

# **EXHIBIT G**

International Centre for Dispute Resolution

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

Between

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

v.

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

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**WITNESS STATEMENT OF SOPHIA BEKELE ESHETE**

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

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust (“DCA”) for rights to .AFRICA, a new generic top-level domain name (“gTLD”), to the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. I am the founder and executive director of DCA and a champion for DCA’s application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN’s breaches of its Bylaws,

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

**I. PERSONAL AND PROFESSIONAL BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

# **EXHIBIT H**

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

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 DOTCONNECTAFRICA TRUST, )  
 )  
 Plaintiff, )  
 )  
 vs. )No. BC607494  
 )  
 INTERNET CORPORATION FOR )  
 ASSIGNED NAMES AND NUMBERS )  
 and DOES 1 through 50, )  
 inclusive, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

\*\*\*CONTAINS HIGHLY CONFIDENTIAL  
ATTORNEYS' EYES ONLY SECTION\*\*\*

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

Reported by:  
Melissa M. Villagran, RPR, CLR  
CSR No. 12543  
Job No. 2479429  
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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

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	)
DOTCONNECTAFRICA TRUST,	)
	)
Plaintiff,	)
	)
vs.	)No. BC607494
	)
INTERNET CORPORATION FOR	)
ASSIGNED NAMES AND NUMBERS	)
and DOES 1 through 50,	)
inclusive,	)
	)
Defendants.	)
_____	)

Videotaped deposition of PERSON MOST QUALIFIED OF DOTCONNECTAFRICA TRUST, SOPHIA BEKELE ESHETE, Volume I, taken on behalf of Defendants, at 555 Flower Street, Los Angeles, California, beginning at 9:42 and ending at 4:47 p.m. on Thursday, December 1, 2016, before Melissa M. Villagran, RPR, CLR, Certified Shorthand Reporter No. 12543.

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13 Julian Shine

14

15 Also Present:

16 John O. Jeffrey, Attorney at Law

17 ICANN, General Counsel

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HIGHLY CONFIDENTIAL ATTORNEYS' EYES ONLY SECTION  
251-256

INFORMATION REQUESTED

(None.)

INSTRUCTION NOT TO ANSWER

(None.)

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

2 9:42

3

4 THE VIDEOGRAPHER: We are on the record at

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

6 video-recorded deposition of the person most

7 qualified for DotConnectAfrica Trust. My name is

8 Julian Shine, here with court reporter Melissa

9 Villagran. We are here with Veritext Legal

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

11 This deposition is being held at 555 South

12 Flower Street in Los Angeles, California.

13 Caption of this case is DotConnectAfrica

14 Trust versus Internet Corporation For Assigned Names

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

16 number BC 607494.

17 Please note that audio and video recording

18 will take place unless all parties agree to go off

19 the record. Microphones are sensitive and may pick

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

21 interference.

22 I am not authorized to administer an oath. I

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

24 financially interested in the outcome in any way.

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

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

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

5 Counsel for ICANN. 09:43:31

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

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

10 MR. BROWN: Ethan Brown on behalf of 09:43:39  
11 DotConnectAfrica Trust.

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

14 THE VIDEOGRAPHER: Thank you.

15 The witness will be sworn in and counsel may 09:43:47  
16 begin the examination.

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

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

22 THE DEPONENT: Yes.

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SOPHIA BEKELE ESHETE,

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

EXAMINATION

BY MR. LE VEE:

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

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

09:44:09

Q Have you been deposed before?

A No.

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

09:44:21

A Yes.

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

A Just one.

09:44:33

Q Oh, just one?

A Yes.

Q Okay. I forgot. For Mr. Attalah.

A Yes.

Q Okay. Real briefly, we are here today

09:44:38

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

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

8 A Yes.

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

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

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

24 A Okay.

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

1 remember what the comment was?

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

3 Q Okay. And my understanding is that DCA

4 submitted some comments on various versions of the

5 guidebook; is that correct?

