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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a
13 Mauritius Charitable Trust,

14 Plaintiff,

15 v.

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

21 Defendant.

Case No.: BC607494

[Assigned to Hon. Howard L. Halm, Dept. 53]

**PLAINTIFF DOTCONNECTAFRICA
TRUST'S SEPARATE STATEMENT OF
DISPUTED MATERIAL FACTS AND
ADDITIONAL UNDISPUTED MATERIAL
FACTS IN OPPOSITION TO
DEFENDANT ICANN'S MOTION FOR
SUMMARY JUDGMENT**

Date: August 9, 2017

Time: 8:30

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[Filed concurrently: Opposition to Motion for
Summary Judgment; Declarations of Sara C.
Colón and Sophie Bekele Eshete; and
Evidentiary Objections to Declaration of
Jeffrey LeVee]

Pursuant to Code of Civil Procedure section 437c(b) and California Rules of Court, Rule 3.1350, Plaintiff DotConnectAfrica Trust (“DCA”) hereby submits the following Separate Statement of Disputed Material Facts and Additional Undisputed Material Facts in Opposition to Defendant Internet Corporation for Assigned Names and Numbers’ (“ICANN”) Motion for Summary Judgment as to DCA’s First Amended Complaint (“FAC”).

**RESPONSE TO ICANN’S SEPARATE STATEMENT OF PURPORTEDLY
UNDISPUTED MATERIAL FACTS**

ISSUE 1: The Covenant Bars DCA’s Entire Complaint

	ICANN’S Undisputed Material Facts and Supporting Evidence	Opposing Party’s Response and Supporting Evidence
1.	DCA applied for .AFRICA through the "New gTLD Program," which ICANN launched in 2012. <i>Declaration of Akram Atallah (“Atallah Decl.”), ¶ 4 (Ex. D to LeVee Decl.); FAC ¶ 21).</i>	Undisputed.
2.	In connection with the New gTLD Program, ICANN also published the Guidebook, which dictates the requirements for New gTLD applications to be approved, and the criteria by which they are evaluated. <i>Declaration of Christine Willett (“Willett Decl.”), ¶ 2 (Ex. C to LeVee Decl.); FAC ¶ 22.</i>	Undisputed.
3.	In order to submit an application for a new gTLD, each applicant was required to agree to be bound by the terms and conditions set forth in the Guidebook: By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.	Disputed. All terms of the Guidebook were presented in a “take-it-or-leave-it” fashion. Applicants were required to submit to all of ICANN’s terms, “without modification.” LeVee Decl. Ex. B (Guidebook) Module 6 (preamble); Declaration of Sophia Bekele Eshete (“Bekele Decl.”) ¶¶ 7-10.

1	<i>Willett Decl. ¶ 3 (Ex. C to LeVee Decl.); New gTLD Applicant Guidebook ("Guidebook") § 6 (Ex. B to LeVee Decl.).</i>	
2 3 4 5 6	4. DCA admitted that, by submitting its application for .AFRICA, DCA was agreeing to be bound by terms of the Guidebook. <i>December 1, 2016 Deposition of Sophia Bekele ("Bekele Dep.") 17:18-20, 24:3-7. (Ex. A to LeVee Decl.)</i>	Disputed. DCA's CEO Sophia Bekele testified that she was required to agree to the terms of the Guidebook in order to apply. LeVee Decl. Ex. A [Bekele Dep.] 17:21-19:3 (Ex. A. to LeVee Decl.).
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	5. Module 6 of the Guidebook contains the Covenant Not To Sue ("Covenant"), which bars lawsuits against ICANN arising out of its evaluation of new gTLD applications: 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. . . . <i>Guidebook Module § 6.6 (Ex. B to LeVee Decl.).</i>	Disputed only to the extent that Module 6 of the Guidebook is as follows in full: "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. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE

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		<p>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. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.”</p> <p>LeVee Decl. Ex. B [Guidebook] Module 6 ¶ 6.</p>
6.	<p>Module 6 also makes clear that ICANN has the absolute discretion to “determine not to proceed with any and all applications for new gTLDs.”</p> <p><i>Guidebook Module § 6.3 (Ex. B to LeVee Decl.).</i></p>	<p>Undisputed as to the language of the Guidebook, disputed to the extent that ICANN has absolute discretion to deny an application. ICANN must follow its Articles of Incorporation and Bylaws, and to the extent ICANN engages in substantive violations of law, ICANN is subject to court proceedings.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [ICANN</p>

		Bylaws] Article IV, ¶ 4.
1 2 3 4 5	7. DCA's First Amended Complaint ("FAC") contains a total of ten causes of action against ICANN: breach of contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, and four claims for declaratory relief. <i>FAC ¶¶ 62-107, 115-142.</i>	Undisputed.
6 7 8 9 10 11	8. DCA's first claim against ICANN, for breach of contract, is based on DCA's allegation that ICANN failed to "review Plaintiff's .AFRICA application in accordance with ICANN's Bylaws, Articles of Incorporation, and the new gTLD rules and procedures" <i>FAC ¶ 68; see also generally ¶¶ 63-71.</i>	Undisputed that the cause of action contains the cited language.
12 13 14 15 16 17 18 19 20 21 22	9. DCA's second and third claims, for intentional and negligent misrepresentation, are based on DCA's allegation that "ICANN represented to Plaintiff that Plaintiff's application for .AFRICA would be reviewed in accordance with ICANN's Bylaws, Articles of Incorporation, and the new gTLD [rules and procedures]." <i>FAC ¶¶ 74, 80; see also generally ¶¶ 75-79, 81.</i>	Disputed to the extent the statement is incomplete. DCA's second and third claims are based upon (1) that ICANN represented DCA's application would be reviewed in accordance with ICANN's Articles of Incorporation and Guidebook; (2) that ICANN represented it had an Accountability Mechanism including an Independent Review Panel (IRP) process to ensure that DCA would be provided proper due process in the event of a dispute with ICANN; (3) that ICANN had represented it would participate in good faith in the IRP; and (4) that all applicants for the .Africa gTLD would be treated the same. FAC ¶¶ 74 and 80.
23 24 25 26 27	10. DCA's fourth claim, for fraud and conspiracy to commit fraud, is based on the allegation that, in lieu of properly reviewing DCA's application, ICANN conspired to "improperly deny[] Plaintiff's application" and improperly accepted a competing application for .AFRICA. <i>FAC ¶¶ 84-85; see also generally ¶¶ 86-93.</i>	Disputed to the extent that DCA's fourth claim, for fraud and conspiracy to commit fraud is based on additional allegations. FAC ¶¶ 84-93.
28	11. DCA's fifth claim, for unfair competition, is based on the same allegations underlying its first four claims.	Undisputed.

