Jeffrey A. LeVee (State Bar No. 125863)
Erin L. Burke (State Bar No. 186660)
Rachel T. Gezerseh (State Bar No. 251299)
Amanda Pushinsky (State Bar No. 267950)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539
Email: jlevee@JonesDay.com

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

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

Defendants.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

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

DATE: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

[Filed concurrently herewith: Declarations of J. LeVee, K. Espinola, A. Atallah, C. Willett and M. McFadden; Evidentiary Objections to Declaration of S. Bekele Eshete]

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INTRODUCTION

This Court should deny DotConnectAfrica Trust's ("DCA") motion for a preliminary injunction ("Motion"). First, DCA agreed to be bound by a covenant not to sue ICANN ("Covenant") that applies to each of its causes of action, including the ninth cause of action for declaratory relief on which DCA bases its motion. *See* Mot. at 11. Second, while DCA seeks a ruling that ICANN did not follow an independent review process ("IRP") panel declaration ("Declaration"), DCA conceded in deposition on December 1, 2016 that ICANN's Board adopted the Declaration and was not required to permit DCA to "skip" the requirement that DCA obtain the support or non-objection of 60% of the governments in Africa.[1] Because DCA's lawsuit is barred by the Covenant, and because DCA cannot win the ninth cause of action, DCA has literally no chance of success on the merits, and its motion should be denied.

When DCA applied to ICANN to operate the generic top-level domain ("gTLD") .AFRICA, DCA, a sophisticated entity, knew its application might not prevail because: (i) it was not the sole applicant for the rights to operate .AFRICA[2;] and (ii) DCA would be required to demonstrate the support or non-objection of 60% of the African governments. Because DCA could never demonstrate the requisite support from the African governments, DCA's application did not prevail. And while DCA argues that ICANN favored the other applicant for .AFRICA, ZA Central Registry ("ZACR"), ICANN treated DCA and ZACR precisely the same; indeed, as DCA admits (Mot. at 12), ICANN has no interest in selecting any particular (qualified) applicant. DCA's baseless claims should not be allowed to delay even further the delegation of a gTLD the African community has eagerly awaited for many years.

STATEMENT OF FACTS[3]

A. ICANN And The New gTLD Program.

ICANN is a California not-for-profit public benefit corporation that oversees the technical

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[1] *See* LeVee Decl., Ex. H (Bekele Dep. 200:7-201:19, 7-203:4-7, 206:14-207:2, 207:16-208:11).

[2] *Id*. at 246:3-14.

[3] Facts critical to this Motion's adjudication are set forth herein; the concurrently filed declarations provide additional facts demonstrating why DCA's motion should be denied.

coordination of the Internet's domain name system ("DNS"). Atallah Decl. ¶ 2. The DNS's essential function is to convert numeric IP addresses into easily-remembered domain names such as "uscourts.gov" and "ICANN.org." *Id*. ¶ 3. The portion of a domain name to the right of the last dot (in these examples, ".gov" and ".org") is known as a gTLD. *Id*. 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. *Id*. ¶ 4. The operator would manage the assignment of names within the gTLD and maintain its database of names and IP addresses. *Id*. ¶¶ 2-3; Willett Decl. ¶¶ 4-5. Applicants must demonstrate, among other things, the significant technical and financial capability needed to operate a gTLD. Willett Decl. ¶¶ 4-5.

ICANN's Applicant Guidebook ("Guidebook") prescribes the requirements for new gTLD applications. *Id*. ¶ 2. The Guidebook was developed in a years-long, bottom-up process in which numerous versions were published for public comment beginning in late 2008. Espinola Decl. ¶ 2. DCA participated in this process: 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. LeVee Decl., Ex. G (Bekele IRP Decl. ¶ 13); *id*., Ex. H (Bekele Dep. 17:3-20, 23:2-24:2). Module 6 of the Guidebook sets forth the terms and conditions that all applicants, including DCA, acknowledged and accepted by submitting a gTLD application. Willett Decl. ¶ 3; LeVee Decl., Ex. H (Bekele Dep. 17:18-20, 24:3-7); Bekele Decl., Ex. 3 § 6. Among those is the Covenant, which bars lawsuits against ICANN arising out of its evaluation of new gTLD applications:

> 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 § 6.6. Although the Covenant bars lawsuits against ICANN, ICANN's Bylaws provide accountability mechanisms to ensure that ICANN operates in accordance with its Articles and Bylaws. *Id*., Ex. 4, Art. IV § 3. One such mechanism is the IRP, under which independent panelists evaluate whether ICANN Board conduct was consistent with ICANN's Articles and Bylaws. *Id*., Ex. 4, Art. IV § 3; Atallah Decl. ¶¶ 6-7. The New gTLD Program resulted in 1,930 applications for approximately 1,400 new gTLDs, including from DCA and ZACR to operate .AFRICA. Atallah Decl. ¶ 4. DCA was required to and did demonstrate that it possesses, among other things, significant technical and financial wherewithal required to operate a gTLD registry. Willett Decl. ¶ 4; *see also* Bekele Decl., Ex. 3 § 1.5.1.

B. DCA's Challenge To ICANN's Acceptance Of The GAC's Advice.

On April 11, 2013, ICANN's Governmental Advisory Committee ("GAC") issued advice that DCA's application should not proceed.[4] *See* Bekele Decl., Ex. 1 ¶ 47; *id*., Ex. 24; *see also* Atallah Decl. ¶ 5. On June 4, 2013, the ICANN Board accepted the GAC's advice, which halted the processing of DCA's application. Atallah Decl., Ex. F (Board Resolutions 2015.07.16.01-05).

DCA submitted an IRP request challenging the Board's acceptance of the GAC's advice. Bekele Decl., Ex. 1. The IRP Panel found in DCA's favor in a Declaration issued on July 9, 2015. *Id*. The IRP Panel concluded that, rather than defer to the GAC's advice, ICANN should have "investigate[d] the matter further." *Id*. ¶ 113. Importantly, the IRP Panel expressly declined to rule on any of the "other criticisms and other alleged shortcomings of the ICANN Board identified by DCA." *Id*. ¶ 117. Thus, as DCA has now conceded in deposition, the IRP Panel did not address—let alone decide—whether DCA had satisfied the 60% governmental support requirement. LeVee Decl., Ex. H (Bekele Dep. 200:7-201:19, 203:4-7, 206:14-207:2, 207:16-208:11); *id*. ¶ 13. Nor did it address DCA's formal request to the IRP Panel that DCA be given 18 months to try to garner that support—a request whereby DCA admitted that it lacked the required support at the time of the IRP. *Id*., Ex. H at 208:2-11.

[4] The GAC is charged with advising ICANN on "concerns of governments . . . or where they may affect public policy issues." Bekele Decl., Ex. 3 § 3.1; *see also id*., Ex. 4, Art. XI, § 2.2. If the GAC issues "consensus advice" against an application, this advice creates a "strong presumption for the ICANN Board that the application should not be approved." *Id*., Ex. 3 § 3.1.

Rather than responding to DCA's request for more time, the IRP Panel recommended only 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 ¶ 133; *see* LeVee Decl. ¶¶ 6-13. ICANN's Board adopted each of the IRP Panel's recommendations, and on July 16, 2015, resolved to "continue to refrain from delegating the .AFRICA gTLD" and to "permit [DCA's] application to proceed through the remainder of the new gTLD application process." Atallah Decl. ¶ 12 & Ex. F (Board Resolutions 2015.07.16.01-05).

C. The Processing Of DCA's Application For .AFRICA.

The Guidebook requires that an applicant for a gTLD that represents the name of a geographic region (such as .AFRICA) provide documentation of support or non-objection from at least 60% of the governments in that region. Bekele Decl., Ex. 3 § 2.2.1.4.2. The Guidebook further provides that a Geographic Names Panel will verify an applicant's documentation of such support or non-objection. *Id*. § 2.2.1.4.4; McFadden Decl. ¶ 3. DCA claimed that it had the required governmental support because the African Union Commission ("AUC") purportedly supported DCA's application.[5] Willett Decl. ¶ 7; Bekele Decl., Ex. 6. The AUC is the secretariat for the African Union, in which every African nation except Morocco is a member. Mot. at 10; *see also* Colon Decl., Ex. 2 at Ex. B. As supposed documentation of the AUC's support, DCA submitted a letter it had received from the AUC in 2009. Willett Decl. ¶ 7; Bekele Decl., Ex. 6. However, in April 2010 (over two years before DCA submitted its application), the AUC sent DCA a letter that formally withdrew its support for DCA. Bekele Decl., Ex. 7. Nevertheless, DCA chose to include the 2009 AUC support letter and exclude the 2010 AUC withdrawal letter when submitting its application for .AFRICA to ICANN in 2012. Willett Decl. ¶ 7; Bekele Decl., Ex. 7. The AUC withdrew its support for DCA's application in 2010 in anticipation of

