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8 **ZA Central Registry, NPC**

9   **UNITED STATES DISTRICT COURT**

10   **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

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DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,
 	
                    Plaintiff,
 	
          v.
 	
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; a California corporation; ZA Central Registry, a South African non-profit company; DOES 1 through 50, inclusive,
 	
                    Defendants.
	CASE NO. 2:16-cv-00862 RGK (JCx)
	
	Assigned for all purposes to the Honorable R. Gary Klausner
	
	DEFENDANT ZACR'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
	
	[Notice of Motion and Motion to Dismiss for Failure to State a Claim; Memorandum of Points and Authorities; Declaration of David W. Kesselman; and [Proposed] Order Filed Concurrently Herewith]
	
	Date: May 31, 2016
	Time: 9:00 a.m.
	Location: Courtroom 850

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1   PLEASE TAKE NOTICE that, pursuant to Rule 201 of the Federal Rules of

2   Evidence, Defendant ZA Central Registry, NPC ("ZACR") hereby requests that

3   the Court take judicial notice of Module 6 of the New gTLD Applicant Guidebook

4   in considering ZACR's concurrently-filed Motion to Dismiss Plaintiff's First

5   Amended Complaint ("FAC") pursuant to Federal Rules of Civil Procedure

6   12(b)(6). A true and correct copy of Module 6 of the New gTLD Applicant

7   Guidebook is attached hereto as **Exhibit A**.

8   Plaintiff DOTCONNECTAFRICA TRUST ("DCA") references the

9   Guidebook both directly and indirectly in its FAC without raising any question as

10   to its authenticity. **Exhibit A** is a portion of the Guidebook that Plaintiff alleges

11   has been breached by ICANN and intentionally interfered with by ZACR.

12   Accordingly, this document may be properly considered in connection with

13   ZACR's Motion to Dismiss the FAC.

14   **LEGAL STANDARD**

15   "[A] district court ruling on a motion to dismiss may consider a document

16   the authenticity of which is not contested, and upon which the plaintiff's

17   complaint necessarily relies." *Parrino v. FHP, Inc.,* 146 F.3d 699, 706 (9th Cir.

18   1998), superseded by statute on other grounds. This includes contracts that

19   plaintiff relies on in the complaint, even where plaintiff does not attach the

20   contract to the complaint. *Neilson v. Union Bank of Cal., N.A.,* 290 F. Supp. 2d

21   1101, 1114 (C.D. Cal. 2003) (taking judicial notice of signed contracts relied on in

22   the complaint but not incorporated).

23   Under Federal Rule of Evidence 201, a fact is judicially noticeable when it

24   is not subject to reasonable dispute and is capable of accurate and ready

25   determination by resort to sources whose accuracy cannot reasonably be

26   questioned. Module 6 of the New gTLD Applicant Guidebook is publically

27   available on Internet Corporation For Assigned Names and Numbers' ("ICANN")

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1   website (https://newgtlds.icann.org/en/applicants/agb). Information obtained from

2   a website is a proper subject of judicial notice where neither party questions the

3   authenticity of the site, or the document meets the definition in Federal Rule of

4   Evidence 201. *Pollstar v. Gigmania Ltd.,* 170 F. Supp. 2d 974, 978 (E.D. Cal.

5   2000) (taking judicial notice of website printout referenced in complaint when

6   ruling on motion to dismiss); *O'Toole v. Northrop Grumman Corp.,* 499 F.3d

7   1218, 1224-25 (10th Cir. 2007) (collecting cases regarding the propriety of taking

8   judicial notice of website and information contained therein).

9   **ARGUMENT**

10   Plaintiff alleges that ICANN breached the New gTLD Applicant Guidebook

11   by failing to comply with its rules. FAC ¶¶ 62-72. Plaintiff also alleges that

12   ZACR intentionally interfered with the New gTLD Guidebook and bases its fraud

13   and conspiracy to commit fraud claim against ZACR on the terms of the

14   Guidebook. FAC ¶¶ 108-114; 83-95.   Judicial notice of Module 6 of the New

15   gTLD Applicant Guidebook is necessary to give the Court a more complete

16   understanding of the allegations upon which Plaintiff's claims rest and may be

17   dispositive to ZACR's Motion to Dismiss. There is no dispute as to the

18   authenticity of **Exhibit A** and its contents are readily verifiable via the website.

19   Thus, this Court may take judicial notice of its contents under Federal Rule of

20   Evidence 201.

21   It is also in the interest of justice for the Court to take judicial notice of

22   Module 6 of the New gTLD Applicant Guidebook in that it contains terms that

23   Plaintiff omits from its FAC. *Parrino,* 146 F.3d at 706 (stating that a policy

24   justification for permitting judicial notice of a document is to "[p]revent[ ]

25   plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting

26   references to documents upon which their claims are based."); *see also Cortec*

27   *Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47 (2d Cir. 1991) (" . . . we have

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ZACR RJN IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

1   held that when a plaintiff chooses not to attach to the complaint or incorporate by

2   reference a prospectus upon which it solely relies and which is integral to the

3   complaint, the defendant may produce the prospectus when attacking the

4   complaint for its failure to state a claim, because plaintiff should not so easily be

5   allowed to escape the consequences of its own failure."). Module 6 of the New

6   gTLD Applicant Guidebook is highly pertinent to Plaintiff's claims, not subject to

7   reasonable dispute, and is relevant to the disposition of ZACR's Motion to

8   Dismiss. Thus, it may be considered in the determination of ZACR's Motion to

9   Dismiss. *Parrino,* 146 F.3d at 706; Fed. R. Evid. 201.

10   **CONCLUSION**

11   For the foregoing reasons, ZACR respectfully requests that the Court take

12   judicial notice of and consider **Exhibit A** in its determination of ZACR's Motion

13   to Dismiss.

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15   DATED: April 26, 2016   Respectfully submitted,

16   KESSELMAN BRANTLY STOCKINGER LLP

17

18   By: /s/ David W. Kesselman
                                                       David W. Kesselman
19   Amy T. Brantly

20   Attorneys for Defendant ZA Central
21   Registry, NPC

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ZACR RJN IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

EXHIBIT A

I C A N N

gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

Top-Level Domain Application –
Terms and Conditions

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.

1.   Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.

2.   Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3.   Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4.   Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.

5.   Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval rejection or withdrawal of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.

6.   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 FOR A ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7.   Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other

materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement http://newgtlds.icann.org/en/applicants/agb/program-privacy, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:

   a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;

   b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;

   c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

    d. Applicant may be requested to supply certain information in the original language as well as in English.

9.   Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.

10.   Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11.   Applicant authorizes ICANN to:

    a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

    b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.

12.   For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

13.   Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.

14.   ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.