PLAINTIFF DCA'S SEPARATE STATEMENT OF DISPUTED MATERIAL FACTS AND ADDITIONAL UNDISPUTED MATERIAL FACTS IN OPPOSITION TO DEFENDANT ICANN'S MOTION FOR SUMMARY JUDGMENT

1		<i>FAC ¶¶ 96,97.</i>	
2	12.	DCA's sixth claim, for negligence, is based on ICANN's alleged "duty to act with proper care in processing Plaintiff's application," including an alleged duty to investigate the GAC's advice concerning DCA's application and an alleged duty not to consider or move forward with the competing application for .AFRICA.	Undisputed.
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6		<i>FAC ¶¶ 101-07.</i>	
7	13.	DCA's complaint contains four claims for declaratory relief. In the first claim for declaratory relief (the eighth cause of action), DCA asks the Court: to "confirm" the IRP Declaration (which dealt with the processing of DCA's application).	Undisputed.
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11		<i>FAC ¶ 118.</i>	
12	14.	DCA's second claim for declaratory relief (the ninth cause of action) asks the Court to require ICANN to "follow the IRP Declaration and allow [DCA's] application to proceed through the delegation phase of the application process."	Undisputed.
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15		<i>FAC ¶124; see also generally ¶¶ 120-123.</i>	
16	15.	DCA's third claim for declaratory relief (the tenth cause of action) seeks a judicial declaration "that the registry agreement between ZACR and ICANN [is] null and void and that ZACR's application does not meet ICANN standards."	Undisputed.
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19		<i>FAC ¶132; see also generally ¶¶ 127-129.</i>	
20	16.	DCA's fourth claim for declaratory relief (the eleventh cause of action) relates to the Covenant at issue in this motion, and seeks a judicial declaration that "the covenant not to sue is unenforceable, unconscionable, procured by fraud and/or void as a matter of law and public policy."	Undisputed.
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24		<i>FAC ¶142; see also generally ¶¶ 134-140.</i>	

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ISSUE 2: The Covenant Is Enforceable

	Moving Party’s Undisputed Material Facts and Supporting Evidence	Opposing Party’s Response and Supporting Evidence
Section 1668 Does Not Apply to the Covenant		
17.	<p>The Covenant explicitly provides for the use of alternative dispute resolution mechanisms, referred to as accountability mechanisms in ICANN's Bylaws and Guidebook: “APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.”</p> <p><i>Guidebook Module 6 § 6 (Ex. B to LeVee Dec.); see also FAC ¶ 138 (DCA’s complaint admits the Covenant explicitly provides for the use of alternate dispute resolution mechanisms).</i></p>	<p>Disputed. ICANN has consistently taken the position that the IRP is not binding.</p> <p>Disputed to the extent that the FAC does not admit the Prospective Release provides for the use of alternate dispute resolution mechanisms, but rather that it is void under Civ. Code § 1668, is unconscionable, and was procured by fraud.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶¶ 3, Ex. B at p. 15-16 ¶¶ 32-34; Ex. E at p. 5 ¶ (c); FAC ¶¶ 136-140.</p>
18.	<p>Any applicant may invoke the various accountability mechanisms provided for in ICANN’s Bylaws; ICANN is therefore not exempt from responsibility.</p> <p><i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.).</i></p>	<p>Disputed. All of ICANN’s accountability mechanisms only provide for procedural review. None of ICANN’s accountability mechanisms provide for substantive relief. Additionally, ICANN argued during DCA’s IRP and subsequent IRPs, that any decision is discretionary. Without any binding effect, all accountability mechanisms do not provide relief.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] § 23 (¶¶98-115); ¶ 15, Ex. 3 [ICANN’s Bylaws], Article IV, Sections 2 & 3; Colón Decl. ¶¶ 3, Ex. B at p. 15-16 ¶¶ 32-34; Ex. E at p. 5 ¶ (c).</p>