09:49:33

6 A It could be.

7 Q Do you remember one way or the other?

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

9 were active participants in the --

10 Q In the development of the guidebook?

09:49:43

11 A Yes.

12 Q Okay. Do you remember whether DCA commented

13 on any portion of Module 6?

14 A No.

15 Q No --

09:49:52

16 A We did not.

17 Q Did not. Okay.

18 And you understood that Module 6 was part of

19 the application?

20 A Yes.

09:49:59

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

22 through Module 6, Paragraph 6, and having any

23 understanding at the time you submitted the

24 application of what the paragraph meant?

25 A Not really.

09:50:17

Page 17



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

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

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

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

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

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

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

18 A I don't remember.

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

22 A Yes.

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

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

2           A    Yeah.

3           Q    Okay.   And you understood when you submitted

4   your application that you were agreeing that DCA

5   would be bound by the terms of -- of the whole           09:56:59

6   guidebook?

7           A    Yes.

8           Q    Okay.

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

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

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

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

19   BY MR. LE VEE:

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

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

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

2 Q Okay.

3 A Yes.

4 Q And it -- there -- the letter says -- well,

5 it's dated August 27, 2009. 11:50:40

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

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

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

14 A Yes.

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

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

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

21 A Yes.

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

24 A Right.

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

1 letter?

2 A I'm not sure.

3 Q You don't know?

4 A I don't know.

5 Q So the reason I -- I say that is I'm going to 11:51:31

6 show you in a couple minutes other letters he has

7 written. It looks like he signed the letter on

8 behalf of Jean Ping.

9 A Okay.

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

11 A He could, yeah.

12 Q Okay. But you don't know?

13 In other words, he could --

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

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

18 A Jean Ping signed.

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

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

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

1 MR. LE VEE: Okay.

2 DEPOSITION OFFICER: Thank you.

3 BY MR. LE VEE:

4 Q Take a look at Exhibit 47.

5 (Exhibit 47 was marked for 01:39:05  
6 identification by the deposition  
7 officer and is attached hereto.)

8 BY MR. LE VEE:

9 Q This appears to be a letter you wrote to  
10 Mr. Shinkaiye, S-h-i-n-k-a-i-y-e, which is -- 01:39:16

11 A Okay.

12 Q -- a name we discussed earlier today, dated  
13 December 30, 2011.

14 You can take a minute to read the letter. I  
15 just want to confirm first that this is the letter 01:39:24  
16 you -- you wrote and sent to Ambassador Shinkaiye.

17 A Yes.

18 Q Okay. And in the first paragraph it says (as  
19 read):

20 "We have been waiting patiently for 01:39:37  
21 the past several months to receive an  
22 official response from your office  
23 regarding the need to properly redress  
24 our wishes as conveyed at different  
25 times for the official reinstatement 01:39:49

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

4 Did I read that accurately?

5 A Yes. 01:39:58

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

8 A Yes.

9 Are we done?

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

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

12 (Exhibit 48 was marked for  
13 identification by the deposition  
14 officer and is attached hereto.)

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

16 Q Do you recognize Exhibit 48?

17 A Yes.

18 Q What is it?

19 A It's an endorsement letter from UNECA.

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

21 letter that you provided to ICANN with the DCA  
22 application; is that correct?

23 A Yes.

24 Q Now, this letter does not refer to DCA, does  
25 it?

01:41:46

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

3 MR. LE VEE: I know it does.

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

6 BY MR. LE VEE:

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

10 A Uh-huh. 01:42:01

11 How?

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

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

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

16 A He is the executive secretary of the UNECA.

17 Q Okay.

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

20 Q Okay. 01:42:29

21 A -- office of the AUC.

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

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

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

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

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

8 Q Where does it say in the guidebook --

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

13 Q Forget international organization.

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

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

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

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

21 A Yeah, right.

22 Q Correct?

23 It was for .Africa, correct?

24 A Yes.

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



1 never asked ICANN for help in having a letter

2 drafted to support your application?

