

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-00862 RGK (JCx)	Date	March 4, 2016
Title	<i>DOTCONNECTAFRICA TRUST v. INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS</i>		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE		
Sharon L. Williams (not present)	Not Reported	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
Not Present	Not Present		
Proceedings:	(IN CHAMBERS) Plaintiff's Ex Parte Application for TRO (DE 20)		

On March 2, 2016, DotConnectAfrica Trust (“Plaintiff”) filed this Ex Parte Application for TRO. By way of this application, Plaintiff seeks an order enjoining Internet Corporation for Assigned Names and Numbers (“Defendant” or “ICANN”) from issuing the .Africa gTLD until the Court decides Plaintiff’s Motion for Preliminary Injunction, scheduled for hearing on April 4, 2016.

A district court may issue a TRO where the moving party demonstrates the need for immediate relief, and establishes that relief is warranted under one of the following circumstances. Under the traditional criteria, a plaintiff must demonstrate “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). Alternatively, “a court may grant the injunction if the plaintiff demonstrates “serious questions going to the merits” and a “balance of hardships that tip sharply toward” plaintiff, provided “plaintiff also show that there is a likelihood of irreparable injury and that the injunction is in the public interest.” *Alliance for Wild Rockies v. Cottrell*, (632 F.3d 1127, 1131-1132 (9th Cir. 2011).

Upon review of the parties’ arguments, the Court finds serious questions going to the merits. Plaintiff has demonstrated that once the tGLD is issued, it will be unable to obtain those rights elsewhere. Moreover, the injury it will suffer cannot be compensated through monetary damages. In opposition, Defendant states in conclusory fashion only that the African governments and the ICANN community will suffer prejudice if the delegation of the gTLD is delayed.

Based on the foregoing, the Court **grants** Plaintiff's Ex Parte Application for TRO. Defendant is enjoined from issuing the .Africa tGLD until the Court decides Plaintiff's Motion for Preliminary Injunction, scheduled for hearing on April 4, 2016.

IT IS SO ORDERED.

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Initials of Preparer _____

EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **16-CV-00862 RGK (JCx)** Date April 12, 2016

Title *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:
Not Present

Attorneys Present for Defendants:
Not Present

Proceedings: (IN CHAMBERS) Order re: Plaintiff’s Motion for Preliminary Injunction (DE 16)

I. INTRODUCTION

On February 26, 2016, Plaintiff DotConnectAfrica Trust (“DCA”) filed a First Amended Complaint (“FAC”) against Defendants Internet Corporation for Assigned Names and Numbers (“ICANN”), and ZA Central Registry (“ZACR”) (collectively “Defendants”) alleging the following claims: (1) Breach of Contract; (2) Intentional Misrepresentation; (3) Negligent Misrepresentation; (4) Fraud & Conspiracy to Commit Fraud; (5) Unfair Competition (Violation of Cal. Bus. & Prof. Code. § 17200); (6) Negligence; (7) Intentional Interference with Contract; (8) Confirmation of IRP Award; (9) Declaratory Relief (that ICANN follow the IRP Declaration and allow the DCA application to proceed through the delegation phase of the process); (10) Declaratory Relief (that the registry agreement between ZACR and ICANN is null and void and that ZACR’s application does not meet ICANN standards); and (11) Declaratory Relief (that the covenant not to sue is unenforceable, unconscionable, procured by fraud and/or void as a matter of law and public policy).

Presently before the Court is DCA’s Motion for Preliminary Injunction. For the following reasons, the Court **GRANTS** the Motion.

II. STATEMENT OF FACTS

The following facts are alleged in the Complaint.

Defendant ICANN is the sole organization worldwide that assigns rights to Generic Top-level

Domains (“gTLDs”). In 2011, ICANN approved the expansion of the number of gTLDs available to eligible applicants as part of its 2012 Generic Top-Level Domains Internet Expansion Program (“New gTLD Program”). Examples of gTLDs include .Lat, .Wales, .Africa, and .Swiss. ICANN invited eligible parties to submit applications to obtain the rights to these various gTLDs. ICANN promised to conduct the bid process in a transparent manner, ensure competition, and abide by its own bylaws and the rules set forth in the gTLD Applicant’s Guidebook. In March 2012, Plaintiff DCA submitted an application to ICANN to obtain the rights to the .Africa gTLD. DCA paid ICANN the mandatory application fee of \$185,000. On February 17, 2014, Defendant ZACR also submitted an application for .Africa.

A. Geographic Name Applications and the Governmental Advisory Committee

ICANN’s Applicant Guidebook contains an overview of the application process. (Bekele Decl., Ex. 3 at 1-3–1-14, ECF No. 17.) After the administrative completeness check, ICANN conducts an initial evaluation of the application. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) During the initial evaluation, ICANN conducts string reviews, which determine whether a gTLD is too similar to existing TLDs. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) The initial evaluation also includes the geographic name evaluation, in which ICANN determines whether an application contains sufficient endorsements, along with determining whether an applicant has the requisite technical, operational, and financial capabilities to operate a gTLD. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) Applicants can request an extended evaluation if it fails the initial evaluation. (Bekele Decl., Ex. 3 at 1-11, ECF No. 17.) Applicants who have successfully completed the initial evaluation (and the extended evaluation, if requested) proceed to the delegation stage, which includes executing a registry agreement with ICANN and conducting a pre-delegation technical test to validate information in the application. (Bekele Decl., Ex. 3 at 1-14, ECF No. 17.)

According to ICANN’s policy and procedures, applicants for geographic gTLDs must obtain endorsements from 60% of the national governments in the region and no more than one written objection from the relevant governments or public authorities associated with the region. DCA obtained endorsements of the United Nations Economic Commission for Africa (“UNECA”) in August 2008 and the African Union Commission (“AUC”) in August 2009. In 2010, however, AUC sent a letter informing DCA that it has “reconsidered its approach” and “no longer endorses individual initiatives in this matter related to continental resource.” (FAC ¶ 24, ECF No. 10.) The Guidebook states that a government may withdraw its endorsement only if the conditions of its endorsement have not been satisfied. Contrary to ICANN’s allegations, DCA maintains that the AUC letter did not formally withdraw its endorsement of DCA because AUC did not have conditions on its endorsement.

On behalf of ICANN, InterConnect Communications (“ICC”) performs string similarity and geographic review during the initial evaluation stage of the gTLD application process. ICC explained to ICANN that if the endorsements of regional organizations like AUC and UNECA were not applied toward the 60% requirement, neither DCA nor Defendant ZACR would have sufficient geographic support. (Bekele Decl., Ex. 19 & 23, ECF No. 17.) ICANN decided to accept endorsements from both AUC and UNECA. During its initial evaluation, the ICC was required to inform applicants of any problems with their endorsements. The ICC failed to inform DCA of any such problems. Therefore DCA assumed that its endorsements from AUC and UNECA were sufficient.

