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Superior Court of California
Central District

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By Paul Sanchez, Deputy

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12 INTERNET CORPORATION FOR
13 ASSIGNED NAMES AND NUMBERS

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

16 DOTCONNECTAFRICA TRUST,
17 Plaintiff,

CASE NO. BC607494

18 v.

Assigned to Hon. Howard L. Halm

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

ICANN'S REPLY TO DCA'S
RESPONSES TO ICANN'S
STATEMENT OF UNDISPUTED
MATERIAL FACTS AND RESPONSES
TO DCA'S ADDITIONAL
UNDISPUTED MATERIAL FACTS

22 Defendants.

Date: August 9, 2017
Time: 8:30 a.m.
Dept: 53

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

ICANN'S REPLY TO DCA'S RESPONSES TO ICANN'S STATEMENT OF UNDISPUTED MATERIAL
FACTS AND RESPONSES TO DCA'S ADDITIONAL UNDISPUTED MATERIAL FACTS

Pursuant to California Code of Civil Procedure Section 437c(b) and California Rule of Court 3.1350(d), Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits the following Reply to Plaintiff DotConnectAfrica Trust (“DCA”) Responses to ICANN’s Statement of Undisputed Material Facts in Support of ICANN’s Motion for Summary Judgment (“Motion”) and Responses to DCA’s Additional Undisputed Material Facts.

ICANN submits this Reply to DCA’s Responses to ICANN’s Statement of Undisputed Material Facts and Responses to DCA’s Additional Undisputed Material Facts for purposes of the Motion only. References herein to DCA’s allegations and positions in this action are not to be construed as an admission by ICANN of the truth of any such allegation or position.

REPLY TO DCA’S RESPONSES TO ICANN’S STATEMENT OF 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	Response
1. 18 19	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.	Fact remains undisputed.
2. 20 21 22 23 24 25	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.	Fact remains undisputed.

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17</p>	<p>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.</p> <p><i>Willett Decl. ¶ 3 (Ex. C to LeVee Decl.); New gTLD Applicant Guidebook (“Guidebook”) § 6 (Ex. B to LeVee Decl.).</i></p>	<p>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.”</p> <p>LeVee Decl. Ex. B (Guidebook) Module 6 (preamble); Declaration of Sophia Bekele Eshete (“Bekele Decl.”) ¶¶ 7-10.</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
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4.	<p>DCA admitted that, by submitting its application for .AFRICA, DCA was agreeing to be bound by terms of the Guidebook.</p> <p><i>December 1, 2016 Deposition of Sophia Bekele ("Bekele Dep.") 17:18-20, 24:3-7. (Ex. A to LeVee Decl.)</i></p>	<p>Disputed. DCA's CEO Sophia Bekele testified that she was required to agree to the terms of the Guidebook in order to apply.</p> <p>LeVee Decl. Ex. A [Bekele Dep.] 17:21-19:3 (Ex. A. to LeVee Decl.).</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA's commentary is superfluous to and does not refute ICANN's statement and, therefore, should be disregarded.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement. Ex. A to the LeVee Declaration does not contain the cited testimony, and no testimony contained in the cited evidence matches the claimed testimony.</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p>	<p>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:</p> <p>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. . .</p> <p><i>Guidebook Module § 6.6 (Ex. B to LeVee Decl.).</i></p>	<p>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</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s response merely provides greater detail as to Module 6.</p> <p>It remains undisputed that the language cited is contained in the Guidebook.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
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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.
APPLICANT
ACKNOWLEDGES
THAT ANY ICANN

1		AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.”	
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6		LeVee Decl. Ex. B	
7		[Guidebook] Module 6 ¶ 6.	
8	6. Module 6 also makes clear that ICANN has the absolute discretion to “determine not to proceed with any and all applications for new gTLDs.”	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.	There is no genuine dispute of material fact.
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10			DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.
11	<i>Guidebook Module § 6.3 (Ex. B to LeVee Decl.).</i>		
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13			It remains undisputed that the language cited is contained in the Guidebook.
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17		Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, ¶ 4.	DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.
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20	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.	Undisputed.	Fact remains undisputed.
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26	<i>FAC ¶¶ 62-107, 115-142.</i>		

1 2 3 4 5 6 7 8	<p>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”</p> <p><i>FAC ¶ 68; see also generally ¶¶ 63-71.</i></p>	<p>Undisputed that the cause of action contains the cited language.</p>	<p>Fact remains undisputed.</p>
9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	<p>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].”</p> <p><i>FAC ¶¶ 74, 80; see also generally ¶¶ 75-79, 81.</i></p>	<p>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.</p> <p>FAC ¶¶ 74 and 80.</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s response merely provides greater detail as to DCA’s claims.</p> <p>It remains undisputed that DCA’s second and third claims are based on DCA’s allegations cited.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

1 2 3 4 5 6 7 8 9 10 11	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.	There is no genuine dispute of material fact. DCA's response merely provides greater detail as to DCA's claims. It remains undisputed that DCA's fourth claim is based on DCA's allegations cited. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement.
12 13 14	11 DCA's fifth claim, for unfair competition, is based on the same allegations underlying its first four claims. <i>FAC ¶¶ 96,97.</i>	Undisputed.	Fact remains undisputed.
15 16 17 18 19 20 21	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. <i>FAC ¶¶ 101-07.</i>	Undisputed.	Fact remains undisputed.
22 23 24 25 26 27	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). <i>FAC ¶ 118.</i>	Undisputed.	Fact remains undisputed.