3 A No, I didn't.

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

8 MR. BROWN: Objection; vague and ambiguous.

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

11 BY MR. LE VEE:

12 Q It has more information?

13 A More information.

14 Q The AUC letter.

15 A Yes. 01:51:36

16 Q Yes.

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

21 A Uh-huh.

22 Q Is that a yes?

23 A Yes.

24 Q Okay.

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

1 A I don't remember.

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

4 A No.

5 Q No. Okay. 01:55:36

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

7 Q Pardon?

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

9 Q I understand your position.

10 A Yeah. 01:55:43

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

13 A Only after -- during the extended evaluation.

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

16 A No.

17 Q Okay.

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

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

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

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

1 A That's not true because, like you -- we  
2 argued on our clarifying letter, the language that  
3 is already in the clarifying, we -- we already meet  
4 the requirement for -- the language required by  
5 ICANN for an updated endorsement. 02:14:57

6 Q Well --

7 A You called it updated, but everything else is  
8 here.

9 Q So you're taking the position that letters  
10 you had received in 2008 and 2009 were sufficient to 02:15:05  
11 meet the guidebook requirements from 2012?

12 A Absolutely.

13 Q Even though you knew that the AUC had sent a  
14 letter in 2010 purportedly withdrawing the  
15 endorsement? 02:15:20

16 A That is a separate issue from meeting the  
17 guidelines and the language that ICANN requires  
18 in -- to legitimize an endorsement.

19 Q If the --

20 A Entirely different from. 02:15:30

21 Q If the AUC properly withdrew the endorsement  
22 in 2010, was there anything that prevented them from  
23 doing that?

24 A No, but they didn't do that.

25 MR. LE VEE: Okay. Let's take a break. 02:15:43

1 Q Of the individual governments.

2 A -- countries.

3 Q Of the countries, yes.

4 Or that the panel require ICANN to accept the

5 UNECA letter as the support; correct?

02:55:57

6 A Right.

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

8 did allow you to proceed through the remainder of

9 the new gTLD application process, correct?

10 That's the words they used.

02:56:11

11 A Right.

12 Q But they didn't address whether they were

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

14 obtain governmental support as set out in the

15 guidebook, right?

02:56:24

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

17 that, right?

18 MR. BROWN: Document speaks for itself.

19 BY MR. LE VEE:

20 Q I mean --

02:56:27

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

22 mute, muted.

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

24 whether the -- the requirement was satisfied as a

25 result of the letter from UNECA, correct?

02:56:43

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1 A Can you say that again.

2 Q Yes.

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

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

10 Q Correct. 02:57:16

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

13 A Good or bad or either way, yeah.

14 Q Right.

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

19 A They just left it mute, I guess.

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

23 A The individual endorsement requirements.

24 Q Right.

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

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

2           Q    Okay.

3           A    -- at that time.

4           Q    But just to be clear, nothing in the final  
5    declaration says that you get to skip the geographic    02:59:22  
6    review process, right?

7           A    Yes.

8           Q    Okay.  And so -- and you would not be  
9    suggesting, would you, that an application for the  
10   registry operator to operate a top-level domain that    02:59:39  
11   is the name of a continent not have support of the  
12   people of that continent, right?

13          A    You mean the government.

14          Q    The governments.

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

16          A    Can you rephrase that question.

17          Q    I'll rephrase it.

18               Don't you think that it's appropriate that  
19    whoever becomes the registry operator for the  
20    .Africa top-level domain have support of the            03:00:08  
21    governments in Africa?

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

24          Q    Yes.

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



1 letter from the AUC or not?

2 A Right.

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

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

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

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

15 Q Right. 03:04:30

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

19 A Correct.

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

24 A Right.

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



1 A No.

2 Q Okay. And so you were asking for 18 months

3 so that you could go country by country to try to

4 get the additional support?

5 A Exactly.

03:05:08

6 Q Okay.

7 And ultimately the panel just simply did not

8 address that question. It issued a ruling without

9 opining on whether you should get any additional

10 time?