The Covenant Is Not Procedurally Unconscionable

19.	<p>DCA is a sophisticated entity, one that claims to possess the significant technical and financial wherewithal required to operate a gTLD registry on behalf of an entire continent. DCA’s CEO has also been “active in the DNS” industry, has an MBA, and has worked for banks and auditors.</p> <p><i>Guidebook Module 2 at 47-48 (§ 2.2.2.1; 2.2.2.2) (applicants for gTLDs are required to demonstrate that they are stable business entities that have the significant technical and financial wherewithal required to operate a gTLD registry) (Ex. B to LeVee Decl.); Willett Decl. ¶ 4 (Ex. C to LeVee Decl.); Bekele IRP Decl. ¶¶ 4-11 (Ex. H to LeVee Decl.).</i></p>	<p>Undisputed but not a material fact, as the release was not negotiated. Sophistication of a party is not determinative of unconscionability. <i>See Morris v. Redwood Empire Bancorp</i> (2005) 128 Cal.App.4th 1015, 1320.</p> <p>Bekele Decl. ¶¶ 7-9.</p>
20.	<p>The Guidebook was developed over many years, during which numerous versions were published for public comment beginning in late 2008.</p> <p><i>Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i></p>	<p>Undisputed.</p>
21.	<p>DCA participated in the development of the Guidebook: its CEO was actively involved in the ICANN community beginning in 2005, and she helped to “formulat[e] the rules and requirements” for the New gTLD Program, including submitting public comments on drafts of the Guidebook.</p> <p><i>Bekele IRP Decl. ¶ 13 (Ex. H to LeVee Decl.); Bekele Dep. 17:3-20, 23:2-24:2 (Ex. A to LeVee Decl.).</i></p>	<p>Disputed to the extent it implies that DCA negotiated the Prospective Release. Ms. Bekele testified that she did not comment on any portion of the Prospective Release. Ms. Bekele further testified that her comments were submitted on her individual behalf, not on DCA’s behalf.</p> <p>LeVee Decl. Ex. A [Bekele Dep.] 17:12-16; 23:6-9; Bekele Decl. ¶ 8.</p>
22.	<p>The Covenant was highlighted through capitalization and formatting in the Guidebook.</p> <p><i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.); Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i></p>	<p>Disputed to the extent it implies the Prospective Release was conspicuous. The Prospective Release was 333 pages into the Guidebook.</p> <p>LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.</p>

<p>1 2 3 4 5 6 7</p>	<p>23. DCA admits it was aware of the Covenant when it applied for .AFRICA.</p> <p><i>Bekele Dep. 16:8-11; 17:12-20 (Ex. A to LeVee Decl.).</i></p>	<p>Undisputed to the extent that DCA admitted it was aware of the Prospective Release when it applied for .Africa. Disputed to the extent that DCA understood what the Prospective Release meant.</p> <p>LeVee Decl. Ex. A [Bekele Dep.] 17:21-25.</p>
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The Covenant Is Not Substantively Unconscionable

<p>8 9 10 11 12 13 14 15</p>	<p>24. Although the Covenant bars lawsuits against ICANN, ICANN's Bylaws provide alternative dispute resolution mechanisms (often referred to as "accountability mechanisms") to ensure that ICANN operates in accordance with its Articles and Bylaws.</p> <p><i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); ICANN's Bylaws, as modified 8 December 2011 ("Bylaws") (Arts. IV, V) (Ex. M to LeVee Decl.).</i></p>	<p>Disputed. ICANN argued at the IRP at subsequent IRPS, and in this proceeding, that any IRP decision was advisory and not binding. Without a binding decision, the alternative dispute resolution mechanism could not ensure that ICANN act in any manner.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶¶ 3, Ex. B at p. 15-16 ¶¶ 32-34; Ex. E at p. 5 ¶ (c)</p>
<p>16 17 18 19</p>	<p>25. The Covenant explicitly provides that applicants "may utilize any accountability mechanism set forth in ICANN's Bylaws" to challenge decisions made by ICANN with respect to a new gTLD application.</p> <p><i>Guidebook Module 6 § 6 (Ex. B to LeVee Dec).</i></p>	<p>Disputed to the extent that an applicant is required to do so according to ICANN's Prospective Release.</p> <p>LeVee Decl. Ex. B [Guidebook] Module 6 ¶ 6.</p>
<p>20 21 22 23 24</p>	<p>26. One "accountability mechanism" provided for in the Bylaws is that applicants can request reconsideration of any action or inaction by the ICANN staff or Board, which is referred to as a Reconsideration Request.</p> <p><i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); Bylaws (Arts. IV, V) (Ex. M to LeVee Decl.).</i></p>	<p>Undisputed that applicants can utilize a Reconsideration Request, but disputed in that ICANN has no similar obligation.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [Bylaws] Article IV, Section 2.</p>

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<p>1 2 3 4 5 6 7</p>	<p>27. Another available “accountability mechanism” is that an aggrieved applicant can ask independent panelists to evaluate whether an action or inaction of ICANN’s Board was inconsistent with ICANN’s Articles and Bylaws, which is referred to as an Independent Review Process (“IRP”).</p> <p><i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); Bylaws (Art. IV, § 2) (Ex. M to LeVee Decl.).</i></p>	<p>Undisputed that applicants can ask an IRP to evaluate whether an action or inaction of ICANN’s board was inconsistent with ICANN’s Articles and Bylaws, but disputed in that ICANN has no similar obligation to request redress through an IRP.</p> <p>Bekele Decl. ¶ 15, Ex. 3[Bylaws] Article IV, Section 3; LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.</p>
<p>8 9 10 11 12</p>	<p>28. A new gTLD applicant can also use an IRP to challenge whether the ICANN Board violated the Bylaws by acting on its application.</p> <p><i>Guidebook Module § 6.6 (Ex. B to LeVee Decl.).</i></p>	<p>Undisputed that applicants can challenge whether the Board violated the Bylaws through an IRP, but that ICANN has no similar obligation to request redress through an IRP.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [Bylaws] Article IV, Section 3; LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.</p>
<p>13 14 15 16 17</p>	<p>29. When ICANN's Board accepted the GAC advice, and stopped the processing of DCA's application for .AFRICA, DCA filed a Reconsideration Request.</p> <p><i>Declaration on the IRP Procedure ("Procedure Declaration"), ¶ 5 (Ex. G to LeVee Decl.).</i></p>	<p>Undisputed.</p>
<p>18 19 20</p>	<p>30. When the Reconsideration Request was unsuccessful, DCA initiated an IRP.</p> <p><i>Procedure Declaration, ¶¶ 5, 6 (Ex. G to LeVee Decl.).</i></p>	<p>Undisputed to the extent that DCA initiated an IRP after ICANN denied DCA’s Reconsideration Request.</p>
<p>21 22 23 24 25 26 27 28</p>	<p>31. The IRP between DCA and ICANN lasted two years, during which ICANN produced hundreds of documents, drafted response documents and supporting declarations, and put forth witnesses to testify under oath at the IRP hearing, on July 9, 2015. The three-member IRP Panel issued a Final Declaration (the "IRP Final Declaration"), finding in DCA's favor.</p> <p><i>LeVee Decl. ¶ 10; IRP Final Declaration ¶ 148 – 150 (Ex. I to LeVee Decl.).</i></p>	<p>Disputed to the extent that ICANN was ordered to put forth witnesses after it argued against any live in-person examination of witnesses by the arbitrators. Further disputed to the extent that the IRP did not rule on all issues raised by DCA.</p> <p>Bekele Decl. ¶5, Ex. 1 [IRP Decl.] ¶ 38 (¶¶ 13-34) and; Colón Decl. ¶ 3, Ex. B at p. 7-14; Ex. E at 6.</p>