ICANN'S REPLY TO DCA'S RESPONSES TO ICANN'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND RESPONSES TO DCA'S ADDITIONAL UNDISPUTED MATERIAL FACTS

1 2 3 4 5 6	<p>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.”</p> <p><i>FAC ¶124; see also generally ¶¶ 120-123.</i></p>	Undisputed.	Fact remains undisputed.
7 8 9 10 11 12	<p>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.”</p> <p><i>FAC ¶132; see also generally ¶¶ 127-129.</i></p>	Undisputed.	Fact remains undisputed.
13 14 15 16 17 18 19	<p>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.”</p> <p><i>FAC ¶142; see also generally ¶¶ 134-140.</i></p>	Undisputed.	Fact remains undisputed.

ISSUE 2: The Covenant Is Enforceable

Moving Party's Undisputed Material Facts and Supporting Evidence	Opposing Party's Response and Supporting Evidence	Analysis
Section 1668 Does Not Apply to the Covenant		
<p>17 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>	<p>There is no genuine dispute of material fact.</p> <p>DCA's commentary is superfluous to and does not refute ICANN's statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the language cited is contained in the Guidebook.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement.</p>

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	18 Any applicant may invoke the various accountability mechanisms provided for in ICANN’s Bylaws; ICANN is therefore not exempt from responsibility. <i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.).</i>	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. 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).	There is no genuine dispute of material fact. DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded. It remains undisputed that an applicant may utilize any accountability mechanism set forth in ICANN’s bylaws. <i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.).</i> DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.
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The Covenant Is Not Procedurally Unconscionable

17 18 19 20 21 22 23 24 25 26 27 28	19 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. <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>	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. Bekele Decl. ¶¶ 7-9.	The fact remains undisputed. DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.
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1 2 3 4	20 The Guidebook was developed over many years, during which numerous versions were published for public comment beginning in late 2008. <i>Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i>	Undisputed.	Fact remains undisputed.
5 6 7 8 9 10 11 12 13 14 15 16	21 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. <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>	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. LeVee Decl. Ex. A [Bekele Dep.] 17:12-16; 23:6-9; Bekele Decl. ¶ 8.	There is no genuine dispute of material fact. DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.
17 18 19 20 21 22 23 24 25	22 The Covenant was highlighted through capitalization and formatting in the Guidebook. <i>Guidebook Module 6 § 6 (Ex. B to LeVee Decl.); Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i>	Disputed to the extent it implies the Prospective Release was conspicuous. The Prospective Release was 333 pages into the Guidebook. LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	There is no genuine dispute of material fact. DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.

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23	<p>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>	<p>There is no genuine dispute of material fact.</p> <p>DCA's commentary is superfluous to and does not refute ICANN's statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA admits it was aware of the Covenant when it applied for .AFRICA.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement.</p>
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The Covenant Is Not Substantively Unconscionable

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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>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. <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>DCA utilized the IRP process, won, and ICANN acted in accordance with the IRP Panel’s decision in returning DCA’s application to processing. <i>LeVee Decl. ¶ 10; IRP Final Declaration ¶ 148 – 150 (Ex. I to LeVee Decl.).</i></p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the language cited is contained in the Guidebook.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>13 14 15 16 17 18 19 20 21 22 23 24 25 26 27</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>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that a Reconsideration Request is one accountability mechanism provided for in the Bylaws. <i>Atallah Decl. ¶ 6 (Ex. D to LeVee Decl.); Bylaws (Arts. IV, V) (Ex. M to LeVee Decl.).</i></p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

<p>1 2 3 4 5 6 7 8 9 10 11 12</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the language cited is contained in the Guidebook.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>13 14 15 16 17 18 19 20 21 22 23 24</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the language cited is contained in the Guidebook.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

1 2 3 4 5	29 When ICANN's Board accepted the GAC advice, and stopped the processing of DCA's application for .AFRICA, DCA filed a Reconsideration Request. <i>Declaration on the IRP Procedure ("Procedure Declaration"), ¶ 5 (Ex. G to LeVee Decl.).</i>	Undisputed.	Fact remains undisputed.
6 7 8	30 When the Reconsideration Request was unsuccessful, DCA initiated an IRP. <i>Procedure Declaration, ¶¶ 5, 6 (Ex. G to LeVee Decl.).</i>	Undisputed to the extent that DCA initiated an IRP after ICANN denied DCA's Reconsideration Request.	Fact remains undisputed.
9 10 11 12 13 14 15 16 17 18 19	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. <i>LeVee Decl. ¶ 10; IRP Final Declaration ¶ 148 -- 150 (Ex. I to LeVee Decl.).</i>	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. Bekele Decl. ¶5, Ex. 1 [IRP Decl.] ¶ 38 (¶¶ 13-34) and; Colón Decl. ¶ 3, Ex. B at p. 7-14; Ex. E at 6.	There is no genuine dispute of material fact. DCA's commentary is superfluous to and does not refute ICANN's statement and, therefore, should be disregarded. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement.
20 21 22 23 24 25 26 27 28	32 The IRP Panel had previously found that its final decision should be binding on the parties. <i>LeVee Decl. ¶ 10; Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i>	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. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (98-115); Colón Decl. ¶ 3, Ex. B at 15-16.	There is no genuine dispute of material fact. DCA's commentary is superfluous to and does not refute ICANN's statement and, therefore, should be disregarded. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN's statement.