In 2011, AUC itself, attempted to obtain the rights to .Africa by requesting ICANN to include .Africa in the list of Top-Level Reserved Names, which would have made .Africa unavailable for delegation under the New gTLD Program. In a March 8, 2012 letter, the ICANN Board Chairman Stephen Crocker explained to AUC that ICANN could not reserve .Africa for AUC’s use. However, Crocker explained, AUC could “play a prominent role in determining the outcome of any application” for .Africa as a public authority associated with the continent by (1) filing one written statement of objection, (2) filing a community objection, or (3) utilizing the Governmental Advisory Committee

(“GAC”) to combat a competing application. (FAC ¶ 69, ECF No. 10.) The Governmental Advisory Committee (“GAC”) is an internal committee that considers applicants and provides advice related to governmental concerns. Under ICANN’s rules, the GAC can recommend that ICANN cease reviewing an application if all of the GAC members agree that an application should not proceed because an applicant is sensitive or problematic. Membership on the GAC is open to representatives of all national governments. AUC became a GAC member in June 2012, apparently on the advice of ICANN.

Because AUC could not obtain .Africa directly through ICANN, AUC contracted with ZACR in March 2014. In exchange for AUC’s endorsement, ZACR would assign to AUC all rights relating to .Africa upon its delegation to ZACR. Subsequently, because of AUC’s interest in ZACR’s application for .Africa, AUC used its influence as a GAC member to campaign against DCA’s application. In June 2013, ICANN accepted the GAC’s advice and rejected DCA’s application for lacking the requisite endorsements. This decision was made amid DCA’s objection that several members of the GAC had conflicts of interest and that Kenya was unrepresented at the GAC meeting. (Bekele Decl., Ex. 24 & 25, ECF. No. 17.) Contrary to ICANN’s contentions, DCA maintains that the lack of unanimous support within the GAC rendered the decision to suspend DCA’s application improper.

DCA further argues that, if ICANN applied the GAC’s rationale for rejecting DCA’s application equally to ZACR, ZACR’s application should have failed as well. Specifically, applying the same standards, ZACR did not have sufficient country specific endorsements to meet ICANN’s requirements: (1) only five of the purported endorsement letters from specific African governments referenced ZACR by name; and (2) ZACR filed support letters in which African governments generally endorsed AUC’s “Reserved Names” initiative without specifically referencing ZACR. ZACR presumably passed the 60% threshold requirement based on the same regional endorsements that the GAC used to derail DCA’s application. Nonetheless, ZACR passed the initial evaluation and entered into the delegation phase with ICANN.

B. The Independent Review Process

As a means to challenge ICANN’s actions with respect to gTLD applications, ICANN provides applicants with an independent review process (“IRP”). The IRP is arbitration comprised of an independent panel of arbitrators. In October 2013, DCA sought an IRP to review ICANN’s processing of its application, including ICANN’s handling of the GAC opinion. In its decision, the IRP Panel found against ICANN as follows: (1) ICANN’s actions and inactions with respect to DCA’s application were inconsistent with ICANN’s bylaws and articles of incorporation; and (2) ICANN should refrain from delegating .Africa and permit DCA’s application to proceed through the remainder of the evaluation process.

DCA asserts that ICANN did not act in accordance with the decision, which was binding. Instead of allowing DCA’s application to proceed through the remainder of the application process (i.e. the delegation phase), ICANN restarted DCA’s application from the beginning and re-reviewed its endorsements. In September 2015, during the second review, ICANN issued clarifying questions regarding DCA’s endorsements, which it did not raise during the initial evaluation of these same endorsements. The DCA requested an extended evaluation, hoping to gain insight on what was wrong with its application. Rather than providing clarification, ICANN merely restated the same questions – allegedly as a pretext to deny DCA’s application – then denied DCA’s application in February 2016. Soon thereafter, ICANN began the process of delegating .Africa to ZACR.

On March 4, 2016, this Court issued a Temporary Restraining Order to prevent ICANN from delegating .Africa to ZACR until the Court decided this present Motion.

III. JUDICIAL STANDARD

“[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). For a court to grant a preliminary injunction, a plaintiff must establish the following: (1) likelihood of success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors injunction. *Id.* at 20.

The Ninth Circuit also employs a “sliding scale” approach to preliminary injunctions. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). This approach uses the same four factors as the *Winter* test, but allows the plaintiff to receive a preliminary injunction in situations where there are “serious questions” going toward the plaintiff’s likelihood of success on the merits, so long as the “balance of hardships tips sharply in the plaintiff’s favor.” *Id.* at 1134-35. The plaintiff must still demonstrate a likelihood of irreparable harm and that public interest favors the injunction. *Id.* at 1135.

VI. DISCUSSION

DCA seeks a preliminary injunction barring ICANN from issuing the rights to .Africa until this case is resolved. DCA moves for a preliminary injunction based on its Ninth Claim for Declaratory Relief. DCA’s Ninth Claim seeks a judicial declaration that ICANN follow the IRP decision and allow the DCA application to proceed through the delegation phase of the application process. In determining whether relief should be granted, the Court addresses each of the relevant factors for preliminary injunction.

A. Likelihood of Success on the Merits

1. *The Release Does Not Bar DCA’s Claim at This Time.*

As a preliminary matter, ICANN argues that DCA, by submitting a New gTLD Program application, is bound by the terms in the Applicant Guidebook. These terms include a Release barring applicants from challenging in court any decision made by ICANN. (Bekele Decl. 6-4, Ex. 3, ECF No. 17.) DCA argues, however, that the Release is unenforceable because it violates California Civil Code § 1668, is unconscionable, and was procured by fraud. The Court finds substantial questions as to the Release, weighing toward its unenforceability.

California Civil Code § 1668 finds that “[a]ll 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 or another, or violation of law, whether willful or negligent, are against the policy of the law.”

The Release applies to all gTLD applicants and states, in relevant part:

Applicant hereby releases ICANN . . . 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 . . . in connection with ICANN’s . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

(Bekele Decl. 6-4, Ex. 3, ECF No. 17.) On its face, the Release is “against the policy of the law” because it exempts ICANN from *any and all claims* arising out of the application process, even those arising from fraudulent or willful conduct. Cal. Civ. Code § 1668.

ICANN argues that Section 1668 is limited only to agreements involving the public interest,

which the Guidebook is not, and cites to *Tunkl v. Regents of Cal.*, 383 P.2d 441 (Cal. 1963) for support. However, *Tunkl* concerns the validity of a release from liability for negligence, not intentional acts or fraud. Here, the Release waives all liability, not just liability resulting from negligence. Thus, *Tunkl* is distinguishable, and the Court need not determine whether the Release is in an agreement involving the public interest.

ICANN further argues that, if the Release is found to violate Section 1668, the Court should limit its unenforceability to DCA's claims sounding in fraud. ICANN contends that because the request for preliminary injunction is based solely on DCA's Declaratory Relief Claim, which does not sound in fraud, the Release is enforceable as it pertains to this Claim. (Def.'s Opp'n to Mot. for Prelim. Inj. 15:12-14, ECF No. 35.) The Court disagrees. ICANN fails to recognize that the alleged conduct giving rise to this claim is intentional. Specifically, DCA alleges that ICANN intended to deny DCA's application after the IRP proceeding under any pretext and without a legitimate reason. (FAC ¶ 59, ECF No. 10.) DCA claims that "the process ICANN put Plaintiff through was a sham with a predetermined ending – ICANN's denial of Plaintiff's application so that ICANN could steer the gTLD to ZACR." (FAC ¶ 60, ECF No. 10.)