[5] DCA also seeks to rely on a letter from the United Nations Economic Commission for Africa ("UNECA") as contributing towards the governmental support or non-opposition requirement. Bekele Decl., Exs. 8, 10. But UNECA later made clear that its letter was not, in fact, a formal endorsement of DCA's application pursuant to the terms of the Guidebook. Willett Decl. ¶ 8; Bekele Decl., Ex. 10. In any event, the letter did not conform to the Guidebook's requirements. McFadden Decl. ¶¶ 5-6, 9, 10, 13, 14, 16.

conducting an open request for proposals ("RFP") process to identify the entity that the AUC would endorse. Bekele Decl., Ex. 19; Colon Decl., Ex. 2, Ex. A. DCA was invited to participate in the RFP process but chose not to do so. LeVee Decl., Ex. H (Bekele Dep. 257:9-22); Colon Decl., Ex. 2 ¶ 8. After ZACR prevailed in the AUC's RFP process, the AUC formally endorsed ZACR's application in a letter ZACR submitted with its application in 2012. Colon Decl., Ex. 2, Ex. A; Bekele Decl., Exs. 7 & 19; McFadden Decl. ¶ 7.

The Geographic Names Review was conducted by the third-party dispute resolution provider InterConnect Communications ("ICC"). Bekele Decl., Ex. 3 § 2.4.2; McFadden Decl. ¶¶ 1-3. ICC determined in early 2013 that ***none*** of the letters of support submitted by DCA or ZACR in 2012 met the requirement of section 2.2.1.4.3 of the Guidebook that letters of support or non-opposition "demonstrate . . . [an] 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 with ICANN requiring compliance with consensus policies and payment of fees." McFadden Decl. ¶ 10. When an endorsement letter does not comply with the Guidebook requirements, ICC directs "clarifying questions" to the applicant; the applicant then may obtain an updated letter. *Id*. ¶ 11. In the Spring of 2013, ICC had decided to send clarifying questions to *both* DCA and ZACR. *Id*. But when ICANN accepted the GAC's advice in June 2013, ICC was told to discontinue processing DCA's application, and therefore did not at that time send clarifying questions to DCA. *Id*.

Consistent with the IRP Declaration, ICANN returned DCA's application to the exact same place in processing that the application had been in prior to the Board's decision in 2013 to stop work on the application: ICANN asked the Geographic Names Panel to determine whether DCA had the required 60% support or non-objection from the governments of Africa. Willett Decl. ¶¶ 9-10. ICC promptly sent clarifying questions to DCA. *Id*. ¶ 10; Bekele Decl., Ex. 13. The questions explained that the letters DCA had provided from the AUC and UNECA did not meet the Guidebook's requirements, and asked for updated letters. *Id*. Notably, nearly identical clarifying questions had been sent to ZACR in 2013 when ICC conducted ZACR's Geographic Name Review; unlike DCA, however, ZACR submitted a revised letter from the AUC endorsing

ZACR on July 2, 2013. *Compare* Bekele Decl., Ex. 13 *with* Willett Decl., Exs. B-C (ZACR clarifying questions). ZACR's revised letter from the AUC satisfied all required criteria in the Guidebook, causing ICC to determine that ZACR had passed the Geographic Names Review.[6] McFadden Decl. ¶ 12.

DCA, however, did ***not*** provide an updated letter from the AUC or UNECA. Indeed, DCA already knew that the AUC had withdrawn its support for DCA in 2010, and had previously tried (unsuccessfully) to convince the AUC to reinstate its support. LeVee Decl., Ex. H (Bekele Dep. 146:9-147:8). Nevertheless, DCA took the position that the AUC's 2009 letter, which DCA knew the AUC had withdrawn in 2010, was sufficient to pass Geographic Names Review. *Id*. at 180:9-12); Willet Decl. ¶ 10; *see also* McFadden Decl. ¶ 15. DCA also took the position that the 2008 UNECA letter was sufficient even though UNECA had disclaimed that it had authority to submit a letter under the Guidebook.[7] *Id*. Because the original letters were insufficient and DCA was unable to provide updated support letters, ICC determined that DCA's application did not pass the Geographic Names Review. McFadden Decl. ¶ 15. On October 13, 2015, ICANN issued an Initial Evaluation Report notifying DCA that its application had not passed Geographic Names Review, but that DCA was eligible for an "Extended Evaluation." Willett Decl. ¶ 11 & Ex. A (Initial Evaluation Report); Bekele Decl., Ex. 14. In the Extended Evaluation, DCA again received clarifying questions explaining that the 2009 AUC letter and 2008 UNECA letter were

