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DOTCONNECTAFRICA TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL

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; and DOES 1 through 50, inclusive,

Defendants.

Case No. BC607494

[*Assigned to Hon. Howard L. Halm*]

JOINT REPLY TO DEFENDANT'S AND INTERVENOR'S OPPOSITION TO PRELIMINARY INJUNCTION

Date: December 22, 2016
Hearing: 8:30 a.m.
Dept.: 53

RESERVATION ID: 161115174199

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Arbitrators in ICANN's own internal dispute resolution process enjoined ICANN from acting until they resolved the initial dispute in DCA's favor.[1] After ICANN again improperly rejected DCA's application, the federal district court overseeing the case enjoined ICANN again and then affirmed that injunction on a motion for reconsideration. After remand to this court, ICANN requested that the Ninth Circuit issue a ruling "reflecting that the preliminary injunction is void." *The Ninth Circuit refused ICANN's request*. ICANN must remain enjoined.

In its opposition, ICANN mainly relies upon the Prospective Release that Judge Klausner held "void as a matter of law." Judge Klausner limited his ruling to an application of Cal. Civ. Code § 1668, but this one-sided clause should also fail as unconscionable, or based on ICANN's fraud. ICANN barely addresses DCA's endorsements.[2] Instead, ZACR – DCA's sole competitor – argues that DCA's endorsements are insufficient. ICANN only questioned one of four evaluated element of the endorsement – one that was *preferred* but *not mandatory* under ICANN rules. In any event, as explained below, DCA's endorsement contained that element. Both oppositions attempt to undermine DCA's UNECA endorsement, by referring to a letter dated September 21, 2015, from UNECA to the AUC***, not ICANN***, stating that UNECA does not consider itself an endorser. But ICANN accepted UNECA as an endorser years before.

ZACR only mentions briefly (in a footnote) that it has already assigned the rights to the .Africa gTLD to the AUC. Examining the timeline of the application process for the .Africa gTLD, it becomes clear why the AUC later "selected" ZACR as its "official" endorsement. In 2010, the African ministers in charge of Information and Communications Technologies issued the Abuja Declaration, requesting the AUC to "set up the structure and modalities for Implementation of the DotAfrica Project." Declaration of Moctar Yedaly ("Yedaly Decl."), ¶ 7, Ex. A. Subsequently, in October 2011, ICANN rejected the AUC's request to place .Africa on the reserved names list.

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[1] ICANN's panel noted "it would have been 'unfair and unjust to deny DCA Trust's request for interim relief when the need for such relief …[arose] out of ICANN's failure to follow its own Bylaws and procedures." Bekele Decl., Ex. 1, p. 4, ¶ 20.

[2] Both ICANN and ZACR have misconstrued and mischaracterized many facts in opposition. DCA responds to many below, and the remainder of DCA's objections are provided in the evidentiary objections.

Declaration of Sophia Bekele ("Bekele Decl."), ¶ 25, Ex. 12. The AUC then appointed ZACR as its "official endorsement" in April 2012, in exchange for ZACR allowing the AUC to "retain all rights relating to the dotAfrica TLD" – essentially ZACR is merely a front for the AUC. *Id*., ¶ 41, Ex. 26, ¶ 22 (7).

DCA had (or should have had) sufficient endorsements to pass the Geographic Names Panel and continue through the ***remainder*** of the application process. However, ICANN subjected DCA to disparate treatment throughout the evaluation, when the Guidebook specifically states that the Geographic Names Panel – third party ICC – is an independent panel subject to a "code of conduct" including "objectivity, integrity, confidentiality, and credibility." *Id.*, Ex. 3, Sections 2.4 and 2.4.3. Instead, ICANN employee Trang Nguyen in conjunction with ICC employee Mark McFadden, drafted a letter for the AUC to support ZACR, violating the rules ICANN has set forth. Declaration of Sara C. Colón ("Colón Decl.), Ex. 3.[3]

Finally, DCA will suffer a greater harm in the absence of an injunction than ZACR and ICANN would suffer from issuance of the injunction. ICANN makes no argument of harm. ZACR, provides an unsupported, conclusory spreadsheet of costs it has incurred as the result of an improper registry agreement it entered into with ICANN. Bekele Decl., ¶ 2, Ex. 1, p. 4. Thus, all costs incurred by ZACR to date are not recoverable. Any future harm to ZACR can be mitigated through a prompt trial setting. Moreover, the public obtains a greater benefit by having the gTLD outcome properly determined rather than prematurely, and improperly awarding it to the wrong party. DCA's harms outweigh all others and the public interest supports an injunction. Significant discovery has been completed in this case, and it can be set for trial soon.

DCA respectfully requests this Court recognize continue to enjoin ICANN from further action.