In support, DCA offers the following evidence. ICANN's initial evaluation report in July 2013 stated that DCA's endorsement letters "met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 40, Ex. 27, ECF No. 17.) After the IRP Decision, ICANN performed a second evaluation on the same information originally submitted by DCA. In the second evaluation, however, ICANN found that the endorsement letters did not meet the same criteria applied in the first evaluation, and sent DCA clarifying questions regarding its endorsements. (Bekele Decl. ¶ 24, Ex. 15, ECF No. 17.) The clarifying questions required DCA to submit endorsement letters that "[d]emonstrate[d] the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available." (Bekele Decl. ¶ 24, Ex. 15, ECF No. 17.) The discrepancy between the pre-IRP and post-IRP evaluations led DCA to seek further clarification, specifically regarding the standard imposed on the endorsement letters at issue. However, in response, ICANN merely sent the same questions. (Bekele Decl. ¶ 26, Ex. 17, ECF No. 17.) DCA then submitted to an extended evaluation, which allows further review and is available to applicants who failed the initial evaluation. Without further communication, ICANN then issued a final decision that restated that the endorsement letters "did not meet the criteria described in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.) ICANN's conduct thereby rendered DCA's application ineligible for further review. (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.)

The evidence suggests that ICANN intended to deny DCA's application based on pretext. Defendants have not introduced any controverting facts. As such, the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668.

Because the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668, the Court need not address DCA's arguments regarding unconscionability or procurement by fraud.

2. *There Are Serious Questions as to the Merits of DCA's Ninth Claim.*

After its review, the IRP Panel declared: (1) "both the actions and inactions of the Board with respect to the application of DCA [] relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN" and (2) ICANN "continue to refrain from delegating the .AFRICA gTLD and permit [DCA's] application to proceed through the remainder of the [New gTLD Program] application process." (Bekele Decl., Ex. 1 ¶ 61, ECF No. 17.) DCA alleges in its Ninth Claim that ICANN failed to follow the IRP Panel's binding order, resulting in ICANN's not properly

considering DCA's application.

After the IRP Decision, ICANN placed DCA at the geographic name evaluation stage of the application process and thereafter determined that DCA lacked the requisite support. (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.) DCA contends that ICANN violated the IRP Decision by restarting the geographic name evaluation, which it had already passed, rather than permitting the application to resume at the delegation phase. (Pl.'s Mot. for Prelim. Inj. 13:4-5, ECF No.16.) ICANN, however, argues that at the time DCA's application had been initially rejected, the application was still under review at the geographic name evaluation stage, and the evaluation was not yet complete. (Def.'s Opp'n to Mot. for Prelim. Inj. 17:20-22, ECF No. 35.) Accordingly, ICANN maintains that it placed DCA's application at the proper stage of evaluation after the IRP Decision.

Despite ICANN's contention, the evidence presents serious questions pointing in favor of DCA's argument. First, a March 2013 email from ICC to ICANN stated that ICANN needs to clarify AUC's endorsements since AUC properly endorsed both DCA and ZACR. (Bekele Decl. ¶ 30, Ex. 19, ECF No. 17.) Subsequently, ICANN's July 2013 initial evaluation report found that the endorsement letters have "met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 40, Ex. 27, ECF No. 17.) Because ICANN found DCA's application passed the geographic names evaluation in the July 2013 initial evaluation report, the Court finds serious questions in DCA's favor as to whether DCA's application should have proceeded to the delegation stage following the IRP Decision.

ICANN further argues that even if ICANN failed to follow the IRP Decision, the Decision was only advisory, and not binding. The evidence does not provide clear indications on this point. On the one hand, the Panel concluded "that its [Decision] on the IRP and its future [Decision] on the Merits of the case were binding on the Parties." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The Panel explains, "[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding . . . [t]he selection of the [International Dispute Resolution Procedures] as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The Panel opined that if the decision is not binding, then at a minimum, "the IRP should forthrightly explain and acknowledge that the process is merely advisory." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The IRP did not provide such explanation or acknowledgment. (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) On the other hand, language in the IRP Decision states that the Panel "*recommends* that ICANN continue to refrain from delegating the .Africa gTLD and permit [DCA's] application to proceed through the remainder of the new gTLD application process." (Bekele Decl., Ex. 1 ¶ 149, ECF No. 17 (emphasis added).) It is clear the decision that ICANN violated its bylaws by failing to fairly review DCA's application is binding. However, it is *not* clear whether ICANN was mandated to permit DCA's application to proceed through the remainder of the process. Without extrinsic evidence as a guide, logic dictates that if the "recommendation" is, in fact, non-binding, the Panel's decision that ICANN violated its bylaws (which is undisputedly binding) is rendered ineffectual. Because the IRP is presumably in place to effect dispute resolution, and the IRP provided no explanation or acknowledgment that its decision was merely advisory, the Court finds serious questions on this issue.

For the reasons stated above, the Court finds serious questions going toward the merits of DCA's Ninth Claim.

B. Likelihood of Irreparable Harm

As DCA points out, without preliminary relief, DCA will lose the opportunity to fairly have its application reviewed by ICANN. If DCA loses this opportunity, DCA will suffer irreparable harm because .Africa can be delegated only once, and only by ICANN. (Bekele Decl., Ex. 3 Application Terms and Conditions ¶ 3, ECF No. 17.) Further, only one entity can operate .Africa. (Bekele Decl., Ex. 3 at 4-2, ECF No. 17.) DCA has sufficiently demonstrated that, due to the unique nature of .Africa, it will likely suffer irreparable harm without preliminary relief.

Moreover, on March 4, 2016, the Court issued a temporary restraining order precluding ICANN from delegating the rights to .Africa until the Court rules on the present motion. (Order Granting TRO, ECF No. 27.) In that Order, the Court found that without a TRO, ICANN would have immediately delegated the rights to .Africa. (Order Granting TRO, ECF No. 27.) The Court finds no evidence indicating a change in circumstances. It is reasonable to believe that without a preliminary injunction, ICANN will immediately delegate the rights to .Africa to ZACR, causing DCA to suffer irreparable harm.

ICANN argues only that DCA cannot possibly suffer irreparable harm because it seeks compensatory relief. This argument is unavailing. Seeking compensatory damages does not preclude the Court from finding irreparable harm, as the control over .Africa cannot fully be compensated by money. *See Blackwater Lodge & Training Ctr., Inc. v. Broughton*, 2008 U.S. Dist. Lexis 49371 at *28 (S.D. Cal. 2008) (granting preliminary injunction despite plaintiff seeking monetary relief).

The Court thus finds that without relief, DCA will likely suffer irreparable harm.

C. Balance of Equities

The balance of equities tips in favor of granting the preliminary injunction. Without a preliminary injunction, DCA will lose the opportunity to obtain rights to .Africa because ICANN will likely delegate the rights to ZACR prior to the conclusion of this action, and these rights can be delegated only once. DCA has invested much time and money in the application process under the representation that the process would be unbiased and fair. Although DCA may be able to recover certain funds through litigation, such as the application fee, the opportunity to obtain the rights to .Africa would be forever gone. ICANN's position, however, will be no different if it delays delegating the rights to .Africa. Thus, the balance of equities tips sharply in DCA's favor.

D. The Public Interest Favors Granting Preliminary Injunction

The public interest favors granting a preliminary injunction. "The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today's society. The IRP Declaration recognizes that ICANN's function is "special, unique, and publicly important" and ICANN itself "is the steward of a highly valuable and important international resources." (Bekele Decl. ¶ 23.110, Ex. 1, ECF No. 17.)