<p>1 2 3 4 5</p>	<p>32. The IRP Panel had previously found that its final decision should be binding on the parties.</p> <p><i>LeVee Decl. ¶ 10; Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p>	<p>Undisputed to the IRP’s findings. Disputed to the extent that it implies ICANN did not argue that the IRP was advisory, and not binding.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (98-115); Colón Decl. ¶ 3, Ex. B at 15-16.</p>
<p>6 7 8 9 10 11 12</p>	<p>33. Acting in accordance with the IRP Declaration, the ICANN Board directed that DCA's application be returned to processing.</p> <p><i>Atallah Decl. ¶ 12 & Ex. F (Board Resolutions 2015.07.16.01-05) (Ex. D to LeVee Decl.); Final Declaration ¶ 149 (Ex. I to LeVee Decl.).</i></p>	<p>Disputed. ICANN’s Board’s actions were not in accordance with the IRP Declaration which stated: “the Panel recommends that ICANN continue to refrain from delegating the .Africa gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.”</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 149.</p>
<p>13 14 15 16 17 18</p>	<p>34. DCA could have initiated a second IRP, focused on ICANN's rejection of DCA's application (rather than ICANN’s earlier acceptance of the GAC advice).</p> <p><i>Willett Decl. ¶ 16 (Ex. C to LeVee Decl.).</i></p>	<p>Undisputed to the extent that DCA could have initiated another IRP. Disputed to the extent that an IRP had any effect with ICANN arguing during and after the IRP, that any decision was advisory and non-binding.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 149; Colón Decl. ¶ 6, Ex. E at p.5 ¶ (c).</p>
<p>19 20 21</p>	<p>35. The New gTLD Program resulted in 1,930 applications for approximately 1,400 new gTLDs.</p> <p><i>Atallah Decl., ¶ 4 (Ex. D to LeVee Decl.).</i></p>	<p>Undisputed, but fails to state a material fact.</p>
<p>22 23 24 25 26 27 28</p>	<p>36. Absent a broad litigation waiver for the New gTLD Program, the applicants for the over 1,900 applications could initiate frivolous and costly legal actions to challenge legitimate ICANN decisions, which could have placed the successful implementation of the New gTLD Program in jeopardy.</p> <p><i>Espinola Decl. ¶ 4 (Ex. E to LeVee Decl.).</i></p>	<p>Disputed to the extent that this statement is an opinion, and not a material fact. Disputed to the extent that ICANN could have placed a fee-shifting provision in the Guidebook.</p>

The Covenant Was Not Procured By Fraud

<p>1 2 3 4 5 6 7</p>	<p>37. The FAC alleges that the Covenant was procured by fraud because, although ICANN's Bylaws and the Guidebook promise a "real and effective" dispute resolution mechanism, according to DCA ICANN did not abide by the IRP Declaration when ICANN returned DCA's application back to the Geographic Names Review for processing.</p> <p><i>FAC ¶ 139.</i></p>	<p>Undisputed to the extent the FAC contains that language. Disputed to the extent that ICANN procured the Prospective Release by fraud in representing that the IRP provided “real and effective” relief, then subsequently arguing during the IRP that any decision was advisory, and not binding.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c); Ex. G [05.12.14 IRP Decision on Interim Relief], ¶ 32.</p>
<p>8 9 10 11 12 13 14 15 16</p>	<p>38. DCA has since admitted that nothing in the IRP Declaration permitted DCA's application to skip the Geographic Names Review.</p> <p><i>Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p>	<p>Disputed to the extent that DCA never requested to skip the Geographic Names Review. Disputed to the extent that DCA maintains its endorsements from the AUC and UNECA were sufficient. Disputed to the extent that it fails to state a material fact.</p> <p>Bekele Decl. ¶¶ 17 and 19, Exs. 5 and 7.</p>

ISSUE 3: DCA’S Lawsuit is Barred by the Doctrine of Judicial Estoppel

	<p align="center">Moving Party’s Undisputed Material Facts and Supporting Evidence</p>	<p align="center">Opposing Party’s Response and Supporting Evidence</p>
<p>17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>39. After DCA initiated the IRP proceedings, the IRP Panel issued lists of questions for the parties to brief regarding IRP procedures.</p> <p><i>Procedure Declaration ¶ 15-18 (Ex. G to LeVee Decl.).</i></p>	<p>Undisputed.</p>