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[6] DCA complains that ICANN improperly "ghost wrote" the AUC's updated letter of support for ZACR. Mot. at 6-7. Not so. To help applicants ensure that their letters of governmental support meet the requirements, the Guidebook contains a sample form of an endorsement letter. Bekele Decl., Ex. 3 § 2, Attachment. As noted, ICC had determined in 2013 that the AUC's initial letter of support for ZACR did not comply with the Guidebook requirements. McFadden Decl. ¶ 10. After ZACR received clarifying questions indicating that its letters were deficient and needed to be updated, ZACR requested further guidance as to the type of letter that would suffice, and ICANN provided it. *See* Colon Decl., Ex. 3. Had DCA asked, it would have received the same guidance, but it did not ask. LeVee Decl., Ex. H (Bekele Dep. 157:19-158:3). There was nothing improper about ICANN providing this guidance in completing the required paperwork, consistent with the Guidebook.

[7] DCA has since acknowledged in deposition that the UNECA letter was written in 2008 even before ICANN had published the first draft Guidebook and, indeed, even before DCA had been created as a legal entity. LeVee Decl., Ex. H (Bekele Dep. 147:16-148:5, 158:17-23.) The letter was obviously insufficient for purposes of the Guidebook, but DCA knew that UNECA would not sign an updated letter. *See id*. at 162:2-16.

insufficient and requesting updated letters. Bekele Decl., Exs. 15-16; McFadden Decl. ¶ 15. Again, DCA claimed the 2009 AUC letter and 2008 UNECA letters were sufficient. Willett Decl. ¶ 12; McFadden Decl. ¶ 15.

Contrary to DCA's claims, the AUC wrote to ICANN in September 2015 to *confirm* its "official position in this matter" that ZACR's application "is the only application endorsed and supported by the AUC and hence African member states." Colon Decl., Ex. 2, Ex. C. The AUC made clear that the "***AUC does not support the DCA application and, if any such support was initially provided, it has subsequently been withdrawn with full knowledge of DCA even prior to the commencement of ICANN's new gTLD application process***." *Id*. (emphasis added). ICANN accordingly issued an Extended Evaluation Report on February 17, 2016, notifying DCA that its application had not passed the Geographic Names Review and, as provided in the Guidebook, would not proceed. Willett Decl. ¶ 15; Bekele Decl., Ex. 16; McFadden Decl. ¶ 15. On March 3, 2016, ICANN's Board voted to move toward delegation of .AFRICA to be operated by ZACR. Willett Decl. ¶ 14. ICANN is now prepared to do so. *Id*. ¶ 15 & Ex. D.

D. Federal Court Proceedings And Remand For Lack of Jurisdiction.

DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County Superior Court. LeVee Decl. ¶ 16. After the Superior Court denied DCA's request for a temporary restraining order, ICANN timely removed the case to federal court, invoking diversity jurisdiction. *Id*. On February 26, 2016, DCA filed the operative First Amended Complaint, adding ZACR as a defendant. *See* Brown Decl., Ex. 2 at 1. On March 1, 2016, DCA moved for a preliminary injunction. The district court granted that motion on April 12, 2016, but did so on the basis of an admitted factual error. *See* Brown Decl., Ex. 3 at 2-3. Citing to what the court ***mistakenly*** identified as the Initial Evaluation Report for ***DCA's*** application (which was actually the Initial Evaluation Report for ***ZACR's*** application), the district court asserted that DCA had passed the Geographic Names Review. *See id*. In fact, DCA's application had not. *Id*.

