H to LeVee Decl.); Bekele Dep. 17:3-20, 23:2-24:2 (Ex. A to LeVee Decl.).

22. The Covenant was highlighted through capitalization and formatting in the Guidebook.

Guidebook Module 6 § 6 (Ex. B to LeVee Decl.); Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).

1	23.	DCA admits it was aware of the Covenant when it applied for .AFRICA.	
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3		<i>Bekele Dep. 16:8-11; 17:12-20 (Ex. A to LeVee Decl.).</i>	
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5	The Covenant Is Not Substantively Unconscionable		
6	24.	Although the Covenant bars lawsuits against ICANN, ICANN's Bylaws provide alternative dispute resolution mechanisms (often referred to as "accountability mechanisms") to ensure that ICANN operates in accordance with its Articles and Bylaws.	
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10		<i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); ICANN's Bylaws, as modified 8 December 2011 ("Bylaws") (Arts. IV, V) (Ex. M to LeVee Decl.).</i>	
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12	25.	The Covenant explicitly provides that applicants "may utilize any accountability mechanism set forth in ICANN's Bylaws" to challenge decisions made by ICANN with respect to a new gTLD application.	
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16		<i>Guidebook Module 6 § 6 (Ex. B to LeVee Dec).</i>	
17	26.	One "accountability mechanism" provided for in the Bylaws is that applicants can request reconsideration of any action or inaction by the ICANN staff or Board, which is referred to as a Reconsideration Request.	
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21		<i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); Bylaws (Arts. IV, V) (Ex. M to LeVee Decl.).</i>	
22	27.	Another available "accountability mechanism" is that an aggrieved applicant can ask independent panelists to evaluate whether an action or inaction of ICANN's Board was inconsistent with ICANN's Articles and Bylaws, which is referred to as an Independent Review Process ("IRP").	
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27		<i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); Bylaws (Art. IV, § 2) (Ex. M to LeVee Decl.).</i>	
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28.	<p>A new gTLD applicant can also use an IRP to challenge whether the ICANN Board violated the Bylaws by acting on its application.</p> <p><i>Guidebook Module § 6.6 (Ex. B to LeVee Decl.).</i></p>	
29.	<p>When ICANN's Board accepted the GAC advice, and stopped the processing of DCA's application for .AFRICA, DCA filed a Reconsideration Request.</p> <p><i>Declaration on the IRP Procedure ("Procedure Declaration"), ¶ 5 (Ex. G to LeVee Decl.).</i></p>	
30.	<p>When the Reconsideration Request was unsuccessful, DCA initiated an IRP.</p> <p><i>Procedure Declaration, ¶¶ 5, 6 (Ex. G to LeVee Decl.).</i></p>	
31.	<p>The IRP between DCA and ICANN lasted two years, during which ICANN produced hundreds of documents, drafted response documents and supporting declarations, and put forth witnesses to testify under oath at the IRP hearing, on July 9, 2015. The three-member IRP Panel issued a Final Declaration (the "IRP Final Declaration"), finding in DCA's favor.</p> <p><i>LeVee Decl. ¶ 10; IRP Final Declaration ¶ 148 – 150 (Ex. I to LeVee Decl.).</i></p>	
32.	<p>The IRP Panel had previously found that its final decision should be binding on the parties.</p> <p><i>LeVee Decl. ¶ 10; Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p>	

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33.	<p>Acting in accordance with the IRP Declaration, the ICANN Board directed that DCA's application be returned to processing.</p> <p><i>Atallah Decl. ¶ 12 & Ex. F (Board Resolutions 2015.07.16.01-05) (Ex. D to LeVee Decl.); Final Declaration ¶ 149 (Ex. I to LeVee Decl.).</i></p>	
34.	<p>DCA could have initiated a second IRP, focused on ICANN's rejection of DCA's application (rather than ICANN's earlier acceptance of the GAC advice).</p> <p><i>Willett Decl. ¶ 16 (Ex. C to LeVee Decl.).</i></p>	
35.	<p>The New gTLD Program resulted in 1,930 applications for approximately 1,400 new gTLDs.</p> <p><i>Atallah Decl., ¶ 4 (Ex. D to LeVee Decl.).</i></p>	
36.	<p>Absent a broad litigation waiver for the New gTLD Program, the applicants for the over 1,900 applications could initiate frivolous and costly legal actions to challenge legitimate ICANN decisions, which could have placed the successful implementation of the New gTLD Program in jeopardy.</p> <p><i>Espinola Decl. ¶ 4 (Ex. E to LeVee Decl.).</i></p>	
The Covenant Was Not Procured By Fraud		
37.	<p>The FAC alleges that the Covenant was procured by fraud because, although ICANN's Bylaws and the Guidebook promise a "real and effective" dispute resolution mechanism, according to DCA ICANN did not abide by the IRP Declaration when ICANN returned DCA's application back to the Geographic Names Review for processing.</p> <p><i>FAC ¶ 139.</i></p>	