1 2 3 4 5	40. Among IRP's questions was: "[i]s the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?" <i>Procedure Declaration ¶ 19 (Ex. G to LeVee Decl.).</i>	Undisputed.
6 7 8 9 10 11 12	41. DCA argued in its response to the IRP that any decision by the IRP Panel should be binding, because Module 6 effectively waives an applicant's right to a lawsuit "in exchange... for the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN's Bylaws, including IRP." <i>"DCA's Response to the Panel's Questions on Procedural Issues" ("Response"), May 20, 2014, ¶ 6 (Ex. F to LeVee Decl.).</i>	Undisputed to the extent DCA argued the language cited, disputed to the extent that DCA argue the language cited for its position that ICANN should not be judgment proof. LeVee Decl. Ex. F, ¶ 6.
13 14 15 16 17	42. "As a result," DCA stated, "the IRP is the sole forum in which an applicant for a new gTLD can seek independent, third-party review of Board actions." <i>Response ¶ 6 (Ex. F to LeVee Decl.).</i>	Undisputed to the extent DCA argued the language cited, disputed to the extent that DCA argue the language cited for its position that ICANN should not be judgment proof. LeVee Decl. Ex. F, ¶ 6.
18 19 20 21 22 23 24 25 26 27 28	43. DCA argued that the IRP Panel's decision must be binding in order to both justify the litigation waiver and remain consistent with California law. <i>Response ¶ 5-7 (Ex. F to LeVee Decl.).</i>	Undisputed to the extent that if the Prospective Release was enforceable, that the IRP decision had to be binding. Disputed to the extent that DCA argued that where broad litigation waivers were upheld by California courts, the alternatives to court litigation provided in the parties' contracts were inevitably binding dispute resolution mechanisms. LeVee Decl. Ex. F, ¶¶ 5-7.

<p>1 2 3 4 5</p>	<p>44. ICANN argued that the IRP should be non-binding.</p> <p><i>Procedural Declaration ¶ 97 (Ex. G. to LeVee Decl.)</i></p>	<p>Undisputed.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c); Ex. G [05.12.14 IRP Decision on Interim Relief], ¶ 32.</p>
<p>6 7 8 9 10 11 12</p>	<p>45. The IRP Panel found that that under the Covenant, "[t]he avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts," and that under the Covenant, "the ultimate 'accountability' remedy for applicants is the IRP."</p> <p><i>Procedure Declaration ¶ 39, 40 (Ex. G to LeVee Decl.)</i></p>	<p>Disputed. The IRP panel held that "assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for applicants is the IRP.</p> <p>LeVee Decl. Ex. G [Procedure Decl.] ¶ 40; Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 73.</p>
<p>13 14 15 16 17 18 19 20</p>	<p>46. Based in part on this determination, the IRP Panel agreed with DCA and held that its decisions must therefore be binding.</p> <p><i>Procedure Declaration ¶ 131 (Ex. G to LeVee Decl.)</i></p>	<p>Disputed. The IRP panel held that "assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for applicants is the IRP.</p> <p>LeVee Decl. Ex. G [Procedure Decl.] ¶ 40. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 73.</p>
<p>21 22 23 24 25 26 27</p>	<p>47. During the course of the IRP proceeding between ICANN and DCA, the parties submitted pleadings and exchanged discovery; witnesses testified under oath; a neutral panel, which found that its final decision should be binding on the parties, presided over the proceedings; and following its issuance, both parties acted in accordance with that panel's decision.</p> <p><i>LeVee Decl. ¶ 10; Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.)</i></p>	<p>Disputed. During the course of the IRP, ICANN continually argued to limit the submissions by the parties, the documents exchanged, witness testimony and argument during hearing.</p> <p>LeVee Decl. Ex. G; Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 38 (¶¶ 13-34); Colón Decl. ¶ 3, Ex. B at p.7-14; Ex. E at 6.</p>

1 2 3 4 5 6 7 8 9	<p>48. DCA itself argued that the IRP was an arbitration:</p> <p>[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision.</p> <p><i>Response ¶ 21 (Ex. F to LeVee Decl.).</i></p>	<p>Undisputed that DCA argued such.</p>
10 11 12 13 14	<p>49. By filing this lawsuit, DCA necessarily took the position that the Covenant does not bar applicants from filing lawsuits against ICANN.</p> <p><i>See generally FAC; LeVee Decl. ¶ 13 (DCA filed suit against ICANN on January 20, 2016).</i></p>	<p>Undisputed to the extent that DCA’s position is that the Prospective Release is unenforceable and ICANN is not judgment proof.</p> <p>LeVee Decl. Ex. F, ¶ 6.</p>

DCA’S ADDITIONAL UNDISPUTED MATERIAL FACTS

ISSUE 1 – DCA’s Entire Complaint is not Barred by the Covenant

	DCA’s Undisputed Material Facts and Supporting Evidence	Opposing Party’s Response and Supporting Evidence
18 19 20 21 22 23 24 25 26 27 28	<p>50. ICANN made the following representations to ICANN in its Articles of Incorporation, Bylaws, and Guidebook:</p> <ul style="list-style-type: none"> • That DCA’s application would be reviewed in accordance with ICANN’s Articles of Incorporation, Bylaws, and Guidebook, which promise a fair and transparent bid process, fair competition, and non-interference with an applicant’s application by a competitor or third party; • That ICANN had an Accountability Mechanism, including the IRP, to ensure that DCA would be provided 	

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17</p>	<p>proper due process in the event of a dispute regarding any decisions by ICANN regarding DCA’s application;</p> <ul style="list-style-type: none"> • That ICANN would participate in good-faith with an applicant in the IRP; • That all applicants would be subject to the same agreement, rules, and procedures; • That ICANN would “[Make] decisions by applying documented policies neutrally and objectively, with integrity and fairness.”; • That ICANN would “remain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness; and • That “ICANN and its constituent bodies shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition. <p>Bekele Decl. ¶¶ 11, 12 & 15, Ex. 3 [Bylaws] Article 1, Section 2 & Article 2, Section 3;</p>	
<p>18 19 20</p>	<p>51. All of the statements made to DCA in ¶ 50 were made prior to the submission of DCA’s application for .Africa.</p> <p>Bekele Decl. ¶¶ 11-12.</p>	
<p>21 22 23</p>	<p>52. DCA’s causes of action for intentional and negligent misrepresentation arise out of the untruthfulness of the statements made in ¶ 50.</p> <p>FAC ¶¶ 74-82.</p>	
<p>24 25 26</p>	<p>53. DCA had no reason to believe that ICANN was misrepresenting the terms of the Articles of Incorporation, Bylaws, and Guidebook.</p> <p>Bekele Decl. ¶ 13.</p>	
<p>27 28</p>	<p>54. According to the Guidebook, ICANN’s GAC can only issue consensus advice if an application “1) is problematic; 2) potentially</p>	