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the ICANN Board directed that DCA’s application be returned to processing at the point in which the application was halted after the ICANN Board accepted the GAC consensus advice against DCA’s application. The Geographic Names Panel had not finished its review of DCA’s support letters when the ICANN Board accepted the GAC advice. When DCA prevailed at the IRP, its application was returned to processing by the Geographic Names Panel to analyze DCA’s letters of support. DCA has admitted that nothing in the IRP Declaration permitted DCA’s application to skip the Geographic Names Review. <i>Bekele Dep. 203:4-7; 206:14-22 (Ex. A to LeVee Decl.).</i></p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA could have initiated another IRP focused on ICANN’s rejection of DCA’s application.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>13 14 15 16</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>Fact remains undisputed.</p>
<p>17 18 19 20 21 22 23</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>	<p>Fact remains undisputed.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p>

The Covenant Was Not Procured By Fraud

<p>1 2 3 4 5 6 7 8 9 10 11 12 13</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>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that the FAC contains the language cited.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>14 15 16 17 18 19 20 21 22 23 24 25 26</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>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA admitted that nothing in the IRP Declaration permitted its application to skip the Geographic Names Review.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

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

	Moving Party's Undisputed Material Facts and Supporting Evidence	Opposing Party's Response and Supporting Evidence	Analysis
39	<p>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>	Undisputed.	Fact remains undisputed.
40	<p>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?"</p> <p><i>Procedure Declaration ¶ 19 (Ex. G to LeVee Decl.).</i></p>	Undisputed.	Fact remains undisputed.

<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>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.”</p> <p><i>“DCA’s Response to the Panel’s Questions on Procedural Issues” (“Response”), May 20, 2014, ¶ 6 (Ex. F to LeVee Decl.).</i></p>	<p>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.</p> <p>LeVee Decl. Ex. F, ¶ 6.</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA argued the language cited.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
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<p>1 2 3 4 5 6 7 8 9 10 11 12</p>	<p>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.”</p> <p><i>Response ¶ 6 (Ex. F to LeVee Decl.).</i></p>	<p>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.</p> <p>LeVee Decl. Ex. F, ¶ 6.</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA argued the language cited.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>13 14 15 16 17 18 19 20 21 22 23</p>	<p>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.</p> <p><i>Response ¶ 5-7 (Ex. F to LeVee Decl.).</i></p>	<p>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.</p> <p>LeVee Decl. Ex. F, ¶¶ 5-7.</p>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not refute ICANN’s statement and, therefore, should be disregarded.</p> <p>It remains undisputed that DCA argued the language cited.</p>

<p>1 2 3 4 5 6</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>Fact remains undisputed.</p>
<p>7 8 9 10 11 12 13 14 15 16 17 18</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>There is no genuine dispute of material fact.</p> <p>DCA’s response merely provides additional detail as to the IRP Panel’s findings.</p> <p>It remains undisputed that the language cited is contained in the Panel’s findings.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17</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>There is no genuine dispute of material fact.</p> <p>DCA’s response merely provides additional detail as to the IRP Panel’s findings.</p> <p>It remains undisputed that based in part on its determination 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,” the IRP Panel held that its decisions were binding.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>
<p>18 19 20 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>	<p>There is no genuine dispute of material fact.</p> <p>DCA’s commentary is superfluous to and does not address or refute ICANN’s statement and, therefore, should be disregarded.</p> <p>DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.</p>

1 2 3 4 5 6 7 8 9 10 11	48 DCA itself argued that the IRP was an arbitration: [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. <i>Response ¶ 21 (Ex. F to LeVee Decl.).</i>	Undisputed that DCA argued such.	Fact remains undisputed.
12 13 14 15 16 17 18	49 By filing this lawsuit, DCA necessarily took the position that the Covenant does not bar applicants from filing lawsuits against ICANN. <i>See generally FAC; LeVee Decl. ¶ 13 (DCA filed suit against ICANN on January 20, 2016).</i>	Undisputed to the extent that DCA’s position is that the Prospective Release is unenforceable and ICANN is not judgment proof. LeVee Decl. Ex. F, ¶ 6.	There is no genuine dispute of material fact. DCA fails to address the statement at issue with competent evidence, and therefore fails to create a genuine dispute as to ICANN’s statement.

**ICANN’S RESPONSES TO 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
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<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<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 proper due process in the event of a dispute regarding any decisions by ICANN regarding DCA’s application; • 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>Undisputed to the extent that ICANN’s Bylaws state that ICANN “shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”</p> <p>Undisputed to the extent that ICANN’s Bylaws provide for several accountability mechanisms to ensure that ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. An applicant can file a “request for independent review,” a unique process set forth in ICANN’s Bylaws that asks independent panelists to evaluate whether an action of ICANN’s Board was consistent with ICANN’s Articles of Incorporation and Bylaws.</p> <p>Undisputed to the extent ICANN’s Bylaws state that “the following core values should guide the decisions and actions of ICANN:</p> <ul style="list-style-type: none"> • Making decisions by applying documented policies neutrally and objectively, with integrity and fairness. • Remaining accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness. <p>Undisputed to the extent that ICANN’s Bylaws state that ICANN “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>
<p>26 27 28</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>Disputed. The cited language in ¶ 50 were not statements made to DCA. Also disputed to the extent ¶ 50 misrepresents statements made in ICANN’s Bylaws, Articles of Incorporation, or the Guidebook, as detailed in ICANN’s response to ¶ 50.</p>