On April 26, 2016, ZACR moved to dismiss the First Amended Complaint as to ZACR for failure to state a claim, which the district court granted. Brown Decl., Ex. 3 at 1. While its motion to dismiss was pending, ZACR also moved for reconsideration of the preliminary

injunction order based on the district court's factual mistake and on the court's erroneous assertion that .AFRICA could not be re-delegated if DCA were to prevail. ICANN joined that motion for reconsideration. *Id*. at 1. On June 20, 2016, the district court denied reconsideration, although acknowledged it had made the factual errors ZACR identified. Brown Decl., Ex. 3. ICANN and ZACR timely appealed to the Ninth Circuit. LeVee Decl. ¶ 17. However, before the Ninth Circuit could issue its decision, the district court ruled that it lacked subject matter jurisdiction because ZACR is an indispensable (but non-diverse) party. *Id*. As such, the district court lacked jurisdiction at the time it issued the preliminary injunction. *Id*. On October 20, 2016, the district court remanded the case to this Court, mooting the Ninth Circuit appeal and rendering the preliminary injunction null and void. *See id*., Ex. I.

LEGAL STANDARD

"The trial court considers two interrelated factors when deciding whether to issue preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will prevail on the merits at trial." *Choice-in-Educ. League v. L.A. Unified Sch. Dist.*, 17 Cal. App. 4th 415, 422 (1993) (citation omitted). A preliminary injunction "must not issue unless it is reasonably probable that the moving party will prevail on the merits." *Fleishman v. Superior Court*, 102 Cal. App. 4th 350, 356 (2002) (citation omitted). "The plaintiff bears the burden of presenting facts establishing the requisite reasonable probability . . . ." *Id*.

ARGUMENT

I. DCA IS NOT ENTITLED TO A PRELIMINARY INJUNCTION.

A. The District Court's Injunction Is Null And Void.

DCA's opening argument—that the federal preliminary injunction "remains valid" (Mot. at 9)—contravenes settled California law that a "judgment is void on its face if the court which rendered the judgment lacked personal or subject matter jurisdiction[.]" *Cty. of Ventura v. Tillett*, 133 Cal. App. 3d 105, 110, (1982). Federal law is in accord: "[i]f a court order issues without personal or subject matter jurisdiction, . . . [the] order is deemed a nullity" and considered "nothing at all." *In re Establishment Inspection of Hern Iron Works, Inc*., 881 F.2d 722, 726–27

(9th Cir. 1989); *see also Takeda v. Nw. Nat'l Life Ins. C*o., 765 F.2d 815, 822 (9th Cir. 1985) (directing district court to vacate its preliminary injunction order after holding that a third party was indispensable and destroyed diversity). In short, an injunction entered by a federal court that lacked subject matter jurisdiction—which DCA does not dispute is the case—is null and void.[8]

B. It Is Not Reasonably Probable That DCA Will Prevail On The Merits.

1. The Covenant Bars DCA's Claims.

DCA does not dispute that the Covenant covers all of DCA's claims because they "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" Plaintiff's application. Bekele Decl., Ex. 3 § 6.6. Instead, DCA argues that the Covenant is unenforceable. However, a federal district court only a few weeks ago considered this precise issue and dismissed a gTLD applicant's lawsuit against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS 163710, at *10–11 (C.D. Cal. Nov. 28, 2016); LeVee Decl., Ex. J (*Ruby Glen* Order). The ruling in *Ruby Glen* compels dismissal of this entire lawsuit, and ICANN will be moving for judgment on the pleadings in this Court based on the rationale of the Court in the *Ruby Glen* matter.[9]

(a) Section 1668 Does Not Apply To The Covenant.

As did the plaintiff in *Ruby Glen*, DCA argues that Civil Code section 1668 invalidates the Covenant. Mot. at 13-14. That provision invalidates clauses that "exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another." Cal. Civ.

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[8] DCA's cases on this point are inapposite, as they do not hold that a district court's ***orders*** are binding after a remand for lack of jurisdiction, but rather merely that a party's pleadings in federal court may have some continuing effect following remand. *Ayres v. Wiswall*, 112 U.S. 187, 190–91 (1884) (answer); *Laguna Vill. v. Laborers' Int'l Union of N. Am*., 35 Cal. 3d 174, 163, 182 (1983) (motion to dismiss); *Edward Hansen, Inc. v. Kearny Post Office Assocs.*, 399 A.2d 319, 320, 322–24 (N.J. Super. Ct. Ch. Div. 1979) (six years of filings).

[9] The Ruby Glen court declined to follow as not "persuasive" the federal court's preliminary ruling in this case that "serious questions" exist regarding the enforceability of the covenant not to sue. *Id*. at *11 n.1.