ICANN argues that a delay in delegating .Africa will prejudice the African community's efforts to participate in the Internet economy and strengthen their technology sectors. (Def.'s Opp'n to Mot. for Prelim. Inj. 20:3-5, ECF No. 35.) The evidence supporting ICANN's argument is a declaration of Moctar Yedaly, the head of the Information Society Division of the AUC's Infrastructure and Energy Department. (Yedaly Decl. ¶ 11, ECF No. 40.) The AUC's relationship with ZACR, and its interest in

preventing the delay of issuing rights to .Africa creates a conflict of interest. Therefore, on this point, the Court accords little weight to the Yedaly Declaration. On balance, the Court finds it more prejudicial to the African community, and the international community in general, if the delegation of .Africa is made prior to a determination on the fairness of the process by which it was delegated.

For the reasons stated, the Court finds the public interest favors granting the preliminary injunction.

E. Implementing the “Sliding Scale” Approach

Implementing the Ninth Circuit’s “sliding scale” approach to preliminary injunctions, the Court finds “serious questions” going toward DCA’s likelihood of success on the merits and a balance of hardships that tips sharply in DCA’s favor. *Alliance for the Wild Rockies* at 1131. Additionally, the Court finds that both the likelihood of irreparable injury and the public interest favors the injunction. As such, the Court **GRANTS** a preliminary injunction barring ICANN from delegating the rights to .Africa until this case is resolved.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion for Preliminary Injunction.

IT IS SO ORDERED.

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Initials of Preparer _____

EXHIBIT 3

DEPARTMENT 53 LAW AND MOTION RULINGS

Tentative rulings are sometimes, but not always, posted. The purpose of posting a tentative ruling is to to help focus the argument. The posting of a tentative ruling is not an invitation for the filing of additional papers shortly before the hearing.

Case Number: BC607494 **Hearing Date:** December 22, 2016 **Dept:** 53

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES – CENTRAL DISTRICT
DEPARTMENT 53

DOTCONNECTAFRICA TRUST;

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.;

Defendants.

Case No.: BC607494

Hearing Date: December 22, 2016

Time: 8:30 a.m.

[TENTATIVE] ORDER RE:

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is GRANTED.

BACKGROUND

This action involves the award and delegation of the generic top-level domain name (“gTLD”) “.Africa.” Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet’s domain name system. In 2012, ICANN launched the “New gTLD program,” in which it invited interested parties to apply to be designated the operator of their chosen gTLD. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses.

In March 2012, Plaintiff DotConnectAfrica Trust (“DCA”) applied to ICANN for the delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC (“ZACR”) also applied to be the operator of .Africa. ZACR is a

South African non-profit company which was formed to promote open standards and systems in computer hardware and software.

The competition for the .Africa gTLD came down to DCA and ZACR. In 2013, ICANN's Government Advisory Committee ("GAC") issued advice that DCA's application should not proceed due to issues with regional endorsements. ICANN rejected DCA's application based on the GAC advice, while ZACR's application continued. Thereafter, DCA challenged ICANN's decision and filed a request for review by an Independent Review Process ("IRP") Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

On July 9, 2015, the IRP Panel issued a "Final Declaration" finding in favor of DCA and concluding that ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (Bekele Decl. ¶10, Ex. 1 at ¶133.) In July 2015, ICANN placed DCA's application back in the geographic names evaluation phase. ICANN later concluded that DCA's application was insufficient to proceed past this phase.

In January 2016, after learning that ICANN would reject its application, DCA filed suit against ICANN. ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

DCA now moves for the same preliminary injunction that the district court previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has been resolved.

EVIDENCE

ICANN's evidentiary objections are overruled.

DCA's evidentiary objections are overruled.

DCA's request for judicial notice is granted.

LEGAL STANDARD

"As its name suggests, a preliminary injunction is an order that is sought by a plaintiff prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528, 554.) "[A]n order granting or denying a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 890-91 (citations omitted).)

"In determining whether to issue a preliminary injunction, the trial court considers: (1) the likelihood that the moving party will prevail on the merits and (2) the interim harm to the respective parties if an injunction is granted or denied. The moving party must prevail on both factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other..." (Church of Christ in Hollywood v. Superior Court (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (White, supra, 30 Cal.4th at p. 554.) The burden is on the party seeking injunctive relief to show all elements necessary to support issuance of a preliminary injunction. (O'Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)

DISCUSSION

A. Effect of the District Court's Preliminary Injunction Order

DCA argues that the preliminary injunction entered by the district court remains valid. However, DCA cites to no authority holding that a district court's orders are binding after a remand for lack of jurisdiction. The authority relied on by DCA is not directly on point as it pertains to the effect of pleadings following remand. (See *Laguna Vill., Inc. v. Laborers' Internat. Union of N. Am.* (1983) 35 Cal.3d 174, 181 (“Adoption of the federal pleadings filed in this case would avoid the needless waste of time, effort and expense...”); *Ayres v. Wiswall* (1884) 112 U.S. 187, 189 (“It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed ... during the pendency of the suit in [federal court]”).)

Case law provides that “any judgment or order rendered by a court lacking subject matter jurisdiction is ‘void on its face.’” (*Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 196; see also *In re Establishment Inspection of Hern Iron Works, Inc.* (9th Cir. 1989) 881 F.2d 722, 726-727 (“If a court order issues without personal or subject matter jurisdiction ... the original order is deemed a nullity”).) Thus, it appears that the district court's preliminary injunction order is no longer valid.

B. Interim Harm to the Parties

“To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication of the merits.” (*White*, supra, 30 Cal.4th at p. 554.) “In evaluating interim harm, the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the defendant is likely to suffer if an injunction is issued.” (*Shoemaker*, supra, 37 Cal.App.4th at 633.)

The evidence reflects that the potential harm to DCA significantly outweighs any harm to Defendants. DCA's mission is to provide a continental Internet domain name to provide access to internet services for the people of Africa by acting as the registry for the .Africa gTLD. (Bekele Decl. ¶3.) DCA does not act as the registry for any other gTLDs and has not applied to act as the registry for any other gTLD. (Bekele Decl. ¶5.) If .Africa is delegated to ZACR before this case is resolved, DCA's mission will be seriously frustrated, funders will likely pull their support due to the uncertainty involved in the re-delegation process, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶6-7.) ZACR, on the other hand, is the single largest domain name registry on the African continent. (Masilela Decl. ¶3.) At the same time that ZACR applied for the .Africa gTLD, it also applied for and obtained the .CapeTown, .Joburg, and .Durban gTLDs, and these gTLDs have been launched to the Internet public. (Masilela Decl. ¶4.)

ZACR contends that the granting of an injunction will cause it great harm because it is incurring significant financial costs with no attendant benefits as a result of the delay in delegation of the .Africa gTLD. Specifically, ZACR asserts that its costs are running at approximately \$16,632 per month. (Masilela Decl. ¶11.) ZACR also contends that it has suffered lost opportunity costs estimated to be in the amount of \$15.5 million. (Masilela Decl. ¶12.) The lost opportunity costs are highly speculative. Further, it appears that the alleged monthly sunk costs are the result of ZACR's decision to enter into a registry agreement with ICANN shortly after DCA initiated the IRP Panel review. (See Bekele Decl. ¶10, Ex. 1, p.3 at ¶14.) It was certainly foreseeable at this time that there would be a delay in the delegation of the .Africa gTLD if DCA prevailed. Moreover, it is unclear why ZACR continues to incur these costs and has failed to mitigate its damages. It appears that, rather than seeking to minimize its potential harm, ZACR has made a calculated decision to continue incurring expenses in anticipation of prevailing in this action.