1	violate[s] national law; or 3) raise sensitivities.”	
2	Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section	
3	3.1.	
4	55. The GAC issued consensus advice against	
5	DCA’s application, provided no applicable	
6	reason, and stated that its decision was	
7	political.	
8	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104,	
9	110, 113.	
10	56. ICANN accepted the GAC’s advice without	
11	question.	
12	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	
13	57. ICANN argued throughout the IRP that its	
14	declaration was advisory and not binding.	
15	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶	
16	98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex.	
17	E at p.5 ¶ (c).	
18	58. ICANN argued in subsequent IRP’s that the	
19	declaration is advisory on the ICANN board	
20	and not binding.	
21	Colón Decl. ¶ 6, Ex. E [ICANN’s Response	
22	to Procedural Order 8], ¶ 32.	
23	59. ICANN argued throughout the IRP to limit	
24	briefing, testimony, and discovery.	
25	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 38 (¶¶	
26	13-34); Colón Decl. ¶ 3, Ex. B at p.7-14; Ex.	
27	E at 6.	
28	60. More than a year after DCA initiated its IRP,	
	although required to, ICANN had still not	
	created a standing panel to address DCA’s	
	IRP.	
	Bekele Decl. ¶ 5, Ex .1 [IRP Decl.] ¶ 22.	
	61. In addition to the ultimate finding that	
	ICANN violated its Bylaws and Articles of	
	Incorporation in rejecting DCA’s application,	
	the IRP Panel also held that ICANN violated	
	its Bylaws and procedures for failing to	
	institute a standing panel to address DCA’s	

1	IRP for more than year.	
2	Bekele Decl. ¶ 5, Ex .1 [IRP Decl.] ¶ 22.	
3	62. The ICANN Board is not required to follow any Reconsideration Request decision.	
4	Bekele Decl. ¶ 15, Ex. 3 [ICANN’s Bylaws] Art. IV, Section 2, ¶ 18.	
5	63. ZACR claimed it received an endorsement from the African Union Commission to apply for the .Africa gTLD on behalf of the African Community.	
6	Bekele Decl. ¶ 29, Ex. 16.	
7	64. ZACR’s application does not list any community, let alone the African community, that ZACR applied for on behalf of.	
8	Bekele Decl. ¶ 28, Ex. 15.	
9	65. ICANN nonetheless accepted ZACR’s application and processed it.	
10	Bekele Decl. ¶ 38, Ex. 24.	
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ISSUE 2 – The Prospective Release is Unenforceable

	DCA’s Undisputed Material Facts and Supporting Evidence	Opposing Party’s Response and Supporting Evidence
	<u>Section 1668 Applies to the Prospective Release</u>	
18	66. ICANN’s has three forms of redress that it purports to provide to gTLD applicants: (1) Reconsideration Request; (2) Ombudsman; and (3) Independent Review Process.	
19	Bekele Decl. ¶15, Ex. 3 [ICANN Bylaws] Articles IV and V.	
20	67. ICANN’s Board is not bound by any decisions of the Board Governance Committee with respect to Reconsideration Requests	
21	Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 2, ¶ 17. [“The [ICANN] Board shall not be bound to follow the recommendations of the Board Governance Committee.”]	
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1	68.	ICANN’s Ombudsman is prohibited from instituting, joining, or supporting in any way any legal action challenging ICANN structure, procedures, processes, or any conduct by the ICANN board, staff, or constituent bodies.	
2		Bekele Decl. ¶15, Ex. 3 [ICANN Bylaws] Article V, Section 4, ¶ 5.	
3	69.	ICANN’S Independent Review Process (“IRP”) is charged with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”	
4		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws], Article IV, Section 3, ¶ 4.	
5	70.	ICANN’s IRP has the authority to	
6		“a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;	
7		b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;	
8		c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and	
9		d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews or acts upon the opinion of the IRP;	
10		e. consolidated requests for independent review if the facts and circumstances are sufficiently similar; and	
11		f. determine the timing for each proceeding.”	
12		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	
13	71.	ICANN’s IRP has no authority to hold ICANN liable for fraud.	

1		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	
2			
3	72.	The IRP is limited to a review of procedural issues in ICANN’s processing of an applicant’s application.	
4		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	
5			
6	73.	None of ICANN’s “Accountability Mechanisms” have the authority to hold ICANN liable for fraud.	
7		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 2, ¶ 17, Article V, Section 4, ¶ 5; Article IV, Section 3, ¶ 11.	
8			
9			
10	74.	ICANN argued throughout the IRP that the IRP was merely advisory.	
11		Bekele Decl. ¶ 15, Ex. 3 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c)	
12			
13	75.	ICANN has submitted statements in IRPs after the IRP with DCA, stating that an IRP decision is advisory to the ICANN Board, who has discretion whether to follow it.	
14		Colón Decl. ¶ 6, Ex. E, p. 5 ¶ (c).	
15			
16	76.	According to the Guidebook, ICANN’s GAC can only issue consensus advice if an application “1) is problematic; 2) potentially violate[s] national law; or 3) raise sensitivities.”	
17		Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 3.1.	
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21	77.	The GAC issued consensus advice against DCA’s application, provided no applicable reason, and stated that its decision was political.	
22		Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104, 110, 113.	
23			
24			
25	78.	ICANN accepted the GAC’s advice without question.	
26		Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	
27			
28	79.	ZACR agreed to sign over all rights to the .Africa gTLD to the AUC, if awarded	