Code § 1668.[10] However, just as in *Ruby Glen*, the conduct alleged here does not amount to "fraud, or willful injury to the person or property of another." Instead, DCA challenges only ICANN's "processing and consideration of a gTLD application." That is neither fraud nor "willful injury." *See Ruby Glen, LLC,* 2016 U.S. Dist. LEXIS 163710, at *9–11 ("Because the [Covenant] only applies to claims related to ICANN's processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which . . . section 1668 applies.").

Courts have interpreted section 1668's phrase "willful injury to the person or property of another" to mean more than merely intentional conduct, but instead "intentional wrongs." *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) ("Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future *intentional wrongs and gross negligence*.") (emphasis added) (citations omitted). In *Food Safety Net Services v. Eco Safe Systems USA, Inc*., 209 Cal. App. 4th 1118 (2012), the cross-complainant alleged that the cross-defendant food safety equipment tester employed "slovenly procedures which seemed to be slanted towards a preconceived conclusion." *Id.* at 1125. Despite these allegations, the court held that a limitation of liability clause was enforceable and barred not only the plaintiff's claim for breach of contract but also plaintiff's "bad faith" claim. *Id*. at 1125–27. Similarly, DCA's claims of a "pretext[ual]" outcome (*see* Mot. at 5, 8) do not assert a "willful injury" within the meaning of section 1668. *See Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 729 (1998) ("While the word 'willful' implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done.") (citations omitted), *disapproved of on other grounds by Aguilar v. Atl. Richfield Co*., 25 Cal. 4th 826 (2001); *Blankenheim v. E. F. Hutton & Co*., 217 Cal. App. 3d 1463, 1471 (1990) ("Section 1668 reflects the policy of this state to look with disfavor upon those who attempt to contract away their legal liability to others *for the commission of torts*.") (emphasis added).

[10] The statute also invalidates contracts that release claims for a "violation of law, whether willful or negligent." Cal. Civ. Code § 1668. There is no basis for arguing that provision applies here given that DCA does not allege in its Ninth Cause of Action that ICANN violated any "law."

DCA argues that the Covenant is facially "void" even as to claims that do *not* assert "willful injury" because the Covenant "encompasses" such claims. Mot. at 13. California courts have squarely rejected this reasoning. *E.g., Werner v. Knoll*, 89 Cal. App. 2d 474, 477 (1948) (enforcing a limitation of liability as to negligence claim even though clause as written also improperly "attempt[ed] to relieve [defendant] from the consequences of his own fraud and willful injury"). Consistent with this principle, courts have routinely enforced release provisions as to claims not covered by section 1668 even though the provision could encompass claims for fraud or willful injury. *Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 340 (1985) (enforcing as to negligence claims a release covering "all actions, claims or demands ... for injury or damage") (citation omitted); *Grayson v. 7-Eleven, Inc.*, No. 09cv1353-GPC(WMC), 2013 U.S. Dist. LEXIS 40462, at *18, *12 (Mar. 21, 2013) (enforcing clause covering "all claims . . . suits or causes of action . . . of every kind and nature") (citation omitted).[11]

(b) The Covenant Is Not Unconscionable.

DCA alternatively argues that the Covenant is unconscionable. Mot. at 14-15. This claim requires that DCA show that the Covenant is both procedurally and substantively unconscionable. *See McCaffrey Grp., Inc. v. Superior Court*, 224 Cal. App. 4th 1330, 1348 (2014)[12]; *see also Ruby Glen, LLC,* 2016 U.S. Dist. LEXIS 163710, at *15–16. However, DCA cannot show either.

The procedural unconscionability analysis "addresses the circumstances of contract negotiation and formation, focusing on oppression and surprise due to unequal bargaining power." *Grand Prospect Partners, L.P. v. Ross Dress for Less*, *Inc*., 232 Cal. App. 4th 1332, 1347 (2015). Neither "oppression" nor "surprise" took place here. The sophistication of the contracting party weighs heavily against a finding that any oppression took place. *Appalachian*

[11] In addition to being inconsistent with statutory language, the application of section 1668 here would run roughshod over the important public benefits the Covenant confers. The Covenant ensures that the thousands of new gTLD applications ICANN must evaluate are not ensnared in endless litigation as disappointed applicants bring lawsuits claiming ICANN violated their rights.

[12] The Court must apply a "sliding scale" analysis, such that the "more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *McCaffrey Grp., Inc*., 224 Cal. App. 4th at 1348 (citation and quotation marks omitted).