ZACR argues that the public interest strongly favors denying the injunction because, if the injunction is granted, African citizens will continue to be deprived of having their own unique gTLD. (See *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 435 (courts consider “the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause”).) However, the public interest in having the .Africa gTLD properly awarded through a fair and transparent application process outweighs

concerns about the delay in the availability of the .Africa gTLD. There is no evidence demonstrating that the African or international community will be harmed by waiting for a fair and proper delegation determination.

The Court finds that the balance of the interim harm weighs in favor of granting the requested preliminary injunction.

C. Likelihood of Success on the Merits

A preliminary injunction must not issue unless it is “reasonably probable that the moving party will prevail on the merits.” (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller) (1985) 170 Cal.App 3d 438, 442.) The “likelihood of success on the merits and the balance-of-harms analysis are ordinarily ‘interrelated’ factors in the decision whether to issue a preliminary injunction.” (White, supra, 30 Cal.4th at 561.) “The presence or absence of each factor is usually a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor.” (Id.)

Here, DCA moves for a preliminary injunction under its ninth cause of action for declaratory relief, which seeks a declaration from the Court that it is entitled to proceed through the remainder of the .Africa gTLD application process as expressed by the IRP Panel findings.

i. DCA's Release of Claims against ICANN

As an initial matter, ICANN contends that DCA is unlikely to prevail on the merits because, among the terms and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD applications (the “Covenant”). The Covenant provides:

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.

(Bekele Decl. Ex. 3 at §6.6.)

DCA contends that the Covenant is unenforceable because it violates Civil Code §1668, it is unconscionable, and it was procured by fraud.

Civil Code §1668 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.”

Section 1668 is not strictly applied. (Farnham v. Superior Court (Sequoia Holdings, Inc.) (1997) 60 Cal.App.4th 69, 74.) For example, “contractual releases of future liability for ordinary negligence, as well as contractual indemnity provisions, insurance contracts, and other limitations on liability are generally enforceable.” (Id. at 71.) “Conversely, however, contractual releases of future liability for fraud and other intentional wrongs are invariably invalidated.” (Id.)

Here, the Covenant on its face encompasses every claim that arises from ICANN's actions including fraud and

intentional violations of law. (See *Baker Pac. Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1154-1155 (holding that a covenant not to sue that released “any and all claims of every nature” was void as against public policy because it “clearly includes a release from liability for fraud and intentional acts”).)

ICANN argues that the conduct alleged here does not amount to fraud or willful injury because DCA challenges only ICANN’s processing and consideration of a gTLD application. However, Plaintiff’s operative pleading includes claims for intentional and negligent misrepresentation, and fraud and conspiracy to commit fraud. Moreover, the declaratory relief cause of action that is the subject of the instant motion arises from ICANN’s alleged intentional and fraudulent conduct.

The Covenant is also arguably unconscionable. “Unconscionability consists of both procedural and substantive elements. The procedural element addresses the circumstances of contract negotiation and formation, focusing on oppression or surprise due to unequal bargaining power. Substantive unconscionability pertains to the fairness of an agreement’s actual terms and to assessments of whether they are overly harsh or one-sided.” (*Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 246 (internal citations omitted).) There is no indication that DCA had any opportunity to negotiate the conditions of the application process or the terms of the Covenant. Given that ICANN is the only organization in the world that assigns rights to gTLDs, the bargaining power heavily favored ICANN. Further, the Covenant is a one-sided agreement in that it exempts any and all claims against ICANN but does not require ICANN to give up any right to sue DCA.

The Court finds that the Covenant is likely to be found unenforceable. Thus, DCA’s likelihood of success on the merits is unaffected by the existence of the Covenant.

ii. Whether DCA’s Application was Properly Rejected

The IRP Panel ruled that: “both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .Africa gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.” (Bekele Decl. ¶10, Ex. 1 at ¶148.) The IRP panel then recommended that ICANN “continue to refrain from delegating the .Africa gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.” (Bekele Decl. ¶10, Ex. 1 at ¶149.) In July 2015, ICANN placed DCA’s application back in the geographic names evaluation phase but ultimately concluded that the application was insufficient to proceed past this phase.

The main issue that is in contention is whether DCA’s application met ICANN’s geographic endorsement standards. ICANN required that applicants for the rights to a geographic gTLD obtain endorsements from 60% of the region’s national governments, and no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the region. (Bekele Decl., Ex. 3 at §2.2.1.4.4.) Pursuant to the new gTLD Guidebook, an endorsement letter was evaluated on the following criteria:

The letter must clearly express the government’s or public authority’s support for or non-objection to the applicant’s application and demonstrate the government’s or public authority’s understanding of the string being requested and its intended use.

The letter should also demonstrate the government’s or public authority’s understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement ICANN requiring compliance with consensus policies and payment of fees.

(Bekele Decl., Ex. 3 at §2.2.1.4.3.)

The evidence reflects that, as part of its application, Plaintiff obtained the endorsements of the African Union Commission (“AUC”) and the United Nations Economic Commission for Africa (“UNECA”). These entities

were approved as endorsers by ICANN and they are representative of more than 60% of the nations in Africa.

The only issue that ICANN had with respect to DCA's endorsements related to the criterion that the endorsement letters should demonstrate the public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available. Significantly, a plain reading of the Guidebook's language reveals that this specific criterion was discretionary, whereas the other criteria were mandatory. Moreover, DCA's endorsement letters from the AUC and UNECA state, respectively, "your organization is applying for delegation of a regional identifier top level domain – '.africa' from the Internet Corporation for Assigned Names and Numbers..." and "your organization is applying to the Internet Corporation for Assigned Names and Numbers (ICANN) for the delegation of the regional identifier top level domain – '.africa.'" (Bekele Decl. ¶¶19, 21, Exs. 6, 8.) This language appears to be sufficient to demonstrate the endorsing body's understanding that the gTLD was being sought through ICANN's gTLD program. It also can be implied from this language that the endorsers understood that DCA would have to adhere to ICANN's policies after the gTLD was awarded. Therefore, there is reason to question the legitimacy of ICANN's purported reason for denying DCA's application.

In opposition, ICANN and ZACR emphasize that AUC's support of DCA was withdrawn. However, the evidence reflects that, prior to DCA commencing litigation, ICANN never claimed that DCA's endorsements were invalid because they had been withdrawn. Indeed, ICANN processed DCA's application based on those endorsements. It appears that ICANN knew that any purported withdrawal of the endorsements was ineffective. This is why ICANN focused on other technical issues with the endorsement letters in denying DCA's application.

Based on the evidence presented, it can reasonably be inferred that the reasons for denying DCA's application were pretextual and that ICANN, which improperly entered into a registry agreement with ZACR while the IRP review was pending, denied DCA a fair evaluation process because it had predetermined that it would award the gTLD to ZACR. Accordingly, the Court finds that DCA has demonstrated a reasonable probability that it will prevail on the merits.

