

1 Ethan J. Brown (SBN 218814)

2 *ethan@bnslawgroup.com*

3 Sara C. Colón (SBN 281514)

4 *sara@bnslawgroup.com*

5 **BROWN NERI & SMITH LLP**

6 11766 Wilshire Boulevard, Suite 1670

7 Los Angeles, California 90025

8 Telephone: (310) 593-9890

9 Facsimile: (310) 593-9980

10 *Attorneys for Plaintiff*

11 DOTCONNECTAFRICA TRUST

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

14 DOTCONNECTAFRICA TRUST, a
15 Mauritius Charitable Trust;

16 Plaintiff,

17 v.

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

24 Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**PLAINTIFF’S REPLY IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: April 4, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Declaration of Sara C. Colón; Supplemental Declaration of Sophia Bekele Eshete; Evidentiary Objections to the Declarations of Christine Willet, Moctar Yedaly, Jeffrey LeVee, Kevin Espinola, & Akram Atallah]

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Internet Corporation for Assigned Names and Numbers
4 (“ICANN”)’s Opposition establishes that Plaintiff DotConnectAfrica (“DCA”) is
5 entitled to a preliminary injunction. ICANN makes **two central arguments**: First,
6 ICANN points to the Prospective Release in its application that it required all
7 applicants for a gTLD to execute. But the **Kentucky district court it relies on that**
8 **upheld the release** involved a plaintiff who lacked counsel and made none of the
9 arguments presented here. ICANN then cites and **relies on the wrong law** to
10 sidestep California Civil Code § 1668, which bars prospective releases like the one
11 here that provide **blanket prospective immunity** for all wrongful conduct. DCA
12 has also shown a strong probability of defeating the release as unconscionable and
13 procured by fraud. Second, ICANN misleadingly suggests that DCA lost the contest
14 for .Africa because it did not submit the African Union Commission’s (“AUC”)
15 withdrawal letter of its support. But ICANN fails to disclose that DCA advised
16 ICANN of the AUC’s alleged withdrawal in its initial application.

17 The real issues are: in light of ICANN’s own internal rule that allows
18 governments and their representatives to withdraw support only if conditions to that
19 support are breached,¹ how is the AUC’s post-hoc withdrawal even relevant as no
20 conditions of its support were presented or breached? And, if ICANN required
21 actual direct support of 60% of the African governments, how did Defendant ZA
22 Central Registry (“ZACR”), ICANN’s favored applicant, pass the endorsement
23 stage when DCA presented substantial evidence of flaws in ZACR’s endorsements?
24 ICANN fails to address either point. **DCA therefore has a strong likelihood of**
25 **success on the merits, and, at a bare minimum, has raised serious questions**

26 _____
27 ¹ It would be grossly unfair to an applicant who obtained support and invested money
28 to apply and build infrastructure to be undercut just because the political winds
shifted in an endorsing government or authority.

1 **going to the merits.**

2 ICANN does not argue that it will suffer prejudice from a preliminary
3 injunction and presents no evidence contradicting DCA's showing that .Africa is a
4 unique asset. **The balance of harms tilts dramatically in DCA's favor.** Instead,
5 ICANN suggests in cursory fashion that ZACR might be hurt because it spent some
6 money (as did DCA) and the continent of Africa might be hurt because of some
7 undisclosed relationship of the gTLD with a foundation that might possibly raise
8 some money from .Africa's exploitation. These vague and barely supported possible
9 harms cannot preclude an injunction.

10 What ICANN's Opposition does **confirm is ICANN's continued favoritism**
11 **towards ZACR**, which undercuts the fairness and even-handedness of the
12 application process. A day *after* Plaintiff filed its application for a TRO, ICANN,
13 in a desperate attempt to render that application moot, held an apparently previously
14 unscheduled board meeting and resolved to "proceed with the delegation of
15 .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR
16 has entered with ICANN." (Willet Decl. ¶14, Ex. C). After the Court issued the
17 TRO, in a GAC meeting with the ICANN board, ICANN board member Mike Silber
18 stated to an AUC member "you have the commitment from ICANN, the board and
19 the staff to not let the litigation issues intervene and we will pursue the finalization
20 of this issue with diligence and all appropriate measures to ensure that the interests
21 of all parties are protected." (Colón Decl. ¶4). ICANN made similar comments at
22 the London meeting during the IRP proceedings. ICANN favors ZACR even though
23 DCA specifically called the adequacy of ZACR's application into question, and
24 ICANN does not attempt to show in its Opposition that ZACR's application met the
25 standards ICANN used to fail DCA. As the IRP panel held, "ICANN is not an
26 ordinary private non-profit entity deciding for its own sake who it wishes to conduct
27 business with, and who it does not. ICANN rather, is the steward of a highly
28 valuable and important international resource." (Declaration of Sophia Bekele

1 Eshete, Dkt No.17 (“Bekele Decl.”), ¶6, Ex. 2, ¶111; Ex. 1, ¶23 p.13). ICANN has
 2 not met this public charge. A preliminary injunction should issue.