Ins. Co. v. McDonnell Douglas Corp., 214 Cal. App. 3d 1, 26–27 (1989). DCA is unquestionably a sophisticated entity; it claimed to possess the significant technical and financial wherewithal required to operate a gTLD registry. Willett Decl. ¶ 4; Mot. at 15. DCA's CEO has been "active in the DNS" industry, has an MBA, and has worked for banks and auditors. LeVee Decl., Ex. G (Bekele IRP Decl. ¶¶ 3-5). DCA cannot claim to have been "oppressed" into a provision it had ample sophistication to comprehend. *See Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *13 ("the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook '. . . has been revised extensively via public comment . . .' militates against a conclusion that the covenant not to sue is procedurally unconscionable") (citation omitted).

DCA also does not claim to have been "surprised" by the Covenant. DCA admits it was aware of the Covenant, as it claims that provision led it to "believe that the IRP process provided for real redress through the IRP in lieu of court review." Mot. at 15. The Covenant was highlighted through capitalization and formatting, and the Guidebook was adopted after numerous versions were posted for public comment. Espinola Decl. ¶ 2. Moreover, according to Plaintiff, DCA's CEO even "helped develop the rules and requirements for the New gTLD Program," including the Guidebook. LeVee Decl., Ex. G (Bekele IRP Decl. ¶ 13); *id*., Ex. H (Bekele Dep. 17:3-20, 23:2-24:2). *See Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005) (rejecting unconscionability claim because it is reasonable to expect a merchant to "carefully read, understand, and consider" its agreements).

Nor is the Covenant substantively unconscionable. Substantive unconscionability exists only where "[t]he terms . . . shock the conscience." *Morris*, 128 Cal. App. 4th at 1323 (citation omitted). DCA argues that the Covenant is substantively unconscionable for only one reason: it does not release any claims ICANN might have against DCA. Mot. at 14. However, "[u]nconscionability turns *not only* on a 'one-sided' result, but also on an absence of 'justification' for it." *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647 (2010) (citations omitted); *see also Kurashige v. Indian Dunes, Inc*., 200 Cal. App. 3d 606, 614 (1988). Here, the Covenant has a well-founded justification: ICANN anticipated that absent

a broad waiver in the application terms and conditions, the over 1,900 applicants could initiate frivolous and costly legal actions to challenge legitimate ICANN decisions, which would imperil the successful implementation of the New gTLD Program. The Covenant in the Guidebook was deemed appropriate in light of these considerations. Espinola Decl. ¶ 4. The Court in *Ruby Glen* confirmed this reasoning, and held: "Without the covenant not to sue, any frustrated applicant could . . . derail the entire system developed by ICANN . . . ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue." *Ruby Glen, LLC,* 2016 U.S. Dist. LEXIS 163710, at *15. Furthermore, it is not true that the Covenant benefits only ICANN. The Covenant achieves finality and reduces delays and uncertainties, which benefits the participants generally and hastens the delivery of the benefits of new gTLDs for the advantage of the Internet community.

(c) The Covenant Was Not Procured By Fraud.

DCA argues that the Covenant was procured by fraud because ICANN purportedly represented that IRP final declarations are binding, and then allegedly did not adhere to the IRP Declaration. Mot. at 15. DCA does not, however, identify any representation (let alone a *knowingly false* one) that ICANN made regarding the purportedly binding nature of IRP declarations, which is fatal to DCA's argument. *See Wilkins v. Nat'l Broad. Co., Inc*., 71 Cal. App. 4th 1066, 1081 (1999) ("knowingly false misrepresentation" is an element of fraud). In all events, ICANN fully complied with the IRP Declaration.

2. ICANN Complied With The IRP Final Declaration.

DCA's Motion relies exclusively on its ninth cause of action, which alleges that ICANN contravened the IRP Declaration because ICANN "forced [DCA] to proceed through parts of the process that it had already completed"—namely, Geographic Names Review. First Amended Complaint ¶ 121. But DCA cannot prevail on this claim because (1) DCA had not completed the Geographic Names Review; and (2) DCA conceded in deposition that the IRP Declaration did ***not*** require ICANN to permit DCA to skip the Geographic Names Review. LeVee Decl., Ex. H (Bekele Dep. 200:7-201:19, 7-203:4-7, 206:14-207:2, 207:16-208:11).