03:05:20

11 A Right.

12 Q Okay.

13 A You can imagine how confusing it is for

14 anyone because the issue of endorsement has not been

15 determined and ICANN's status on signing the

03:05:28

16 registry agreement and acceptance of the AUC is

17 still a matter of doubt because we -- because the

18 panel has already ruled on delaying the ZACR

19 application. So there is a lot of things pending

20 that's not finished.

03:05:46

21 So I'm trying to give ICANN a chance to give

22 us 18 months to go, if they choose to go that path

23 of individual government.

24 Q Okay.

25 A That's what it is.

03:05:59

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

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

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

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

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

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

13 A There was a chance?

14 Q Yes.

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

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

21 A Right.

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

25 A Yeah. 04:00:15

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

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

8 BY MR. LE VEE:

9 Q Have you seen this document before?

10 A It appears familiar. 04:10:28

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

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

17 Q Okay.

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

19 A Yeah.

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

22 A No.

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

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

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

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

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

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

Dated: 12/5/2016



MELISSA M. VILLAGRAN

# **EXHIBIT I**

Nos. 16-55693, 16-55894

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**DOTCONNECTAFRICA TRUST,**

*Plaintiff/Appellee,*

v.

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

*Defendant/Appellant.*

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**DOTCONNECTAFRICA TRUST,**

*Plaintiff/Appellee,*

v.

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

*Defendant/Appellant.*

and

**ZA CENTRAL REGISTRY, NPC.**

*Appellant.*

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On Appeal from the United States District Court for the Central District  
of California, No. 2:16-CV-00862-RGK, The Honorable R. Gary Klausner

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**APPELLANTS' MEMORANDUM REGARDING THE DISTRICT  
COURT'S LACK OF JURISDICTION**

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[Attorneys for Appellant ZA Central Registry, NPC listed on signature page]

Appellants Internet Corporation for Assigned Names and Numbers (“ICANN”) and ZA Central Registry, NPC (“ZACR”) file this memorandum to advise the Court that, on October 20, 2016, the district court in this case entered an order concluding that it lacks subject matter jurisdiction and remanding the case to state court. A copy of the district court’s order is attached as Exhibit A.

The district court’s order means that the district court’s preliminary injunction order is void and a nullity, and this appeal from that order is moot. Appellants accordingly request that the Court dismiss this appeal, reflecting that the preliminary injunction order is void and the appeal is moot.

### **BACKGROUND**

Plaintiff DotConnectAfrica Trust (“DCA”) filed this suit against ICANN on January 20, 2016, in Los Angeles County Superior Court. 7 ER 1569. ICANN timely removed the case to the court below, invoking the court’s diversity jurisdiction. 7 ER 1568-1656. DCA thereafter filed a First Amended Complaint, adding ZACR as a defendant along with ICANN. 7 ER 1538-67. The gist of DCA’s claims is that ICANN improperly entered into a registry agreement with ZACR, rather than DCA, to be the operator of a new generic top-level domain name known as .AFRICA.

On April 12, 2016, the district court granted DCA’s motion for a preliminary injunction, preventing ICANN from delegating .AFRICA for operation by ZACR

during the pendency of the litigation.<sup>1</sup> 1 ER 40-47. ICANN timely appealed from that preliminary injunction on May 11, 2016. 1 ER 4-39. Both ICANN and ZACR timely sought reconsideration of the preliminary injunction order, which the district court denied on June 20, 2016. 1 ER 21-24. ICANN amended its notice of appeal on June 27, 2016, to include the district court's denial of reconsideration. 1 ER 2. ZACR filed its separate notice of appeal from the preliminary injunction and from the denial of reconsideration on June 24, 2016. ER 1675.

On April 26, 2016, ZACR moved to dismiss the complaint as to ZACR for failure to state a claim. On June 14, 2016, the court granted ZACR's motion. 2 ER 48-52. Despite that dismissal of DCA's affirmative claims against it, however, ZACR continued to maintain an interest in DCA's claims against ICANN because, among other things, DCA seeks to invalidate ZACR's registry agreement with ICANN, and the preliminary injunction prevented ICANN from proceeding to delegate .AFRICA for operation by ZACR. ZACR accordingly moved, on August 1, 2016, to intervene in the case below.