3 **II. ARGUMENT**

4 **A. DCA will prevail on the merits, and, at the least, raises serious** 5 **questions going to the merits.**

6 DCA meets both the “traditional test” and the “serious questions” test for a
 7 preliminary injunction. *See Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012).
 8 DCA is likely to succeed on the merits because (1) the Prospective Release is void,
 9 (2) ICANN did not follow the IRP ruling, and (3) ICANN does not show that
 10 ZACR’s and DCA’s applications were reviewed under the same standards.

11 1. ICANN’s case law supporting the Prospective Release is not 12 persuasive or precedential.

13 ICANN relies principally on the Prospective Release, referred to as the
 14 “Covenant not to Sue” in the Opposition, which it claims insulates it from any
 15 judicial review. ICANN’s reliance on *Commercial Connect v. Internet Corp. for*
 16 *Assigned Names and Numbers*, No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS
 17 8550 (W.D. Ky. Jan. 26, 2016), a district court decision from outside this circuit is
 18 entirely unpersuasive. There, plaintiff’s lawyers withdrew and plaintiff made no
 19 effective arguments to challenge the Prospective Release. Plaintiff did not rely on
 20 California law and apparently never presented any of the arguments presented here
 21 – or any meaningful arguments at all.

22 ICANN’s reliance on *Tunkl* is inapposite because the Prospective Release
 23 waives fraud and intentional violations of law and is therefore void regardless of
 24 whether it implicates public policy²: “A party [cannot] contract away liability for his
 25 _____

26 ² In any event, DCA satisfies the test under *Tunkl* invalidating the Prospective
 27 Release. *See Tunkl, supra* at 98-101 (listing factors). First, ICANN’s business is
 28 suitable for public regulation and was regulated by the U.S. government (Atallah
 Decl. ¶2). Second, ICANN’s fair regulation of the Internet is of great importance
 and practical necessity. *See Id.* (“ICANN’s mission is to coordinate...the global

1 fraudulent or intentional acts or for his negligent violations of statutory law,
 2 **regardless of whether the public interest is affected** (emphasis added).” *Reudy v.*
 3 *Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116 (N.D. Cal. 2007)
 4 (referencing Cal. Civ. Code §1668 (hereinafter “Section 1668”)). *See also Health*
 5 *Net of California v. Department of Health Services*, 113 Cal.App.4th 224, 235; 239.
 6 **This is the law**, and ICANN fails to explain how the release overcomes it.³

7 2. The IRP does not validate the Prospective Release.

8 The IRP forum does not save the Prospective Release as ICANN refuses to
 9 recognize the process as binding. (Opp. at p.16:4-16). As the IRP Panel explained,
 10 “The Panel seriously doubts that the Senators questioning former ICANN President
 11 Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN
 12 had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP
 13 process touted by ICANN as the ‘ultimate guarantor’ of ICANN accountability was
 14

15 Internet’s system of unique identifiers, and in particular to ensure the stable and
 16 secure operation of the Internet’s unique identifier status” (internal quotations
 17 omitted)). Third, DCA’s services are broadly offered as anyone can apply for
 18 gTLDs, and gTLDs allow all Internet users to access websites. Fourth, ICANN is
 19 the *only* entity that can grant the rights to gTLDs and holds all of the bargaining
 20 power (*See Id.* at ¶3). Fifth, DCA had no choice but to sign the release. ICANN
 21 claims that the public had input in the drafting of the Guidebook, but ignored its own
 22 advisory committee’s (the GAC’s) recommendation to eliminate the release (*See*
 23 *Espinola Decl.*, Exs. D, E). Finally, ICANN controls applicant’s property in the
 24 form of the \$185,000 gTLD application fee. ICANN can unilaterally deny an
 25 application without refund or redress.

26 ³ *City of Santa Barbara v. Sup. Court*, is inapposite because it involved “an
 27 agreement purporting to release liability for future gross negligence committed
 28 against a developmentally disabled child who participates in a recreational camp
 designed for needs of such children,” which the court found violated public policy.
 (41 Cal.4th 747, 777 (2007)). *Sanchez v. Bally’s Total Fitness Corp*, 68 Cal.App.4th
 62 (1998), is inapposite because the waiver excepted “claims arising out of the
 center’s knowingly failing to correct a dangerous situation brought to its attention.”
 (Id., at 65). *Sanchez* does not discuss Section 1668. Here, the release waives all
 liability, not just negligence.