DCA's motion for a preliminary injunction is granted.

D. Bond Requirement

If a preliminary injunction is granted, the court must require an undertaking (CCP § 529), or allow a cash deposit in lieu thereof (CCP § 995.710). The bond is to cover any damages to the defendant caused by issuance of the injunction, if it is finally determined that plaintiff was not entitled to the injunction. (CCP § 529; see *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14 ("the trial court's function is to estimate the harmful effect which the injunction is likely to have on the restrained party, and to set the undertaking at that sum."))

ZACR argues that the bond amount should be set at more than \$15 million. However, this amount is based on speculative lost profits and is predicated on the validity of the registry agreement that it entered into with ICANN. The Court is inclined to require DCA to post a bond in an amount that represents an estimate of ZACR's actual damages. The Court will determine the appropriate bond amount at the hearing.

DCA is ordered to provide notice of this ruling.

DATED: December 22, 2016

Howard L. Halm
Judge of the Superior Court

EXHIBIT 4

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:

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.

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
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:

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

MINUTES ENTERED 12/22/16 COUNTY CLERK

9107767771

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

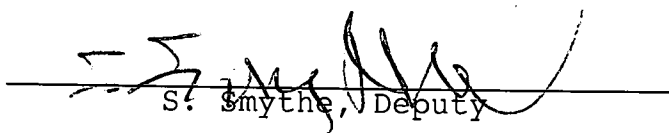
NATURE OF PROCEEDINGS:

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

<p>MINUTES ENTERED 12/22/16 COUNTY CLERK</p>
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9107/07/71

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

EXHIBIT 5

1 Ethan J. Brown (SBN 218814)

ethan@bnsklaw.com

2 Sara C. Colón (SBN 281514)

sara@bnsklaw.com

3 **BROWN NERI SMITH & KHAN LLP**

4 11766 Wilshire Boulevard, Suite 1670

Los Angeles, California 90025

5 T: (310) 593-9890

6 F: (310) 593-9980

7 *Attorneys for Plaintiff*

8 DOTCONNECTAFRICA TRUST

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES - CENTRAL**

12 DOTCONNECTAFRICA TRUST, a Mauritius
13 charitable trust,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS, a
18 California corporation; ZA Central Registry, a
19 South African non-profit company; and DOES
20 1 through 50, inclusive,

21 Defendants.

Case No. BC607494

[Assigned to Hon. Howard L. Halm]

**DECLARATION OF SARA C. COLÓN
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Date: December 22, 2016

Hearing: 8:30 a.m.

Dept.: 53

[Filed concurrently: Declarations of Sophia
Bekele Eshete & Ethan J. Brown]

RESERVATION ID: 161115174199

1 **DECLARATION OF SARA C. COLÓN**

2 I, Sara C. Colón, declare as follows:

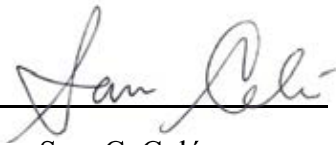
3 1. I am a partner at the law firm of Brown Neri Smith & Khan, LLP and licensed to
4 practice law in California and before this court. I am counsel of record for Plaintiff
5 DOTCONNECTAFRICA Trust (“DCA”). I make this declaration in support of DCA’s
6 application for a temporary restraining order. The matters referred to in this declaration are
7 based upon my personal knowledge, and/or when referencing documents, such documents were
8 reviewed by me, and if called as a witness, I could and would testify competently thereto.

9 2. On March 1, 2016 I emailed counsel for Defendant Internet Corporation for
10 Assigned Names and Numbers (“ICANN” or “Defendant”) to advise him that DCA would file an
11 *ex parte* application for a temporary restraining order on March 2, 2016 if ICANN did not agree
12 to refrain from delegating the rights to .Africa until after a ruling on DCA’s motion for a
13 preliminary injunction. A true and correct copy of my email is attached hereto as **Exhibit 1**.

14 3. Attached hereto as **Exhibit 2** is a true and correct copy of the Declaration of
15 Mokgabudi Lucky Masilela submitted by Intervenor ZA Central Registry (“ZACR”) in support
16 of its motion for reconsideration and to vacate the preliminary injunction.

17 4. On June 25, 2013, ICANN employee, Trang Nguyen prepared an endorsement
18 letter for the AUC in relation to their endorsement of ZACR. Attached hereto as **Exhibit 3** is a
19 true and correct copy of Trang Nguyen’s email and the letter ICANN wrote for the AUC to
20 endorse ZACR as produced by ICANN to DCA in previous proceedings.
21

22
23 I declare under penalty of perjury under the laws of the State of California that the
24 foregoing is true and correct. Executed on this 15th day of November 2016, at Los Angeles,
25 California.

26 

27 Sara C. Colón

EXHIBIT 1

From: sara@bnslawgroup.com
Sent: March 01, 2016 11:12 PM
To: jlevee@JonesDay.com
Cc: 'Ethan Brown'; kete@bnslawgroup.com; rzernik@jonesday.com; kwallace@jonesday.com
Subject: DCA v. ICANN

Importance: High

Counsel,

Please be advised that tomorrow (March 2, 2016) DCA will file an *ex parte* application for a temporary restraining order if you do not confirm in writing to us by tomorrow at 10.30 a.m. that ICANN will refrain from doing anything with respect to delegating the rights to .Africa until the Court has ruled on DCA's preliminary injunction motion.

Best,

Sara Colón
Partner



11766 Wilshire Blvd., Suite 1670
Los Angeles, CA 90025

Tel. (310) 593 9890
sara@bnslawgroup.com

EXHIBIT 2

1 David W. Kesselman (SBN 203838)
 2 *dkesselman@kbslaw.com*
 3 Amy T. Brantly (SBN 210893)
 4 *abrantly@kbslaw.com*
 5 KESSELMAN BRANTLY STOCKINGER LLP
 6 1230 Rosecrans Ave., Suite 690
 7 Manhattan Beach, CA 90266
 8 Telephone: (310) 307-4555
 9 Facsimile: (310) 307-4570
 10 *Attorneys for Defendant*
 11 **ZA Central Registry, NPC**

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

14 DOTCONNECTAFRICA TRUST, a
 15 Mauritius Charitable Trust,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
 19 ASSIGNED NAMES AND
 20 NUMBERS; a California corporation;
 21 ZA Central Registry, a South African
 22 non-profit company; DOES 1 through
 23 50, inclusive,

24 Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)

*Assigned for all purposes to the
 Honorable R. Gary Klausner*

**DECLARATION OF MOKGABUDI
 LUCKY MASILELA IN SUPPORT
 OF DEFENDANT ZACR’S MOTION
 TO RECONSIDER AND VACATE
 PRELIMINARY INJUNCTION
 RULING**

[Notice of Motion and Motion to
 Reconsider and Vacate Preliminary
 Injunction Ruling; Memorandum of
 Points and Authorities; Declaration of
 David W. Kesselman; and [Proposed]
 Order Filed Concurrently Herewith]

Date: June 6, 2016
 Time: 9:00 a.m.
 Location: Courtroom 850

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DECLARATION OF MOKGABUDI LUCKY MASILELA

I, Mokgabudi Lucky Masilela, hereby declare as follows:

1. I am the Chief Executive Officer of named defendant ZA Central Registry, NPC (“ZACR”). I have personal knowledge of the matters contained herein, except as to those matters asserted on information and belief, and as to those, I believe them to be true. If called upon as a witness, I could and would testify competently thereto.