On October 20, 2016, the district court granted ZACR's motion to intervene. *See* Exhibit A, hereto. The court concluded that ZACR is entitled to intervene as

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<sup>1</sup> ZACR was a named defendant as of that date, and it had been served with the summons and the First Amended Complaint, although ZACR had not yet filed its response to the First Amended Complaint. Further, DCA served the summons and First Amended Complaint on DCA in South Africa after ICANN and DCA had submitted their briefing on DCA's preliminary injunction motion.



of right as to DCA’s Tenth Cause of Action, which seeks a declaration that ZACR’s registry agreement with ICANN is null and void. *Id.* at 3-4. However, because ZACR and DCA are both citizens of a foreign country, ZACR’s intervention would destroy diversity. The district court accordingly proceeded to consider whether ZACR must be treated as an “indispensable” party, whose existence requires that the case be dismissed for lack of subject matter jurisdiction. *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1013–14 (9th Cir. 2006); *Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985). Applying the factors set out in Federal Rule of Civil Procedure 19(b), the district court concluded that, because DCA is seeking to void a contract to which ZACR is a party, ZACR is an indispensable party and the case must be dismissed for lack of subject matter jurisdiction. The court accordingly remanded the case to state court.

## DISCUSSION

The district court’s ruling that it lacks subject matter jurisdiction means that the preliminary injunction order is nullity and this appeal is moot. “It is well settled that a judgment is void if the court that considered it lacked jurisdiction of the subject matter . . . .” *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (internal quotation marks, citations and emphasis omitted); *see also In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 726–27 (9th Cir. 1989) (“If a court order issues without personal or subject matter jurisdiction, . . .

[the] order is deemed a nullity” and considered “nothing at all.”); *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) (“If jurisdiction was lacking, then the court's various orders . . . were nullities.”).

Reflecting this settled law, when this Court has determined in appeals from preliminary injunction orders that the district court lacked subject matter jurisdiction, the court has directed that the injunction be vacated and the case dismissed. *See Takeda*, 765 F.2d at 820, 822 (directing district court to vacate its preliminary injunction order after holding that a third party was indispensable and destroyed diversity); *see also Wang Zong Xiao v. Barr*, 979 F.2d 151, 156 (9th Cir. 1992) (“Lacking jurisdiction, the district court erred in entering the preliminary injunction . . . Consequently, the preliminary injunction is VACATED”); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) (“The district court lacked subject matter jurisdiction. . . . The preliminary injunction is vacated and this case is remanded to the district court with instructions to dismiss the City's underlying action.”).

In this case, the district court itself has ruled that it lacks jurisdiction and has already remanded the case to state court. The preliminary injunction order thus presents no live issue for this Court’s review. Appellants accordingly request that

the Court dismiss this appeal, reflecting that the preliminary injunction order is now void and a nullity and that the appeal is accordingly moot.

Dated: October 21, 2016.

Respectfully submitted,

JONES DAY

By: /s/ Jeffrey A. LeVee  
Jeffrey A. LeVee

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing REPLY BRIEF OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2016. Under said practice, the CM/ECF users were electronically served.

Executed on October 21, 2016, at Los Angeles, California.

By: s/ Jeffrey A. LeVee  
Jeffrey A. LeVee

Attorneys for Defendant/Appellant  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No.	CV-16-00862-RGK (JCx)	Date	October 19, 2016
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Title	<i>DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers</i>
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Present: The Honorable	R. GARY KLAUSNER, U.S. DISTRICT JUDGE
------------------------	---------------------------------------

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

Not Present

Attorneys Present for Defendants:

Not Present

**Proceedings:**            **(IN CHAMBERS) Order re: ZA Central Registry’s Motion to Intervene (DE 122)**

## **I. INTRODUCTION**

On February 26, 2016, Plaintiff DotConnectAfrica Trust (“DCA”) filed a First Amended Complaint against Defendants Internet Corporation for Assigned Names and Numbers (“ICANN”), and ZA Central Registry (“ZACR”). Plaintiff alleges 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 application process); (10) Declaratory Relief (that the Registry Agreement between ZACR and ICANN be declared 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).