1 only an advisory process, the benefit of which accrued only to ICANN.” (Bekele
 2 Decl. ¶5 & 6, Ex. 1, ¶115; Ex. 2, p. 13). ICANN attempts to dodge this point by
 3 declaring that the binding nature of the IRP is a moot issue because ICANN has
 4 allegedly agreed to follow the IRP ruling. But, as explained in subsection 6, *infra*,
 5 that is not what happened here. (Atallah Decl. ¶¶ 7–10). More importantly, even if
 6 ICANN had voluntarily accepted the ruling, a dispute resolution procedure ICANN
 7 is free to disregard is hardly effective and certainly does not provide applicants with
 8 an effective method of redress.⁴

9 ICANN fails to explain why the holdings in *Skrbina v. Fleming Cos.*, 45
 10 Cal.App.4th 1353, 1366 (1996); *San Diego Hospice v. Cty. of San Diego*, Cal.App.4
 11 1048, 1053 (1995); and *Winet v. Price*, 4 Cal. App. 4th 1159, 1173 (1992) (all
 12 dealing with releases in settlement agreements) should apply here. As the court in
 13 *Reudy* explained “the Special Master finds ***that when two parties settle a case and***
 14 ***a consideration is given in which a plaintiff allows a defendant to continue on with***
 15 ***its’ alleged wrongful conduct, that conduct is no longer wrongful***, at least as to that
 16 particular defendant. Plaintiff in exchange for consideration is permitting that
 17 conduct to go forward in the future.” *Id.*, at 1119 (emphasis added). There was no
 18 settlement here and no wrongful conduct ongoing when Plaintiff submitted its
 19 application. A settlement release is not analogous to the *Prospective Release*; if it
 20 were, it would obviate the need for Section 1668.

21 3. The release is void regardless of DCA’s claims.

22 Because the release is void, the Court should sever it from the Guidebook,
 23 decline to apply it to any of DCA’s claims, and adjudicate the motion for preliminary
 24 injunction. Cal. Civ. Code §1599; *Ulene v. Jacobson*, 209 Cal.App.2d 139, 142-143
 25

26 _____
 27 ⁴ The scope of the IRP is limited to review of actions “inconsistent with the Articles
 28 of Incorporation or Bylaws.” (Bekele Decl. ¶12, Ex. 4, p. 453 (Section IV.3.1)).
 Therefore, even under the Bylaws ICANN is free to engage in wrongful conduct
 without repercussion if it does not violate its own Articles and Bylaws.

1 (1962) (“To the extent that the challenged provisions are in violation of the
 2 governing statutory law, they are void.”) ICANN argues that if the provision is
 3 unenforceable, it is only unenforceable as to DCA’s claims sounding in fraud. (Opp.
 4 at p.15:12-14.) There is no authority for this proposition. Because the provision
 5 violates Section 1668 and is void as a matter of law, the Court should strike the entire
 6 provision from the Guidebook.

7 4. The release is unconscionable as DCA had no “bargaining power.”

8 ICANN seemingly asserts that DCA had the opportunity to “negotiate” the
 9 Prospective Release because ICANN invited public comment. (Opp. p.12:19-13:7.)
 10 ICANN undermines its own argument by submitting criticism of the Prospective
 11 Release from its own advisory group, the GAC. *See* Espinola Decl., Exs. D, E (“The
 12 exclusion of ICANN liability ...provides no leverage to applicants to challenge
 13 ICANN’s determinations ...**The covenant not to challenge and waiver ... is overly**
 14 **broad, unreasonable, and should be revised in its entirety**”) (emphasis added).
 15 The GAC is composed of governments and distinct economies, and “consider[s] and
 16 provide[s] advice on the activities of ICANN ...particularly matters where there may
 17 be an interaction between ICANN policies and various laws...or where they may
 18 affect public policy issues.” (Bekele Decl. Ex. 4, p. 496 (Art XI § 2.1(a)). **ICANN**
 19 **refused to eliminate the Prospective Release in the face of the GAC and other**
 20 **commenters’ recommendations.** It is therefore disingenuous to imply DCA could
 21 have negotiated elimination of the release or used the comment process to avoid it.

22 5. The Prospective Release Was Procured by Fraud.