Instead, the IRP Panel recommended that ICANN "permit DCA Trust's application to

proceed through the *remainder* of the new gTLD application process." Bekele Decl., Ex. 1 ¶ 119 (emphasis added). It is beyond dispute that DCA's application had *not* passed Geographic Names Review before ICANN stopped processing the application. LeVee Decl., Ex. H (Bekele Dep. 200:7-201:19, 7-203:4-7, 206:14-207:2, 207:16-208:11). Thus, permitting DCA to complete the "remainder" of the process following the IRP Declaration meant that DCA had to complete Geographic Names Review. This is exactly what ICANN required, and ICANN gave DCA several additional months to attempt to meet the Guidebook's requirements.

DCA claims the 2009 AUC letter met the Guidebook's requirement, but it is deficient in two respects. First, as ICC determined, the letter did not meet the requirement that it "should demonstrate the government'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." *See* Bekele Decl., Ex. 15; *id*., Ex. 3 § 2.2.1.4.3. And, despite the fact that the clarifying questions specifically informed DCA of this deficiency, DCA refused to submit an updated AUC letter. *Id*., Ex. 15; Willett Decl. ¶¶ 10-12; McFadden Decl. ¶¶ 15-16. DCA argues that ICC should have ignored the deficiency because the requirement is supposedly only "discretionary." Mot. at 11. In fact, however, ICC has consistently required that endorsement or non-objection documentation contain all the information specified in the Guidebook, and treated all applicants identically in that regard. *See* McFadden Decl. ¶ 16. DCA offers no reason why this is not a permissible interpretation of the Guidebook. *See Stabler v. El Dora Oil Co*., 27 Cal. App. 516, 522, (1915) (construing "may" as imposing mandatory duty based on context of bylaws provision). The Guidebook and clarifying questions make clear that a letter "should demonstrate" the governmental entity's understanding of the process. Bekele Decl., Ex. 15; *id*., Ex. 3 § 2.2.1.4.3. DCA's did not, thus ICC properly requested an updated letter.

Second, the AUC issued a subsequent letter in 2010 explicitly ***withdrawing*** its support for DCA, more than two years before DCA submitted its application in 2012.[13] Bekele Decl., Ex. 7.

[13] DCA contends the 2010 letter withdrawing the AUC's support was not signed by the proper person, but DCA presents no evidence as to why the signature is improper, and the AUC has confirmed it was validly executed. Yedaly Decl. ¶ 10; LeVee Decl., Ex. H (Bekele Dep. 104:19-105:18).

DCA argues that section 2.2.1.4.3 of the Guidebook barred the AUC from withdrawing the 2009 letter of support, but that provision was not even in the Guidebook in 2010 when the AUC withdrew its support.[14] Even had it been in force, it merely describes *one* circumstance in which support may be withdrawn: "*It is also possible* that a government may withdraw its support for an application at a later time, *including* after the new gTLD has been delegated, if the registry operator has deviated from the conditions of original support or nonobjection." Bekele Decl., Ex. 3 § 2.2.1.4.4 (emphasis added). Further, the provision applies only to "registry operators" (not applicants) that deviated from the conditions of original support. *Id.* The Guidebook simply does not delimit every circumstance when a government may withdraw its support of an application.[15]

In short, ICANN complied with the IRP Declaration, placed DCA's application in the exact same place it had been in prior to the Declaration, and provided DCA every opportunity to submit sufficient documentation of support or non-objection. DCA failed to do so, and, for that reason, its application did not pass the Geographic Names Review. As such, DCA has no likelihood of prevailing on its ninth cause of action.[16]

CONCLUSION

The longer a delay to the delegation of .AFRICA, the greater the prejudice to the African peoples and the Internet community. The motion for a preliminary injunction should be denied.

Dated: December 9, 2016

JONES DAY

By: Jeff LeVee/aw
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS

[14] *See* Guidebook § 2-18, April 2011 Discussion Draft, https://archive.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf.

[15] Further, DCA conceded in its deposition that the 2009 letter could have been validly withdrawn notwithstanding this Guidebook provision. LeVee Decl., Ex. H (Bekele Dep. 180:9-12).

[16] Because DCA's claim fails on the merits, the Court need not address whether DCA has shown harm sufficient to support an injunction. Nevertheless, DCA's motion fails on that point as well, as demonstrated in ZACR's opposition. ICANN joins in and adopts ZACR's arguments.