On June 14, 2016, the Court granted ZACR’s Motion to Dismiss as to all claims alleged against ZACR in its entirety, thereby extinguishing ZACR as a party to the action.

Currently before the Court is ZACR’s Motion to Intervene as a matter of right under Rule 24(a) or permissively under Rule 24(b). For the following reasons, the Court **GRANTS** in part the motion.

## II. FACTUAL BACKGROUND

On February 26, 2016, DCA filed a First Amended Complaint against Defendants. The action arises out of a dispute involving the delegation of rights related to the .Africa top-level domain.

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. ICANN invited eligible parties to submit applications to obtain the rights to these various gTLDs. In March 2012, 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, ZACR also submitted an application for .Africa.

In October 2012, DCA challenged ICANN’s processing of its application and response to an independent review conducted at DCA’s request. DCA alleges that instead of allowing DCA’s application to proceed through the delegation phase as mandated by the review panel, ICANN restarted DCA’s application from the beginning. In February 2016, ICANN denied DCA’s application. Shortly thereafter, ICANN began the processing of delegating .Africa to ZACR.

On March 4, 2016, the Court granted DCA’s Ex Parte Application for TRO, enjoining ICANN from issuing the .Africa top-level domain until the Court decided DCA’s Motion for Preliminary Injunction. On April 12, 2016, the Court granted DCA’s Motion for Preliminary Injunction, keeping the injunction in place until resolution of the action.

On April 26, 2016, ZACR filed a Motion to Dismiss on all claims asserted against it. On May 6, 2016, ZACR filed a Motion for Reconsideration regarding the Court’s Order re Preliminary Injunction. ICANN joined the motion on May 10, 2016. On June 14, 2016, the Court granted ZACR’s Motion to Dismiss in its entirety, thereby extinguishing ZACR as a party to the action. On June 20, 2016, the Court denied as moot ZACR’s Motion for Reconsideration, and addressed the motion only as it pertained to ICANN. The Court denied ICANN’s Motion for Reconsideration.

## III. JUDICIAL STANDARD

Two types of intervention are available under Rule 24: (a) intervention of right, and (b) permissive intervention. Fed. R. Civ. P. 24(a)–(b). Intervention of right is governed by Rule 24(a), which states that on timely motion, the court must permit anyone to intervene who:

Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Permissive intervention under Rule 24(b) gives the Court the discretion to grant intervention if a party has a claim or defense that shares a common question of law or fact with the main action, as long as intervention will not unduly delay or prejudice the existing parties. *See* Fed. R. Civ. P. 24(b).

A court deciding a motion to intervene must accept as true all non-conclusory allegations in the motion. *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Proposed intervenors, however, bear the burden of establishing that the requirements of Rule 24 are satisfied. *Petrol Stops Nw. v. Cont’l Oil Co.*, 647 F.2d 1005, 1010 n.5 (9th Cir. 1981).

## VI. DISCUSSION

In its Complaint, DCA asserts claims for Declaratory Relief. The Ninth Claim seeks a declaration that ICANN follow the IRP Declaration and allow the DCA application to proceed through the delegation phase of the application process. The Tenth Claim seeks a declaration that the agreement delegating .Africa rights to ZACR is null and void. ZACR moves to intervene as to both of these claims as a matter of right under Rule 24(a), or alternatively, for permissive intervention under Rule 24(b).

### A. Intervention

Based on Rule 24(a), the Ninth Circuit has outlined four requirements for intervention of right. The applicant must: (1) file a timely application, (2) possess a “significantly protectable” interest relating to the property or transaction that is the subject of the action, (3) be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) be inadequately represented by existing parties. *California ex rel. Lockyear v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (citing *Sierra Club v. E.P.A.*, 995 F.3d 1478, 1481 (9th Cir. 1993)).