23 ICANN asserts “Plaintiff’s Amended Complaint does not contain a single
 24 allegation of a representation by ICANN that IRP panel declarations are binding[.]”
 25 However, the IRP panel concluded that ICANN’s Bylaws, Supplementary
 26 Procedures and testimony to the U.S. Senate suggest that an IRP is binding. (Bekele
 27 Decl. ¶5, Ex. 1, p. 13). Any applicant would have concluded the same. ICANN
 28 cannot explain how advertising a dispute resolution proceeding while hiding the

1 material fact that the ICANN board believes itself free to disregard its findings and
2 rulings is not materially misleading and fraudulent.

3 ICANN further purports to have adopted and followed the IRP ruling in full
4 but this is demonstrably untrue. The Panel concluded the IRP is binding; ICANN
5 continues to deny that. (Bekele Decl. ¶5, Ex. 1, ¶23, p. 6-7; Opp. at 16:4-16). The
6 IRP is just an illusion ICANN provides to make it appear that it has a fair and real
7 internal dispute process. It does not.

8 6. ICANN fails to show that it followed the IRP ruling or that it treated
9 applicants consistently and fairly.

10 The IRP final declaration instructed that DCA be allowed to proceed through
11 the “remainder” of the IRP proceeding. ICANN states that the board resolved to
12 adopt the IRP’s “recommendations.” (Atallah Decl. ¶ 12). But ICANN does not
13 (and cannot) declare under penalty of perjury that it followed the IRP ruling. ICANN
14 asserts that “the net effect of the Declaration was that the IRP Panel wanted Plaintiff
15 to have further opportunity to try to obtain support or non-objection from 60% of the
16 governments of Africa.” (Opp. at 17:16-19). This statement is not in the IRP
17 Declaration, and ICANN provides no support for it.

18 The IRP Declaration states that “both the actions and inactions of the
19 [ICANN] board with respect to the application of DCA Trust relating to the
20 .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of
21 ICANN.” (Bekele Decl. ¶5, Ex. 1, ¶115, p.60; ¶148, p.67). When the IRP panel
22 declared that DCA should be allowed to proceed through the “remainder” of the
23 process, the IRP panel could not have meant that ICANN should be allowed to keep
24 DCA’s application in the initial evaluation phase, where ICANN’s wrongdoing had
25 already tainted the process. The GAC decision was effectively the end of the initial
26 evaluation phase for DCA and it should have proceeded to the next step in ICANN’s
27
28

1 review process, string contention⁵. Instead, ICANN **forced DCA to proceed**
2 **through the geographic name panel** phase of the initial evaluation as if the GAC
3 decision had never happened.

4 ICANN did not follow its own rules in rejecting DCA's endorsements. But
5 instead of addressing the substance of DCA's point that the AUC and UNECA
6 withdrawals are invalid under ICANN's rules, ICANN argues that its rules regarding
7 withdrawal are inapplicable to DCA's endorsements because they were never valid
8 in the first place. (Opp. at fn. 9). This is a circular argument: ICANN declares that
9 the endorsements were not proper precisely because they were withdrawn. Under
10 ICANN's own rules, withdrawal is proper only if there were some conditions
11 between the applicant and the endorser that were not fulfilled. (Bekele Decl. ¶7, Ex.
12 3, p.172). There were no such conditions in either AUC's or UNECA's endorsement
13 letters to DCA and therefore the withdrawal of support was improper. (Bekele Decl.
14 ¶¶ 15& 16, Exs. 7 & 8). Additionally, the alleged withdrawal letter from the AUC
15 came from an individual, Moctar Yadley, and not the chairman's office as the initial
16 endorsement had been. (Bekele Decl. ¶15, Ex. 7). ICANN misleadingly complains
17 in its opposition that DCA did not submit this letter with its application, but DCA
18 did disclose its existence in its application, and explained its belief that it was not
19 valid. (Bekele Supp. Decl. ¶2, Ex. 1 at p. 6). Moreover, UNECA's letter came *after*
20 the geographic name panel review resumed so ICANN cannot argue that the letter
21 was not valid at the time DCA submitted its application for .Africa. In fact, ICANN
22 *admitted* in the IRP that UNECA was a proper endorser! (See Bekele Decl. ¶5, Ex.1,
23 p.44 ¶90 (¶45)). It is ICANN's own determination, not UNECA's opinion of
24 ICANN's rules, which should govern. UNECA was also clearly bowing to pressure
25 from the Infrastructure and Energy division of the AUC to withdraw its support of DCA.
26 In addition, similar to the AUC, the UNECA letter did not come from the Executive
27

28 _____
⁵ However, DCA maintains that ZACR's application should be disqualified.