1 2 3 4 5 6 7	52. DCA's causes of action for intentional and negligent misrepresentation arise out of the untruthfulness of the statements made in ¶ 50. FAC ¶¶ 74-82.	Disputed. The cited evidence – DCA's own FAC – does not support DCA's purported fact. Moreover, DCA's response includes impermissible legal argument and the ultimate legal conclusions of this case. A separate statement "consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party's] statements of material facts . . . is totally deficient." <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
8 9 10 11 12	53. DCA had no reason to believe that ICANN was misrepresenting the terms of the Articles of Incorporation, Bylaws, and Guidebook. Bekele Decl. ¶ 13.	Disputed. The cited evidence does not support the purported fact. A separate statement "consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party's] statements of material facts . . . is totally deficient." <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
13 14 15 16 17 18	54. 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." Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 3.1.	Disputed to the extent DCA misrepresents the actual language of the Guidebook, which states: the "process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities." (Bekele Decl., Ex. 2, Section 3.1.)
19 20 21 22	55. The GAC issued consensus advice against DCA's application, provided no applicable reason, and stated that its decision was political. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104, 110, 113.	Disputed. DCA's characterization of the evidence distorts the record. This statement is an opinion, and not a material fact.
23 24 25 26	56. ICANN accepted the GAC's advice without question. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not support DCA's assertion. This statement is an opinion, and not a material fact.

<p>1 2 3 4 5 6 7 8 9 10 11</p>	<p>57. ICANN argued throughout the IRP that its declaration 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).</p>	<p>Disputed. DCA’s characterization of the evidence distorts the record. The first two cited evidence cited do not support DCA’s assertion.</p> <p>Undisputed to the extent that in “ICANN’s Response to Procedural Order 8” in the IRP proceeding, <i>Dot Registry v. ICANN</i>, Case No. 01-14-0001-5004, ICANN stated that ICANN’s Board is required to “review[]” and “consider” the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.” (Colón Decl., Ex. E.)</p> <p>Undisputed to the extent that ICANN argued in its Memorandum Regarding Procedural Issues that the IRP was advisory. (Colón Decl., Ex. B.)</p>
<p>12 13 14 15</p>	<p>58. ICANN argued in subsequent IRP’s that the declaration is advisory on the ICANN board and not binding.</p> <p>Colón Decl. ¶ 6, Ex. E [ICANN’s Response to Procedural Order 8], ¶ 32.</p>	<p>Disputed. The cited evidence relates only to the IRP between DCA and ICANN, and therefore does not support DCA’s purported fact.</p>
<p>16 17 18 19 20 21</p>	<p>59. ICANN argued throughout the IRP to limit briefing, testimony, and discovery.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 38 (¶¶ 13-34); Colón Decl. ¶ 3, Ex. B at p.7-14; Ex. E at 6.</p>	<p>Disputed. ICANN urged the Panel to move more quickly and not to permit live witnesses to testify, but the Panel rejected ICANN’s requests. (Bekele Decl., Ex. 1.) It is also unclear what DCA means by “throughout.” Accordingly, also disputed to the extent DCA references anything other than ICANN’s documented arguments to the IRP Panel.</p>
<p>22 23 24 25</p>	<p>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.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 22.</p>	<p>Undisputed only to the extent that in the cited evidence, the IRP Panel stated that “more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed . . .” (Bekele Decl. Ex. 1. ¶ 22.)</p>

<p>1 2 3 4 5 6 7 8 9 10 11</p>	<p>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 IRP for more than year.</p> <p>Bekele Decl. ¶ 5, Ex .1 [IRP Decl.] ¶ 22.</p>	<p>Disputed. The IRP Panel did not find that ICANN violated its Bylaws and Articles of Incorporation in “rejecting DCA’s application.” Rather, the IRP Panel found that the ICANN Board’s actions were inconsistent with the Articles of Incorporation and Bylaws of ICANN in that that, rather than defer to the GAC’s advice, ICANN should have “investigate[d] the matter further.” (Bekele Decl., Ex. 1.)</p> <p>Undisputed to the extent that the IRP Panel concluded that ICANN has offered no explanation why the standing panel has not been formed . . .” (Bekele Decl., Ex. 1.) Disputed to the extent the cited evidence does not indicate the Panel found that ICANN had violated its Bylaws or Articles of Incorporation as a result.</p>
<p>12 13 14</p>	<p>62. The ICANN Board is not required to follow any Reconsideration Request decision.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [ICANN’s Bylaws] Art. IV, Section 2, ¶ 18.</p>	<p>Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not state the asserted language.</p>
<p>15 16 17 18</p>	<p>63. ZACR claimed it received an endorsement from the African Union Commission to apply for the .Africa gTLD on behalf of the African Community.</p> <p>Bekele Decl. ¶ 29, Ex. 16.</p>	<p>Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence, the African Union Communique on the dotAfrica gTLD, states that the AU Commission selected ZACR to administer and operate dotAfrica gTLD on behalf of the African community. (Bekele Decl., Ex. 16.)</p>
<p>19 20 21 22 23 24 25 26 27 28</p>	<p>64. ZACR’s application does not list any community, let alone the African community, that ZACR applied for on behalf of.</p> <p>Bekele Decl. ¶ 28, Ex. 15.</p>	<p>Disputed. There is no evidence ZACR’s application was improper and DCA makes a baseless allegation regarding the propriety of ZACR’s application. ZACR indicated it intended to operate .AFRICA for the benefit of the African community but it did not have an obligation to submit a “community” application. A “community” application is a special application available under the Guidebook that requires an application to meet heightened criteria, and my be given priority over other applications. (See Declaration of Christine Willet in support of ICANN’s Opposition to Plaintiff’s Motion for Preliminary Injunction, ¶ 19.)</p>