1	the .Africa gTLD.	
2	Bekele Decl. 28, Ex. 15.	
3	80. After DCA submitted its application,	
4	ICANN advised the AUC how to join the	
5	GAC and how to object to an application,	
6	either through the community objection or	
7	the use of GAC Objection Advice.	
8	Bekele Decl. ¶ 21, Ex. 9.	
9	81. The AUC, through ZACR, was the only	
10	competitor to DCA for the .Africa gTLD.	
11	Bekele Decl. ¶ 26, Ex. 14.	
12	82. Out of all of the individual country	
13	endorsement letters that ZACR submitted,	
14	only five referenced ZACR by name. All	
15	others referred to the AUC's failed "reserved	
16	names initiative."	
17	Bekele Decl. ¶ 31.	
18	83. ICANN held that ZACR's endorsement	
19	letters satisfied the first requirement that "the	
20	[endorsement] letter must clearly express the	
21	government's or public authority's support	
22	for or non-objection to the applicant's	
23	application[.]"	
24	Bekele Decl. ¶ 32, Ex. 18.	
25	84. ICANN "ghost-wrote" a sample letter of	
26	endorsement for the AUC to endorse	
27	ZACR's application.	
28	Bekele Decl. ¶ 33, Ex. 19.	
29	85. After DCA's application was denied, ICC	
30	employee, Mark McFadden, wrote to Trang	
31	Nguyen, stating: "I've seen the press on	
32	the .dotafrika application. So far, so good, I	
33	think. The ball is now in Sophia's court – if	
34	she wants to invoke Independent Review,	
35	then good luck to her."	
36	Bekele Decl. ¶ 34, Ex. 20.	
37	86. Following the IRP declaration, former	
38	ICANN president wrote to the	
39	Commissioner of Infrastructure and Energy	

1	at the Africa Union Commission, stating:	
2	“You have my commitment that our Global	
3	Domains Division team and all other	
4	necessary teams at ICANN Will work	
5	expeditiously with ZACR to bring	
6	the .AFRICA TLD to delegation and launch,	
	just as soon as it is appropriate for that work	
	to proceed.”	
	Bekele Decl. ¶ 35, Ex. 21.	
7	87. Following the IRP declaration, ICANN	
8	allowed the AUC to contact ICANN’s	
9	Geographic Names Panel, during the re-	
10	evaluation of DCA’s endorsements.	
	Bekele Decl. ¶ 36, Ex. 22.	
11	88. Pursuant to Guidebook Section 2.4.4,	
12	“Contacting individual ICANN staff	
13	members, Board Members, or individuals	
14	engaged by ICANN to perform an evaluation	
15	role in order to lobby for a particular	
16	outcome or to obtain confidential	
	information about applications under review	
	is not appropriate.”	
	Bekele Decl. ¶ 6, Ex. 2, Section 2.4.4.	
17	89. DCA protested to ICANN that the AUC’s	
18	contact of ICANN’s GNP Panel violated the	
19	Guidebook, but ICANN provided no	
20	response or corrected action to DCA.	
	Bekele Decl. ¶ 37, Ex. 23.	

THE PROSPECTIVE RELEASE IS UNCONSCIONABLE

The Prospective Release is Procedurally Unconscionable

22	90. ICANN reserved the right to make changes	
23	to the any part of the Guidebook, including	
24	Module 6, at any time, including after	
25	applicants had submitted their applications.	
26	Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section	
27	1.2.11 [“ICANN reserves the right to make	
28	reasonable updates and changes to the	
	Applicant Guidebook at any time[.]”]	
	91. ICANN changed the procedures of the IRP	
	after DCA submitted its application.	
	Colón Decl. ¶ 7, Ex. F.	

1 2 3 4	<p>92. The Prospective Release states that the applicant must agree to the terms and conditions “without modification.”</p> <p>LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.</p>	
5 6 7 8 9 10 11	<p>93. ICANN’s Government Advisory Committee commented on the Prospective Release, stating: “The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion ICANN’s legal liability for its decisions and asks that his statement in the DAG be removed accordingly.”</p> <p>Colón Decl. ¶ 8, Ex. G p.2.</p>	
12 13 14 15 16 17 18 19	<p>94. ICANN received a comment from INTA regarding the Prospective Release, stating: “ICANN has not justified the requirement that an applicant release ICANN from all claims and waive any rights to judicial action and review. This paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability. [...] [p]rovision 6, release of claims against ICANN, is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the part of ICANN[.]”</p> <p>Colón Decl., ¶ 4, Ex. C, p. 183.</p>	
20 21 22 23 24 25 26	<p>95. ICANN received a comment regarding the Prospective Release from NCUC on April 13, 2009, stating: “The exclusion of ICANN liability in clause 6 of the Terms and Conditions provides no leverage to applicants to challenge ICANN’s determinations to a recognized legal authority. If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open.”</p> <p>Colón Decl. ¶ 4, Ex. C, p. 184.</p>	
27 28	<p>96. ICANN received a comment regarding the Prospective Release from Microsoft on April 13, 2009, stating: “The covenant not to challenge and waiver in Paragraph 6 is</p>	