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38.	<p>DCA has since admitted that nothing in the IRP Declaration permitted DCA's application to skip the Geographic Names Review.</p> <p><i>Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p>	
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ISSUE 3: DCA's Lawsuit is Barred By the Doctrine of Judicial Estoppel

	<p>Moving Party's Undisputed Material Facts and Supporting Evidence</p>	<p>Opposing Party's Response and Supporting Evidence</p>
39.	<p>After DCA initiated the IRP proceedings, the IRP Panel issued lists of questions for the parties to brief regarding IRP procedures.</p> <p><i>Procedure Declaration ¶ 15-18 (Ex. G to LeVee Decl.).</i></p>	
40.	<p>Among IRP's questions was: "[i]s the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?"</p> <p><i>Procedure Declaration ¶ 19 (Ex. G to LeVee Decl.).</i></p>	
41.	<p>DCA argued in its response to the IRP that any decision by the IRP Panel should be binding, because Module 6 effectively waives an applicant's right to a lawsuit "in exchange... for the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN's Bylaws, including IRP."</p> <p><i>"DCA's Response to the Panel's Questions on Procedural Issues" ("Response"), May 20, 2014, ¶ 6 (Ex. F to LeVee Decl.).</i></p>	

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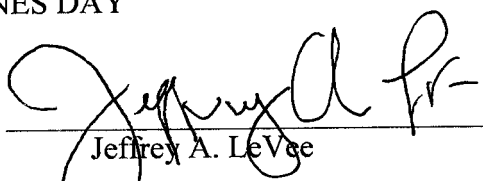
42.	<p>"As a result," DCA stated, "the IRP is the sole forum in which an applicant for a new gTLD can seek independent, third-party review of Board actions."</p> <p><i>Response ¶ 6 (Ex. F to LeVee Decl.).</i></p>	
43.	<p>DCA argued that the IRP Panel's decision must be binding in order to both justify the litigation waiver and remain consistent with California law.</p> <p><i>Response ¶ 5-7 (Ex. F to LeVee Decl.).</i></p>	
44.	<p>ICANN argued that the IRP should be non-binding.</p> <p><i>Procedural Declaration ¶ 97 (Ex. G to LeVee Decl.)</i></p>	
45.	<p>The IRP Panel found that that under the Covenant, "[t]he avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts," and that under the Covenant, "the ultimate 'accountability' remedy for applicants is the IRP."</p> <p><i>Procedure Declaration ¶ 39, 40 (Ex. G to LeVee Decl.)</i></p>	
46.	<p>Based in part on this determination, the IRP Panel agreed with DCA and held that its decisions must therefore be binding.</p> <p><i>Procedure Declaration ¶ 131 (Ex. G to LeVee Decl.)</i></p>	

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47.	<p>During the course of the IRP proceeding between ICANN and DCA, the parties submitted pleadings and exchanged discovery; witnesses testified under oath; a neutral panel, which found that its final decision should be binding on the parties, presided over the proceedings; and following its issuance, both parties acted in accordance with that panel's decision.</p> <p><i>LeVee Decl. ¶ 10; Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p>	
48.	<p>DCA itself argued that the IRP was an arbitration:</p> <p>[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision.</p> <p><i>Response ¶ 21 (Ex. F to LeVee Decl.).</i></p>	
49.	<p>By filing this lawsuit, DCA necessarily took the position that the Covenant does not bar applicants from filing lawsuits against ICANN.</p> <p><i>See generally FAC; LeVee Decl. ¶ 13 (DCA filed suit against ICANN on January 20, 2016).</i></p>	

Dated: May 26, 2016

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

NAI-1502681711v4

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 May 26,
6 2017, I served a copy of the within document(s):

7 **ICANN’S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF
8 MOTION FOR SUMMARY JUDGMENT**

- 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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VIA EMAIL ONLY

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

Executed on May 26, 2017, at Los Angeles, California.

26 
 Diane Sanchez