1 2 3 4 5 6 7 8 9	<p>65. ICANN nonetheless accepted ZACR’s application and processed it. Bekele Decl. ¶ 38, Ex. 24.</p>	<p>Disputed. There is no evidence ZACR’s application was improper and DCA makes baseless allegations regarding the propriety of ZACR’s application. ZACR indicated it intended to operate .AFRICA for the benefit of the African community but it did not have an obligation to submit a “community” application. A “community” application is a special application available under the Guidebook that requires an application to meet heightened criteria, and may be given priority over other applications. (See Declaration of Christine Willet in support of ICANN’s Opposition to Plaintiff’s Motion for Preliminary Injunction, ¶ 19.)</p>
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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
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Section 1668 Applies to the Prospective Release

13 14 15 16 17	<p>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. Bekele Decl. ¶15, Ex. 3 [ICANN Bylaws] Articles IV and V.</p>	<p>Undisputed to the extent that a Reconsideration Request, Ombudsman and Independent Review Process are accountability mechanisms contained in ICANN’s Bylaws.</p>
18 19 20 21 22 23	<p>67. ICANN’s Board is not bound by any decisions of the Board Governance Committee with respect to Reconsideration Requests 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.”]</p>	<p>Disputed to the extent DCA mischaracterizes the language of the Bylaws. The cited evidence states, “The Board shall not be bound to follow the recommendations of the Board Governance Committee.” Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 2, ¶ 17.</p>

<p>1 2 3 4 5 6 7</p>	<p>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.</p> <p>Bekele Decl. ¶15, Ex. 3 [ICANN Bylaws] Article V, Section 4, ¶ 5.</p>	<p>Undisputed to the extent the cited evidence states: “The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.”</p>
<p>8 9 10 11 12 13 14 15 16 17 18 19 20 21</p>	<p>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.”</p> <p>Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws], Article IV, Section 3, ¶ 4.</p>	<p>Undisputed to the extent the cited evidence states:</p> <p>“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be 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. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:</p> <ul style="list-style-type: none"> a. did the Board act without conflict of interest in taking its decision?; b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?”

1 2 3 4 5 6 7 8 9 10 11 12	70. ICANN’s IRP has the authority to “a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious; b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties; c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and 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; e. consolidated requests for independent review if the facts and circumstances are sufficiently similar; and f. determine the timing for each proceeding.” Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	Undisputed that the cited evidence contains the quoted language.
13 14 15 16 17 18 19	71. ICANN’s IRP has no authority to hold ICANN liable for fraud. Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
20 21 22 23 24 25 26 27 28	72. The IRP is limited to a review of procedural issues in ICANN’s processing of an applicant’s application. Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 3, ¶ 11.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. DCA does not define “procedural issues” and it is unclear what that term means. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).

73.	<p>None of ICANN’s “Accountability Mechanisms” have the authority to hold ICANN liable for fraud.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [ICANN Bylaws] Article IV, Section 2, ¶ 17, Article V, Section 4, ¶ 5; Article IV, Section 3, ¶ 11.</p>	<p>Disputed. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i>, 112 Cal. App. 4th 16, 22 (2003).</p>
74.	<p>ICANN argued throughout the IRP that the IRP was merely advisory.</p> <p>Bekele Decl. ¶ 15, Ex. 3 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c)</p>	<p>Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence (Bekele Decl. ¶ 15, Ex. 3 ¶ 23 (¶¶ 98-115) does not contain arguments in the IRP that the IRP was merely advisory.</p> <p>Undisputed to the extent that ICANN argued in its Memorandum Regarding Procedural Issues that the IRP was advisory. (Colón Decl., Ex. B.)</p>
75.	<p>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.</p> <p>Colón Decl. ¶ 6, Ex. E, p. 5 ¶ (c).</p>	<p>Undisputed to the extent the cited evidence states that the term “declaration” as used in the context of ICANN’s Bylaws requires ICANN’s Board to “review and consider the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that decision.” Disputed to the extent the purported fact misrepresents the meaning and scope of the cited evidence.</p>
76.	<p>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.”</p> <p>Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 3.1.</p>	<p>Disputed. The Guidebook states that the “process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” (Bekele Decl., Ex. 2.)</p>
77.	<p>The GAC issued consensus advice against DCA’s application, provided no applicable reason, and stated that its decision was political.</p> <p>Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104, 110, 113.</p>	<p>Disputed. DCA’s characterization of the evidence distorts the record. This statement is an opinion, and not a material fact.</p> <p>Undisputed only to the extent that the GAC issued consensus advice in 2013 that DCA’s application for .Africa should not proceed.</p>