1	overly broad, unreasonable, and should be revised in its entirety.”	
2	Colón Decl. ¶ 4, Ex. C, p. 184.	
3	97. ICANN received a comment regarding the Prospective Release from Leap of Faith Financial Services, Inc. on November 23, 2008, stating: “Section 6 demonstrates ICANN is concerned about protecting itself from court challenges. It’s unclear whether such language is able to be enforced though. If ICANN showed equal regard for the protection of registrants, as is demonstrates protection for itself in this section, it might have greater respect in the community.”	
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9	Colón Decl. ¶ 5, Ex. D, ¶G.3.	
10	98. DCA did not submit any comment on the Prospective Release.	
11	LeVee Decl. Ex. A [Bekele Depo.] 17:12-14.	
12		
13	99. All comments made by Ms. Bekele were submitted on behalf of herself as an individual.	
14	LeVee Decl. Ex. A [Bekele Depo.] 23:6-9.	
15	100. ICANN refused the comments on the grounds that “[I]t would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potentially unsuccessful applicants.”	
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18	Colón Decl. ¶ 4, Ex. C, p. 184.	
19	101. The only change that ICANN made to the Prospective Release was adding language that “[an] applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for [the] purposes of challenging any final decision made by ICANN with respect to the application.”	
20		
21		
22	LeVee Decl. Ex. E, ¶ 3.	
23	102. ICANN did not alter the Prospective Release according to the comments in ¶¶ 80-83	
24		
25	Bekele Decl. ¶ 5, Ex. 1 [Guidebook] Module 6, ¶ 6; Colón Decl. ¶ 4, Ex. C, p. 184.	
26	103. The IRP Panel decided that the relationship between ICANN and applicants was an adhesive one and that “there is no evidence that the terms of the application are negotiable or that applicants are able to	
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1		negotiate changes in the IRP.”	
2		LeVee Decl. Ex. G [Procedure Decl.] ¶ 108.	
3	104.	ICANN has nearly \$500 million in assets.	
4		Colón Decl. ¶10, Ex. I.	
5	105.	The contract between ICANN and the U.S. Government, providing for U.S. Government oversight ended on October 1, 2016.	
6		https://www.icann.org/news/announcement-2016-10-01-en .	
7	<u>The Prospective Release is Substantively Unconscionable</u>		
8	106.	The Prospective Release does not apply to ICANN.	
9		LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	
10			
11	107.	ICANN is not barred from instituting legal action in a court of law against applicants.	
12		LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	
13			
14	108.	ICANN is permitted to pursue all legal remedies in any judicial forum	
15		LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	
16	109.	The IRP Panel decided that the relationship between ICANN and applicants was an adhesive one and that “there is no evidence that the terms of the application are negotiable or that applicants are able to negotiate changes in the IRP.”	
17		LeVee Decl. Ex. G [Procedure Decl.] ¶ 108.	
18			
19			
20	110.	ICANN admitted that “the release simply limits the recourse available to one of the contracting parties.”	
21		Colón Decl. ¶ 3, Ex. B.	
22			
23	The Prospective Release was Procured by Fraud		
24	111.	The Guidebook represented that the IRP provided actual redress to applicants.	
25		Bekele Decl. ¶ 11; LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	
26			
27	112.	ICANN’s Bylaws contained representations that ICANN would:	
28		<ul style="list-style-type: none"> • “make decisions by applying 	

1		documented policies neutrally and objectively, with integrity and fairness”;	
2		<ul style="list-style-type: none"> • “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”; and 	
3		<ul style="list-style-type: none"> • “be accountable to the Internet community for operating in a manner that is consistent with [its] Bylaws, and with due regard to the core values set forth in Article 1 of [its] Bylaws.” 	
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9		Bekele Decl. ¶ 15; Ex. 3 [Bylaws] Article IV, Section 3.	
10	113.	ICANN represented that the application process would be fair and transparent through various representatives in presentations about the application process before DCA applied, and at meetings of the Generic Names Support Organization.	
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14		Bekele Decl. ¶ 12.	
15	114.	DCA believed those representations were true.	
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18		Bekele Decl. ¶ 13.	
19	115.	DCA would not have applied for the .Africa gTLD, paid the non-refundable fee, and spent years campaigning for endorsements and preparing the application, if it had known that ICANN would favor its competitor ZACR, throughout the process.	
20			
21			
22			
23		Bekele Decl. ¶ 14.	
24	116.	DCA was harmed by those misrepresentations.	
25			
26		Bekele Decl. ¶ 4.	
27	117.	According to the Guidebook, ICANN’s GAC can only issue consensus advice if an application “1) is problematic; 2) potentially	
28			

1	violate[s] national law; or 3) raise sensitivities.”	
2		
3	Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 3.1.	
4		
5	118. The GAC issued consensus advice against DCA’s application, provided no applicable reason, and stated that its decision was political.	
6		
7		
8	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104, 110, 113.	
9		
10	119. ICANN accepted the GAC’s advice without question.	
11		
12	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	
13		
14	120. ICANN argued throughout the IRP that its declaration was advisory and not binding.	
15		
16	Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c).	
17		
18	121. ICANN argued in subsequent IRP’s that the declaration is advisory on the ICANN board and not binding.	
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20		
21	Colón Decl. ¶ 6, Ex. E.	

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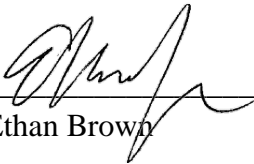
Issue 3: DCA’s Lawsuit is Not Barred by Judicial Estoppel

	DCA’s Undisputed Material Facts and Supporting Evidence	ICANN’s Response and Supporting Evidence
122.	<p>DCA argued in the IRP that ICANN should not be “judgment-proof.”</p> <p>LeVee Decl. ¶ 8, Ex. F at ¶ 5.</p>	
123.	<p>ICANN argued during the IRP that any decision is advisory and not binding.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c); Ex. G [05.12.14 IRP Decision on Interim Relief], ¶ 32.</p>	
124.	<p>ICANN continues to maintain today that IRP’s are advisory, and not binding.</p> <p>LeVee Decl. ¶ 6, Ex. D, ¶ 9.</p>	
125.	<p>The IRP Panel held “<i>assuming that</i> the foregoing waiver of any and all judicial remedies <i>is valid and enforceable</i>, the ultimate ‘accountability’ remedy for applicants is the IRP.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 40.</p>	
126.	<p>The IRP did not make an express finding whether the Prospective Release was valid and enforceable.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 115.</p>	
127.	<p>ICANN argued that the IRP was not an arbitration.</p> <p>Colón Decl. ¶ 3, Ex. B.</p>	

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