2. ZACR is a South African non-profit company with its principal place of business in Midrand, South Africa.

3. ZACR was originally formed in 1988 under the name UniForum S.A. The purpose of the company was to promote open standards and systems in computer hardware and software. In 1995, the company was assigned the administration rights for the South African domain name, “co.za”. Today ZACR has registered over 1 million co.za domain name registrations – or about 95% of the total registrations for “.za.” Due to its well-known reputation for independence and neutrality, as well as technical competence and operational excellence, ZACR is the single largest domain name registry on the African continent.

4. After Internet Corporation For Assigned Names and Numbers (“ICANN”) formally launched the “New gTLD Program”, ZACR submitted an application for the .Africa gTLD on June 13, 2012. I am aware that both ZACR and DCA submitted their respective applications for the .Africa gTLD in the Spring/ Summer of 2012. At the same time, ZACR also applied for, and obtained, the .CapeTown, .Joburg and .Durban gTLDs, and these gTLDs have been launched to the Internet public.

5. I am familiar with the ICANN selection criteria for the gTLD. ICANN set forth selection criteria in an Applicant Guidebook. Among other

1 things, ICANN made clear that because the .Africa gTLD represented the name of
2 a geographic region, an applicant would need to provide documentation showing
3 support from at least 60% of the governments in the region. Further, ICANN
4 criteria provided that no more than one objection from a government or public
5 entity associated with the geographic region would be permitted. These criteria
6 are set forth in ICANN Application Guidebook Module 2, and available online at:
7 <http://newgtlds.icann.org/en/applicants/agb> par 2.2.1.4.2.4.

8 6. ZACR submitted its application to ICANN with the full support of
9 African Union member states via the African Union Commission (“AUC”)
10 endorsement. Specifically, the AUC, which serves as the Secretariat of the
11 African Union, provided a letter supporting ZACR’s application. A true and
12 correct copy of the July 2, 2013 AUC letter is attached as **Exhibit A**. In addition,
13 the only nonmember, Morocco, separately provided a letter supporting ZACR’s
14 application. A true and correct copy of the March 28, 2012 Moroccan letter of
15 support is attached as **Exhibit B**.

16 7. ZACR received the support of the African Union only after the AUC
17 publicized a request for proposal (“RFP”). This was an open bid process. The
18 AUC made clear that it was only going to support one applicant. By way of
19 background, the AUC RFP process began because it was well known that ICANN
20 was considering a new gTLD program, including .Africa. It was in anticipation of
21 this new gTLD program that the AUC decided to hold an RFP to support a single,
22 qualified applicant for the African Union. This is because the AUC was
23 specifically mandated by member states to set up the structures and modalities for
24 the implementation of the dotAfrica (.Africa) gTLD. Details of the process are
25 set forth in the September 29, 2015 AUC letter attached hereto as **Exhibit C**. This
26 letter is also available at: <http://africainonespace.org/downloads/GNP.PDF>
27
28

1 8. I was informed by AUC officials that Plaintiff DotConnectAfrica
2 Trust (“Plaintiff”) chose not to participate in the RFP. Ultimately, ZACR
3 prevailed in the RFP process and received the support of the AUC in its
4 application for the .Africa gTLD.

5 9. Attached as **Exhibit D** are the 17 “Early Warning Notices” from
6 individual African countries to Plaintiff’s application. These “Early Warning
7 Notices” are also available online at:
8 <http://africainonespace.org/content.php?tag=13&title=Resources>

9 10. The Registry Agreement between ICANN and ZACR was effective
10 on March 24, 2014 and runs for ten years. Yet, over two years into the
11 Agreement, the .Africa gTLD has still not been delegated to ZACR. In effect,
12 20% of the period of the Agreement has already lapsed without any benefit to
13 ZACR. This delay has resulted in unforeseen and mounting costs, as well as lost
14 opportunities, for the .Africa project.

15 11. ZACR has incurred considerable expenses both prior to and after
16 entering into the Registry Agreement. The current and continuing cost due to the
17 delay in the delegation is running at approximately \$20,000 per month. This is
18 based upon a review of the monthly costs incurred during the last 10 months for
19 the .Africa project, including the ongoing costs related to consultants, marketing,
20 sponsorships and related expenses. The importance of maintaining visibility for
21 the .Africa project, coupled with the ongoing need to interface with government
22 officials throughout the African continent, makes clear that these ongoing
23 expenses will continue during the course of this litigation. In determining these
24 figures, we averaged the monthly expenses for the .Africa project and where
25 necessary converted expenditures from South African Rand to U.S. dollars.

26 12. The Loss of Net Income after Tax (opportunity costs) suffered by
27 ZACR from the date of the planned delegation following the Registry Agreement
28

1 through May 1, 2016, are now estimated to be approximately \$15 million (U.S.
2 dollars). Of that amount, approximately \$5.5 million would have been donated to
3 the dotAfrica Foundation for African online development. Until such time as
4 delegation takes place, the .Africa gTLD in effect stagnates and generates no
5 income and no value in the marketplace. The ongoing delay is also prejudicial to
6 the gTLD itself (no matter who the operator is) in that the initial interest
7 surrounding the launch of this domain name will have faded, and persons who
8 may have sought to register will have lost interest.

9 13. Once a gTLD is delegated it starts increasing in value. The gTLD is
10 at its lowest value prior to delegation and increases as the number of second level
11 domain delegations (for example: xyz.africa) increases. If Plaintiff is redelegated
12 the .Africa gTLD, it will suffer no irreparable harm as it will inherit a more
13 valuable gTLD without incurring the cost to develop it.

14 14. In my role as ZACR's CEO, and based upon my numerous and
15 ongoing discussions with political, business and civic leaders from throughout the
16 African Union, it is my firm understanding and belief that the ongoing delay in the
17 delegation of .Africa is depriving the people of the Africa continent of an
18 important opportunity to expand internet domain name capabilities. The .Africa
19 domain name would add brand value to the continent and would provide a
20 platform that connects products, businesses and individuals that have interests in
21 Africa. The African people are further harmed because the agreement between
22 ZACR and the AUC required that a foundation be created upon delegation and
23 that a significant portion of the revenues received from second level domain
24 delegations (for example: xyz.africa) be directed to the "dotAfrica Foundation."
25 The Foundation would use the revenues to fund various African domain name and
26 Internet related developmental projects which are now delayed as a result of the
27 preliminary injunction.
28

1 15. I am aware that ICANN builds in time limits in its gTLD registry
 2 agreements. I am further informed, based upon my experience in the industry and
 3 discussions with technical personnel within ZACR, that a re-delegation of a gTLD
 4 is entirely feasible. In fact, ICANN has prepared for this precise eventuality and
 5 issued a manual in 2013 providing step-by-step instructions for how to redelegate
 6 a gTLD. The manual, titled “User Documentation on Delegating and
 7 Redelegating a Generic Top Level Domain (gTLD),” makes clear that the process
 8 is available and feasible if necessary. A true and correct copy of the manual is
 9 attached hereto as **Exhibit E**. It is also available on ICANN’s website:
 10 <https://www.icann.org/en/system/files/files/gtld-drd-ui-10sep13-en.pdf>

11 16. ZACR has never operated in California. ZACR has no personnel, no
 12 offices, no bank accounts, and maintains no operations in California. ZACR has
 13 no telephone listings or mailing addresses in California.