1	78.	ICANN accepted the GAC's advice without question. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not support DCA's assertion. This statement is an opinion, and not a material fact.
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4	79.	ZACR agreed to sign over all rights to the .Africa gTLD to the AUC, if awarded the .Africa gTLD. Bekele Decl. 28, Ex. 15.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not state that ZACR agreed to sign over all rights to the .Africa gTLD to the AUC, if awarded the .Africa gTLD.
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7	80.	After DCA submitted its application, ICANN advised the AUC how to join the GAC and how to object to an application, either through the community objection or the use of GAC Objection Advice. Bekele Decl. ¶ 21, Ex. 9.	Disputed. ICANN in no way assisted the AUC in obtaining any rights to .AFRICA. AUC requested that ICANN put .AFRICA on a Reserved Names List (in other words, reserve the name to the AUC without the need for an application), but ICANN <i>denied</i> the request. The balance of ICANN's letter denying the reserve request that DCA cites does not advise the AUC how to join the GAC and object to an application, but in fact does nothing more than cite portions of the Guidebook that ensure African countries – 53 of which the AUC represents – have a say in who operates .AFRICA.
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15	81.	The AUC, through ZACR, was the only competitor to DCA for the .Africa gTLD. Bekele Decl. ¶ 26, Ex. 14.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not state that the AUC, through ZACR, was the only competitor to DCA for the .Africa gTLD.
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19	82.	Out of all of the individual country endorsement letters that ZACR submitted, only five referenced ZACR by name. All others referred to the AUC's failed "reserved names initiative." Bekele Decl. ¶ 31.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not prove that only five of the individual country endorsement letters that ZACR submitted referenced ZACR by name and that the others referred to the AUC's "reserved names initiative." The cited evidence is an opinion, and not a material fact.
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24	83.	ICANN held that ZACR's endorsement letters satisfied the first requirement that "the [endorsement] letter must clearly express the government's or public authority's support for or non-objection to the applicant's application[.]" Bekele Decl. ¶ 32, Ex. 18.	Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not support DCA's assertion that "ICANN held that ZACR's endorsement letters satisfied the first requirement that "the [endorsement] letter must clearly express the government's or public authority's support for or non-objection to the applicant's application[.]"
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<p>1 2 3 4 5</p>	<p>84. ICANN “ghost-wrote” a sample letter of endorsement for the AUC to endorse ZACR’s application.</p> <p>Bekele Decl. ¶ 33, Ex. 19.</p>	<p>Disputed. There was nothing improper about ICANN’s assistance; indeed, to help applicants ensure that their letters of governmental support met the requirements, the Guidebook contains a sample form of an endorsement letter. Had DCA asked, it would have received the same guidance as ZACR, but it did not ask.</p>
<p>6 7 8 9 10 11</p>	<p>85. After DCA’s application was denied, ICC employee, Mark McFadden, wrote to Trang Nguyen, stating: “I’ve seen the press on the .dotafrika application. So far, so good, I think. The ball is now in Sophia’s court – if she wants to invoke Independent Review, then good luck to her.”</p> <p>Bekele Decl. ¶ 34, Ex. 20.</p>	<p>Undisputed that the cited evidence contains the quoted language.</p>
<p>12 13 14 15 16 17 18 19</p>	<p>86. Following the IRP declaration, former ICANN president wrote to the Commissioner of Infrastructure and Energy at the Africa Union Commission, stating: “You have my commitment that our Global Domains Division team and all other necessary teams at ICANN Will work expeditiously with ZACR to bring the .AFRICA TLD to delegation and launch, just as soon as it is appropriate for that work to proceed.”</p> <p>Bekele Decl. ¶ 35, Ex. 21.</p>	<p>Undisputed that the cited evidence contains the quoted language.</p>
<p>20 21 22 23</p>	<p>87. Following the IRP declaration, ICANN allowed the AUC to contact ICANN’s Geographic Names Panel, during the re-evaluation of DCA’s endorsements.</p> <p>Bekele Decl. ¶ 36, Ex. 22.</p>	<p>Disputed. The AUC wrote a letter to ICANN, Attention: Geographic Names Panel, on September 29, 2015 on its own volition.</p>

1	88.	Pursuant to Guidebook Section 2.4.4, “Contacting individual ICANN staff members, Board Members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate.”	Undisputed that the language contained in section 2.4.4 is accurately quoted.
2		Bekele Decl. ¶ 6, Ex. 2, Section 2.4.4.	
3	89.	DCA protested to ICANN that the AUC’s contact of ICANN’s GNP Panel violated the Guidebook, but ICANN provided no response or corrected action to DCA.	Disputed. DCA wrote a letter to ICANN with “comments in response to the AUC letter that was sent to the ICANN GNP.” (Bekele Decl., Ex. 23.)
4		Bekele Decl. ¶ 37, Ex. 23.	
5	THE PROSPECTIVE RELEASE IS UNCONSCIONABLE		
6	<u>The Prospective Release is Procedurally Unconscionable</u>		
7	90.	ICANN reserved the right to make changes to the any part of the Guidebook, including Module 6, at any time, including after applicants had submitted their applications.	Undisputed that section 1.2.11 of the Guidebook states that [“ICANN reserves the right to make reasonable updates and changes to the Applicant Guidebook at any time[.]”]
8		Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 1.2.11 [“ICANN reserves the right to make reasonable updates and changes to the Applicant Guidebook at any time[.]”]	
9	91.	ICANN changed the procedures of the IRP after DCA submitted its application.	Disputed. The vast majority of the IRP procedures that DCA argues ICANN changed were already contained in the Bylaws at the time of DCA’s application. Any minor adjustments were procedural and did not affect the scope of an applicant’s ability to seek redress against ICANN. For example, additions included the following: “Evidence will not be included when calculating the page limit” and “Copies of the DECLARATION shall be communicated to the parties by the ICDR.” (Colón Decl., Ex. F.)
10		Colón Decl. ¶ 7, Ex. F.	
11	92.	The Prospective Release states that the applicant must agree to the terms and conditions “without modification.”	Undisputed.
12		LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	

ICANN’S REPLY TO DCA’S RESPONSES TO ICANN’S STATEMENT OF UNDISPUTED MATERIAL FACTS AND RESPONSES TO DCA’S ADDITIONAL UNDISPUTED MATERIAL FACTS

1 2 3 4 5 6 7 8	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." Colón Decl. ¶ 8, Ex. G p.2.	Undisputed that the cited evidence purports to relay a comment from the GAC, and that the purported fact accurately quotes that relayed comment.
9 10 11 12 13 14 15 16 17	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[.]" Colón Decl., ¶ 4, Ex. C, p. 183.	Immaterial but undisputed to the extent that the cited language is quoted correctly from the supporting document.
18 19 20 21 22 23 24	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." Colón Decl. ¶ 4, Ex. C, p. 184.	Immaterial but undisputed to the extent that the cited language is quoted correctly from the supporting document.
25 26 27 28	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 overly broad, unreasonable, and should be revised in its entirety." Colón Decl. ¶ 4, Ex. C, p. 184.	Immaterial but undisputed to the extent that the cited language is quoted correctly from the supporting document.