As to the first requirement, the Court finds that ZACR’s motion to intervene is timely. The case is still in the early stages. Discovery has just begun, and no depositions have been taken. Trial is not scheduled until February 2017. Further, there is no evidence of undue delay. ZACR brought the present motion not long after dismissal from the case and after appealing the Court’s preliminary injunction and reconsideration orders in June. In addition, ICANN and DCA do not oppose ZACR’s motion to intervene, and there is no indication of prejudice to existing parties.

Regarding the second requirement, a significantly protectable interest exists if “(1) [the proposed intervenor] asserts an interest that is protected under some law, and (2) there is a ‘relationship’ between its legally protected interest and the plaintiff’s claims.” *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). “An applicant generally satisfies [the second] ‘relationship’ requirement only if the resolution of the [plaintiff’s] claims *actually will affect* the applicant.” *Id.* at 410 (emphasis added). Here, the allegations show that ZACR and ICANN entered into a ten-year Registry Agreement on March 24, 2014. (ZACR’s Mem. P. & A. In Supp. Of Mot. To Intervene 7:14-15, ECF No. 122-1.) DCA’s Tenth Claim bears directly on that agreement. As such, the Court finds that ZACR possesses a significant protectable interest in the Tenth claim. As to the Ninth Claim, however, the allegations show that ZACR did not play a role in the independent review decision. The claim involves only a determination of what the IRP decision stated, whether it was mandatory, and if so, whether ICANN complied. These issues do not directly involve ZACR, and the determination of these issues do not necessarily impact ZACR’s current status with respect to its application. As such, the Court finds that ZACR does not possess a significant protectable interest as to the Ninth claim, and the inquiry of intervention as a right ends with respect to this claim.

Regarding the third requirement as it applies to the Tenth Claim, ZACR’s interest would be impaired or impeded if ZACR is not permitted to intervene. Resolution of the Tenth Claim in favor of DCA would extinguish any purported rights granted to ZACR under the Registry Agreement.

Regarding the final requirement, to determine whether adequate representation exists, courts consider (1) whether the parties will undoubtedly make all of the intervenor’s arguments; (2) whether they are capable of and willing to make such arguments; and (3) whether the intervenor would add some necessary element to the suit that would be otherwise neglected. *California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

The applicant-intervenor’s burden in showing that its interest is not adequately represented is minimal, and “is satisfied if the applicant shows that representation of [its] interest ‘may be’



inadequate.” *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972); *California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). However, “[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. In such a case a compelling showing is required to demonstrate inadequate representation.” *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

ZACR and ICANN both argue that ICANN engaged in no wrongdoing and properly determined that ZACR is the appropriate party for delegation of .Africa. However, their interests are not directly aligned and they do not have the same ultimate objective. ICANN’s interest in the litigation is related to its role as the nonprofit organization responsible for assigning rights to Generic Top-level Domains, and stems from defending the integrity of its application process. In contrast, ZACR’s interest is as an applicant and is limited to not disrupting ICANN’s delegation of .Africa to ZACR. As such, ZACR need only show that ICANN’s representation *may be* inadequate. It has done so. Furthermore, ZACR’s perspective as a South African nonprofit company differs materially from that of ICANN, a California nonprofit corporation, as such, ZACR may make new and additional arguments that are specific to ZACR, which ICANN may not be situated to make. The Court finds that ZACR has satisfied its burden of showing that its interest may not be adequately represented by ICANN.

Therefore, ZACR is entitled to intervene as to the Tenth Claim as a matter of right. As to the Ninth Claim, the Court in its discretion denies ZACR’s request for permissive intervention.

## **B. Subject Matter Jurisdiction**

Finding that ZACR is entitled to intervene as a matter of right, the Court now turns to determining whether there is subject matter jurisdiction over the parties. *See Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004) (stating that “[t]he court has a continuing obligation to assess its own subject-matter jurisdiction, even if the issue is neglected by the parties.”)