14 17. I have read Plaintiff’s First Amended Complaint, including the
 15 allegations against ZACR. Contrary to what is asserted in the First Amended
 16 Complaint, there was no fraud or conspiracy between ZACR and ICANN. Nor
 17 was there any fraud or conspiracy with the AUC. Similarly, there was no
 18 interference with Plaintiff’s application to ICANN. At all times, ZACR competed
 19 fairly and abided ICANN’s procedures in seeking the award for the generic top
 20 level domain .Africa.

21 I declare under penalty of perjury under the laws of the United States of
 22 America that the foregoing is true and correct.

23 Executed this 6 day of May 2016 at Georgetown DC.

24 

25 _____
 26 MOKGABUDI LUCKY MASILELA

EXHIBIT 3

From: Trang Nguyen
Sent: Tuesday, June 25, 2013 11:37 AM
To: Mark McFadden
Cc: Cheri Bolen
Subject: AU template letter for Uniforum
Attachments: AU template letter.docx
Signed By: trang.nguyen@icann.org

Hi Mark,

Per our conversation this morning, attached is the letter that I drafted based on the template in the AGB. We will forward the official letter from the AUC as soon as we receive it. The goal is to have results for this application published on 12 July 2013.

Warm regards,

Trang

[This letter should be provided on official letterhead]

ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA USA
90094-2536

Attention: New gTLD Evaluation Process

Subject: Letter for support for .Africa

This letter is to confirm that the African Union Commission fully supports the application for .Africa submitted to ICANN by UniForum SA (NPC) trading as Registry.Africa in the New gTLD Program. As the Commissioner I confirm that I have the authority of the African Union Commission to be writing to you on this matter. The African Union Commission is the Secretariat of the Union entrusted with executive functions. The structure represents the Union and protects its interest under the auspices of the Assembly of Heads of State and Government as well as the Executive Committee. The African Union Commission is made up of Portfolios. They are: Peace and Security; Political Affairs; Trade and Industry; Infrastructure and Energy; Social Affairs; Rural Economy and Agriculture; Human Resource, Science and Technology; and Economic Affairs.

The primary objective of the gTLD is summarised as follows: “To establish a world class domain name registry operation for the .Africa Top Level Domain (TLD) by engaging and utilising African technology, know-how and funding; for the benefit and pride of Africans; in partnership with African governments and other ICT stakeholder groups”.

Our mission is to establish the .Africa TLD as a proud identifier of Africa’s online identity, fairly reflecting the continent’s rich cultural, social and economic diversity and potential. In essence we will strive to develop and position the .Africa TLD as the preferred option for individuals and businesses either based in Africa or with strong associations with the continent and its people.

The .Africa TLD represents a unique opportunity for Africa to develop and enhance its domain name and Internet eco-systems and communities by collaborating with each other to:

- identify, engage and develop African-based specialist skills and resources;
- share knowledge and develop DNS thought-leadership; and
- implement world class registry standards and contribute towards their continued development.

The African Union Commission has worked closely with the applicant in the development of this proposal.

The African Union Commission supports this application, and in doing so, understands that in the event that the application is successful, UniForum SA (NPC) trading as Registry.Africa will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

The African Union Commission further understands that, in the event of a dispute between the African Union Commission and the applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of the African Union Commission.

The African Union Commission understands that the Geographic Names Panel engaged by ICANN, will, among other things, conduct due diligence on the authenticity of this documentation. I would request that if additional information is required during this process, to contact my office in the first instance.

Thank you for the opportunity to support this application.

Yours sincerely,

[signature/seal from the African Union Commission signatory]

EXHIBIT 6

From: David Kesselman <dkesselman@kbslaw.com>
Sent: January 03, 2017 12:05 PM
To: Jeffrey LeVee; Kete Barnes
Cc: Amy Brantly; Amanda Pushinsky; Ethan Brown; Rachel Gezerseh; Sara Colón; Erin Burke
Subject: RE: DCA v. ICANN - Notice of Ex Parte Application for Temporary Restraining Order

ZACR will similarly oppose DCA's proposed TRO.

David

David W. Kesselman, Esq.
Kesselman Brantly Stockinger LLP
1230 Rosecrans Ave, Suite 690
Manhattan Beach, CA 90266
(310) 307-4556
(310) 307-4570 fax
dkesselman@kbslaw.com
www.kbslaw.com

From: Jeffrey LeVee [mailto:jlevee@JonesDay.com]
Sent: Tuesday, January 03, 2017 11:58 AM
To: Kete Barnes <kete@bnsklaw.com>
Cc: Amy Brantly <abrantly@kbslaw.com>; Amanda Pushinsky <apushinsky@jonesday.com>; David Kesselman <dkesselman@kbslaw.com>; Ethan Brown <ethan@bnsklaw.com>; Rachel Gezerseh <rgezerseh@jonesday.com>; Sara Colón <sara@bnsklaw.com>; Erin Burke <eburke@JonesDay.com>
Subject: Re: DCA v. ICANN - Notice of Ex Parte Application for Temporary Restraining Order

Kete:

1. I am confirming that this is the first I have heard of any TRO application and that there was no prior effort to meet and confer (or even ask ICANN when the delegation will occur).
2. ICANN will oppose the TRO.
3. Charlotte Wasserstein has left Jones Day. Please include Amanda Pushinsky and Erin Burke, both copied on this note, on future email.

Jeff LeVee
[JONES DAY® - One Firm Worldwide](http://www.jonesday.com)
Telephone: 213.243.2572

From: Kete Barnes <kete@bnsklaw.com>
To: Jeffrey LeVee <jlevee@JonesDay.com>, David Kesselman <dkesselman@kbslaw.com>
Cc: Rachel Gezerseh <rgezerseh@jonesday.com>, "cswasserstein@jonesday.com" <cswasserstein@jonesday.com>, Amy Brantly <abrantly@kbslaw.com>, Sara Colón <sara@bnsklaw.com>, Ethan Brown <ethan@bnsklaw.com>

Counsel,

Please take notice that tomorrow, January 4, 2017, at 8:30 a.m., or as soon thereafter as may be heard, in Department 53 of Stanley Mosk Courthouse, Plaintiff DotConnectAfrica Trust (“DCA”) will apply *ex parte* for a temporary restraining order enjoining Defendant ICANN from taking any further action regarding the delegation of the .Africa gTLD. DCA’s application is based on its second and fifth causes of action for intentional misrepresentation and unfair competition, respectively. DCA applies *ex parte* because ICANN will not refrain from delegating the .Africa gTLD until a regularly noticed motion for a preliminary injunction can be heard, and DCA will suffer irreparable harm if the domain is delegated prior to the resolution of this case.

Please let me know if you oppose.

Sincerely,

Kete Barnes

Kete Barnes – Associate

Direct: [\(310\) 905-3495](tel:3109053495)

BROWN NERI SMITH & KHAN LLP

[11766 Wilshire Blvd., Ste. 1670, Los Angeles, CA 90025](#)



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