<p>1 2 3 4 5 6 7</p>	<p>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."</p> <p>Colón Decl. ¶ 5, Ex. D, ¶G.3.</p>	<p>Immaterial but undisputed to the extent that the cited language is quoted correctly from the supporting document.</p>
<p>8 9 10</p>	<p>98. DCA did not submit any comment on the Prospective Release.</p> <p>LeVee Decl. Ex. A [Bekele Depo.] 17:12-14.</p>	<p>Undisputed that Ms. Bekele testified that DCA did not comment on any portion of Module 6.</p>
<p>11 12 13 14</p>	<p>99. All comments made by Ms. Bekele were submitted on behalf of herself as an individual.</p> <p>LeVee Decl. Ex. A [Bekele Depo.] 23:6-9.</p>	<p>Disputed. Ms. Bekele stated in her deposition that she <i>thought</i> most comments were submitted on behalf of her personally as a community participant. (LeVee Decl., Ex. A., 23:6-9.)</p>

<p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16</p>	<p>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.”</p> <p>Colón Decl. ¶ 4, Ex. C, p. 184.</p>	<p>Disputed. The cited evidence states:</p> <p>“Prospective applicants cannot appropriately be offered any reassurances that ICANN will enter into a registry agreement with them, otherwise this undermines the purpose and intent of a rigorous application review. Further, ICANN must retain this right to evaluate applicants up to the point of entry into a registry agreement. Under its Bylaws ICANN’s actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including “Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants. The other specific comments and suggestions on the application terms and conditions will be considered by ICANN in the preparation of version 3 of the Applicant Guidebook.”</p> <p>Colón Decl. ¶ 4, Ex. C, p. 184.</p>
<p>17 18 19 20 21</p>	<p>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.”</p> <p>LeVee Decl. Ex. E, ¶ 3.</p>	<p>Disputed. The Guidebook was revised numerous times over a multi-year period.</p> <p><i>Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i></p>
<p>22 23 24 25</p>	<p>102. ICANN did not alter the Prospective Release according to the comments in ¶¶ 80-83</p> <p>Bekele Decl. ¶ 5, Ex. 1 [Guidebook] Module 6, ¶ 6; Colón Decl. ¶ 4, Ex. C, p. 184.</p>	<p>Disputed. The Guidebook was revised numerous times over a multi-year period.</p> <p><i>Espinola Decl. ¶ 2 (Ex. E to LeVee Decl.).</i></p>

1 2 3 4 5	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 negotiate changes in the IRP.” LeVee Decl. Ex. G [Procedure Decl.] ¶ 108.	Undisputed to the extent that the cited language was contained in the Declaration on the IRP Procedure.
6 7 8 9	104. ICANN has nearly \$500 million in assets. Colón Decl. ¶10, Ex. I.	Disputed. DCA’s purported fact contains ambiguous language that is subject to interpretation. DCA’s purported fact also distorts the cited evidence, and in inappropriately expresses vague and summary conclusions that are opinion, not fact.
10 11 12 13 14	105. The contract between ICANN and the U.S. Government, providing for U.S. Government oversight ended on October 1, 2016. https://www.icann.org/news/announcement-2016-10-01-en .	Immaterial, but undisputed to the extent that the cited evidence indicates the contract between ICANN and the United States Department of Commerce National Telecommunications and Information Administration (NTIA), to perform the Internet Assigned Numbers Authority functions, expired on October 1, 2016.
<u>The Prospective Release is Substantively Unconscionable</u>		
16 17 18 19 20 21 22	106. The Prospective Release does not apply to ICANN. LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	Disputed. DCA’s asserted fact is vague, misrepresents the record, and inappropriately includes legal arguments. The cited evidence does not state the asserted language. The Guidebook states 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.” (LeVee Decl., Ex. B.)
23 24 25	107. ICANN is not barred from instituting legal action in a court of law against applicants. LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	Disputed in that DCA’s purported fact contains ambiguous or vague language that is subject to multiple meanings, timeframes, or interpretation.
26 27 28	108. ICANN is permitted to pursue all legal remedies in any judicial forum LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not state that ICANN is permitted to pursue all legal remedies in any judicial forum.

1 2 3 4 5	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.” LeVee Decl. Ex. G [Procedure Decl.] ¶ 108.	Undisputed to the extent that the cited language was contained in the Declaration on the IRP Procedure.
6 7 8	110. ICANN admitted that “the release simply limits the recourse available to one of the contracting parties.” Colón Decl. ¶ 3, Ex. B.	Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not contain the cited language.
The Prospective Release was Procured by Fraud		
9 10 11 12 13 14 15 16	111. The Guidebook represented that the IRP provided actual redress to applicants. Bekele Decl. ¶ 11; LeVee Decl. Ex. B [Guidebook] Module 6, ¶ 6.	DCA’s purported fact contains ambiguous language that is too subject to interpretation to dispute or not dispute. This statement is not a material fact. 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. The Covenant specifically notes that applicants will be able to use any of the resolution mechanisms contained in ICANN’s Bylaws. (Bekele Decl., Ex. B).
17 18 19 20 21 22 23 24 25 26 27 28	112. ICANN’s Bylaws contained representations that ICANN would: <ul style="list-style-type: none"> • “make decisions by applying documented policies neutrally and objectively, with integrity and fairness”; • “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”; and • “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.” Bekele Decl. ¶ 15; Ex. 3 [Bylaws] Article IV, Section 3.	Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not contain the cited language.