1 Office who granted the original endorsement to DCA, but a low level employee.
2 (Bekele Decl. ¶18, Ex. 10).

3 Finally, ICANN did not treat DCA and ZACR equally. (Bekele Decl. ¶3, Ex.
4 2). Although DCA raised this point and presented substantial evidence, ICANN's
5 Opposition conspicuously fails to address it. The individual country endorsements
6 ZACR relies upon were written in support of the AUC's initiative to get .Africa
7 name "reserved", not in support of ZACR. (Bekele Decl. ¶ 34). Many of the letters
8 submitted by ZACR as an endorsement do not even mention ZACR by name. (*Id.*).
9 ICANN actually ghostwrote ZACR's endorsement from the AUC, but did not afford
10 DCA this same privilege. (Supp. Bekele Decl. ¶3, Ex. 2). Whether ICANN should
11 have considered AUC as an endorser at all for ZACR is also questionable given the
12 agreement between ZACR and the Infrastructure Division of the AUC to assign
13 AUC any rights to .Africa that ZACR were to obtain. (Bekele Decl., ¶32, Ex. 20,
14 p.617(7)). ICANN says nothing about this, effectively admitting its truth.

15 ICANN also seems to argue that ZACR's application was somehow more
16 legitimate because the AUC chose to support it after a request for proposal ("RFP")
17 held by the AUC. However, the AUC's RFP is irrelevant to ICANN's selection
18 process and imposed extraneous requirements outside the rules of the ICANN's
19 guidebook. DCA and ZACR submitted the same type of application and should have
20 been evaluated under identical standards and treated consistently.

21 ICANN improperly allowed the AUC, effectively an applicant for .Africa
22 through ZACR, to influence DCA's application after the IRP. ICANN invited
23 ZACR to opine on the IRP Declaration. (Colón Dec. ¶5, Ex. 3). In violation of
24 ICANN's rules, ZACR wrote to the chairperson at ICANN in order to lobby for its
25 view on how ICANN should handle the post IRP processing of DCA's application.
26 (*See id.*; Bekele Decl. ¶7, Ex. 3, p.179 [Section 2.2.4]). This letter prejudiced
27 ICANN's post IRP evaluation of DCA's application. ICANN's recent conduct after
28 the filing of the TRO is equally improper. *Infra* at Section I, p.2.

1 Accordingly, DCA is likely to succeed on its claim for declaratory relief that
2 ICANN failed to follow its own Articles, Bylaws and rules and the IRP's ruling.

3 **B. The balance of hardships tips overwhelmingly in DCA's favor**

4 In its opposition ICANN's only argument as to why DCA will not suffer
5 irreparable harm in the absence of injunctive relief is that DCA has requested
6 compensatory damages. (*See Opp.* at 20:11- 20). This is a red herring. The fact
7 that DCA has requested compensatory damages in no way suggests that it can be
8 compensated for *all* or *any* harm – as ICANN suggests – arising from the wrongful
9 delegation of .Africa to another entity. The request for compensatory damages is
10 simply an alternative request for relief. The .Africa gTLD is a unique asset available
11 only through ICANN (ICANN does not deny any of this), the control over which
12 cannot be fully compensated by money. *See Blackwater Lodge & Training Ctr., Inc.*
13 *v. Broughton*, No. 08-CV0926 H (WMC), 2008 U.S. Dist. LEXIS 49371, at *28
14 (S.D. Cal. Jun. 17, 2008) (granting a temporary restraining order when Plaintiff
15 alleged monetary harm and other harms). ICANN concedes that it will suffer no
16 harm if it is enjoined from granting .Africa as it utterly fails to address the issue in
17 its Opposition.

18 Further, there is no “critical public interest that would be injured by the grant
19 of preliminary relief.” *Alliance For The Wild Rockies v. Cottrell*, 632 F.3d 1127,
20 1138 (9th Cir. 2011). ICANN presents only conclusions and beliefs as to harm the
21 continent of Africa will suffer. (*See Mocdaly Decl.* ¶¶6, 11-13). But, these
22 statements are conclusory and lacking in foundation.

23 **III. CONCLUSION**

24 Accordingly, DCA requests that the Court grant its motion.

25 Dated: March 21, 2016

BROWN NERI & SMITH LLP

26 By: /s/ Ethan J. Brown

Ethan J. Brown

Attorneys for Plaintiff

28 DOTCONNECTAFRICA TRUST

CERTIFICATE OF SERVICE

I, Ethan J. Brown, hereby declare under penalty of perjury as follows:

I am a partner at the law firm of Brown, Neri & Smith LLP, with offices at 11766 Wilshire Blvd., Los Angeles, California 90025. On March 21, 2016, I caused the foregoing **PLAINTIFF’S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on March 21, 2016

/s/ Ethan J. Brown