“Ordinarily, when removal is proper at the outset, federal jurisdiction is not defeated by later changes or developments in the suit. But . . . an exception to this rule [is] when an indispensable party would destroy diversity.” *Takeda v. Nw. Nat’l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985). This exception applies when a nondiverse indispensable party intervenes as a matter of right under Fed. R. Civ. P. 24(a)(2). *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1013–14 (9th Cir. 2006).

Here, the exception is significant because Plaintiff DCA and Intervenor-Defendant ZACR are both foreign citizens. *See Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (holding “[d]iversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants”); *Faysound, Ltd. v. United Coconut Chems., Inc.*, 878 F.2d 290, 294–95 (9th Cir. 1989) (holding the presence of citizen defendant does not save diversity jurisdiction as to alien co-defendant in action brought by alien plaintiff because diversity must be complete); *Nike, Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994). As the Court has already found that ZACR is entitled to intervene as a matter of right, if ZACR is considered an indispensable party, ZACR’s presence would destroy complete diversity.

“A party is indispensable if in ‘equity and good conscience,’ the court should not allow the action to proceed in its absence.” *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002); *see also Mattel, Inc.*, at 1013. Fed. R. Civ. P. 19(b). In the Ninth Circuit, it is well-established that “in an action to set aside a lease or a *contract*, all parties who may be affected by the determination of the action are indispensable.” *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)(emphasis added); *see Dawavendewa* at 1157 (reaffirming “the fundamental principle outlined in *Lomayaktewa*: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract”); *Northrop Corp. v. McDonnell Douglas*

*Corp.*, 705 F.2d 1030, 1044 (9th Cir. 1983) (stating that there is a correlative rule that all parties who may be affected by a suit to set aside a contract must be present). Furthermore, when applying the 19(b) factors to the specific facts of this case, the Court finds that the same general rule applies.

Therefore, the Court finds that ZACR is an indispensable party. As a nondiverse, indispensable party, ZACR destroys diversity jurisdiction, and remand of this action to state court is proper.

**VI. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** ZACR’s Motion to Intervene as a matter of right as to the Tenth Claim. The Court denies ZACR’s motion as to the Ninth Claim. Because the Court finds that Intervenor-Defendant ZACR is an indispensable party that is not diverse from Plaintiff DCA, the Court **REMANDS** this case for lack of subject matter jurisdiction.

**IT IS SO ORDERED.**

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:  
\_\_\_\_\_  
**Initials of Preparer**  
\_\_\_\_\_



**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**WESTERN DIVISION**  
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**KIRY K. GRAY**  
Clerk of Court

October 20, 2016

Los Angeles County Superior Court  
312 N. Spring Street  
Los Angeles, CA 90012

Re: Case Number: 2:16-cv-00862-RGK-JC  
Previously Superior Court Case No. BC607494  
Case Name: DOTCONNECTAFRICA TRUST V. INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS ET AL

Dear Sir/Madam:

Pursuant to this Court's ORDER OF REMAND issued on 10/19/16, the above-referenced case is hereby remanded to your jurisdiction.

Attached is a certified copy of the ORDER OF REMAND and a copy of the docket sheet from this Court.

Please acknowledge receipt of the above by signing the enclosed copy of this letter and returning it to our office. Thank you for your cooperation.

Respectfully,

Clerk, U.S. District Court

By: /s/ Brent Pacillas  
Deputy Clerk  
Brent\_Pacillas@cacd.uscourts.gov  
Western Division

cc: *Counsel of record*

---

Receipt is acknowledged of the documents described herein.

Clerk, Superior Court

\_\_\_\_\_  
Date

By: \_\_\_\_\_  
Deputy Clerk

# **EXHIBIT J**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. CV 16-5505 PA (ASx) Date November 28, 2016

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

Present: The Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Stephen Montes Kerr

None

N/A

Deputy Clerk

Court Reporter

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

**Proceedings:** IN CHAMBERS COURT ORDER

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

**I. Factual and Procedural Background**

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

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

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

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

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

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

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

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

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

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

## **II. Legal Standard**

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

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

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

### III. Analysis

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



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

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

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

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

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

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

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

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

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

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

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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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**Conclusion**

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

IT IS SO ORDERED.