1 2 3 4 5 6	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. Bekele Decl. ¶ 12.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
7 8 9 10 11 12	114. DCA believed those representations were true. Bekele Decl. ¶ 13.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
13 14 15 16 17 18 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. Bekele Decl. ¶ 14.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
20 21 22 23 24 25 26	116. DCA was harmed by those misrepresentations. Bekele Decl. ¶ 4.	Disputed. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).

1 2 3 4 5	117. 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.” Bekele Decl. ¶ 6, Ex. 2 [Guidebook] Section 3.1.	Disputed. The Guidebook states that the “process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.” (Bekele Decl., Ex. 2.)
6 7 8 9 10	118. The GAC issued consensus advice against DCA’s application, provided no applicable reason, and stated that its decision was political. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶¶ 104, 110, 113.	Disputed. DCA’s characterization of the evidence distorts the record. This statement is an opinion, and not a material fact. Undisputed to the extent that the GAC issued consensus advice in 2013 that DCA’s application should not proceed.
11 12 13 14 15 16 17	119. ICANN accepted the GAC’s advice without question. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 113.	Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not support the conclusory remarks added by DCA. This statement is an opinion, and not a material fact. A separate statement “consist[ing] only of legal conclusions, unsupported assertions, and the opinion of its counsel . . . [which] . . . purport[s] to dispute [moving party’s] statements of material facts . . . is totally deficient.” <i>California Sch. of Culinary Arts v. Lujan</i> , 112 Cal. App. 4th 16, 22 (2003).
18 19 20 21 22 23 24 25 26	120. ICANN argued throughout the IRP that its declaration was advisory and not binding. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 23 (¶¶ 98-115); Colón Decl. ¶ 3, Ex. B at 15-16; Ex. E at p.5 ¶ (c).	Disputed. DCA’s characterization of the evidence distorts the record. The first two evidence cited do not support DCA’s assertion. Undisputed to the extent that in “ICANN’s Response to Procedural Order 8” in the IRP proceeding, <i>Dot Registry v. ICANN</i> , Case No. 01-14-0001-5004, ICANN stated that ICANN’s Board is required to “review[.]” and “consider” the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.” (Colón Decl., Ex. E.)

1 2 3 4 5 6	<p>121. ICANN argued in subsequent IRP's that the declaration is advisory on the ICANN board and not binding.</p> <p>Colón Decl. ¶ 6, Ex. E.</p>	<p>Undisputed to the extent that in "ICANN's Response to Procedural Order 8" in the IRP proceeding, <i>Dot Registry v. ICANN</i>, Case No. 01-14-0001-5004, ICANN stated that ICANN's Board is required to "review[]" and "consider" the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration." (Colón Decl., Ex. E.)</p>
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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
9 10 11 12	<p>122. DCA argued in the IRP that ICANN should not be "judgment-proof."</p> <p>LeVee Decl. ¶ 8, Ex. F at ¶ 5.</p>	<p>Disputed. DCA's characterization of the evidence distorts the record. The cited evidence does not support DCA's assertion.</p>
13 14 15 16 17 18 19 20 21	<p>123. 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>	<p>Disputed. DCA's characterization of the evidence distorts the record. The first two evidence cited and the last evidence cited does not support DCA's assertion.</p> <p>Undisputed to the extent that in "ICANN's Response to Procedural Order 8" in the IRP proceeding, <i>Dot Registry v. ICANN</i>, Case No. 01-14-0001-5004, ICANN stated that ICANN's Board is required to "review[]" and "consider" the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration." (Colón Decl., Ex. E.)</p>
22 23 24 25	<p>124. ICANN continues to maintain today that IRP's are advisory, and not binding.</p> <p>LeVee Decl. ¶ 6, Ex. D, ¶ 9.</p>	<p>Undisputed to the extent that in the cited evidence, Akram Atallah states that "To my knowledge, ICANN has never represented that IRPs are binding. Instead, ICANN has consistently argued that IRP declarations are not binding." (LeVee Decl., Ex. D.)</p>

1 2 3 4 5	25. 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. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 40.	Disputed. DCA’s characterization of the evidence distorts the record. The cited evidence does not contain the cited language.
6 7 8	26. The IRP did not make an express finding whether the Prospective Release was valid and enforceable. Bekele Decl. ¶ 5, Ex. 1 [IRP Decl.] ¶ 115.	Undisputed.
9 10 11 12	27. ICANN argued that the IRP was not an arbitration. Colón Decl. ¶ 3, Ex. B.	Undisputed to the extent ICANN argued that the IRP is an internal accountability mechanism and not an international arbitration.

Dated: August 4, 2017

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORP.
FOR ASSIGNED NAMES AND NUMBERS

PROOF OF SERVICE

I, Grace M. Directo, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On August 4, 2017, I served a copy of the within document(s):

**ICANN’S REPLY TO DCA’S RESPONSES TO ICANN’S
STATEMENT OF UNDISPUTED MATERIAL FACTS AND RESPONSES
TO DCA’S ADDITIONAL UNDISPUTED MATERIAL FACTS**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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VIA EMAIL ONLY

VIA PERSONAL SERVICE

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

1 motion of the party served, service is presumed invalid if postal cancellation date or postage
2 meter date is more than one day after date of deposit for mailing an affidavit.

3 I declare that I am employed in the office of a member of the bar of this court at whose
4 direction the service was made.

5 Executed on August 4, 2017, at Los Angeles, California.

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9 Grace M. Directo
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