II. ARGUMENT

A. The Federal Court Preliminary Injunction Remains Valid

As DCA has argued, it is the Court's decision to adopt the federal rulings, and DCA requests this Court do so, including the preliminary injunction. "It will be for the state court when the case gets back there, to determine what shall be done with pleadings filed…during…the suit

[3] When ICANN rejected the AUC's request to place .Africa on the reseved names list, ICANN informed the AUC on GAC procedures available to defeat DCA's application. Bekele Decl., Ex. 12, p 2-3.

in federal court. *Ayers v. Wiswall* (1884) 112, U.S. 187, 190-191. Adoption of the federal ordered preliminary injunction is especially appropriate because the Ninth Circuit expressly rejected ICANN's request to including language "reflecting that the preliminary injunction order is void" in its order dismissing ICANN's appeal, implying that the preliminary injunction is valid. *See* Request for Judicial Notice, Ex. A. ICANN argues that the preliminary injunction is void, yet ignores the Court's order finding ZACR a necessary party. If the Court lacked jurisdiction and its orders are void, the Court's order regarding ZACR is also void. This is yet another attempt by ICANN to inequitably apply the rules to its advantage.

B. ICANN's Prospective Release is Void as a Matter of Law

Under any of the theories that DCA proposes, ICANN's Prospective Release attempts to absolve it, and it alone of any liability, and is thus void as a matter of law.

1. *Ruby Glen, LLC v. ICANN* – 2016 U.S. Dist. LEXIS 163710 ("*Ruby Glen*")

In this case, the Honorable Gary R. Klaunser held the Prospective Release "void as a matter of law." ICANN relies on a federal court decision in a different case, *Ruby Glen,* which is both distinguishable and non-binding. "Decisions of lower federal courts are…not binding." *Boucher v. Alliance Title Co., Inc.* (2005) 127 Cal.App.4th 262, 267. ICANN argues that "just as in *Ruby Glen*, the conduct alleged here does not amount to "fraud, or willful injury to the person or property of another." But *in stark contrast* to *Ruby Glen*, DCA alleges claims for intentional and negligent misrepresentation, and fraud and conspiracy to commit fraud. The plaintiff in *Ruby Glen* alleged causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and unfair competition. *See* Declaration of Jeffrey LeVee ("LeVee Decl."), Ex. L. 2. Although ICANN relies on Judge Anderson's doubt in that case that ICANN committed fraud or intentional wrongdoing, DCA alleges exactly that: intentional disparate treatment of its application and ZACR's. The facts of *Ruby Glen* are thus clearly distinguishable.

2. *ICANN's pre-textual denial of DCA's Application is Willful Injury.*

ICANN also argues that Civ. Code § 1668 does not apply to the Prospective Release because "willful injury to the person or property of another "means more than intentional conduct,

1 but instead 'intentional wrongs.'" ICANN Opp., at 10:8-9 (citing *Fritelli, Inc. v. 350 N. Canon*
2 *Drive, LP* (2011) 202 Cal.App.4th 35, 43.). However, DCA alleges intentional wrongs.
3 As stated in DCA's moving papers, ICANN's actions in reissuing the same clarifying
4 questions after the IRP without any further explanation establishes that its actions were merely a
5 pre-text to deny DCA's application for a final time. "While the word 'willful' implies an intent,
6 the intention must relate to the misconduct and not merely to the fact that some act was
7 intentionally done." *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 729. Black's Law
8 Dictionary defines pretext as: "ostensible reason or motive assigned or assumed as a color or cover
9 for the real reason or motive; false appearance; pretense." *Id.*, 1184 (Sixth Edition 1991). Put
10 otherwise, ICANN used the same clarifying questions as the reason to improperly hide and
11 disguise its true motive of arbitrarily rejecting DCA's application. There could not be a more clear
12 instance of willful misconduct. Judge Klausner agreed with DCA, holding that "the evidence
13 suggests that ICANN intended to deny DCA's application based on pretext" in granting DCA's
14 preliminary injunction. Brown Decl., Ex. 2, p. 5. Thus, ICANN's actions constitute intentional
15 conduct to invalidate the Prospective Release.
16 ICANN also argues that Section 1668 cannot be used to invalidate the contract based on a
17 violation of law because DCA alleges no violation of law in its Ninth Cause of Action. ICANN
18 Opp., p.10, n.10. This is plainly wrong. DCA alleges fraud and misrepresentation and those are
19 sufficient to invalidate the contract. DCA's Ninth Cause of Action is also based on ICANN's
20 fraud – ICANN's false promise that it would follow the rules as it represented.
21 For the foregoing reasons, ICANN's Prospective Release is void as a matter of law.
22 3. *No "Separate" Promises exist and the Prospective Release affects all claims*
23 ICANN cannot differentiate between causes of action because only one agreement was
24 made between ICANN and DCA. ICANN argues that the Prospective Release is valid as to any
25 negligence claims. ICANN Opp. p. 11, citing to *Werner v. Knoll* (1948) 89 Cal.App.2d 474, 477;
26 *Hulsey v. Elsinore Parachute Ctr*. (1985) 168 Cal.App.3d 333, 340; and *Grayson v. 7-Eleven, Inc.*,
27 No 09cv1353-GPC (WMC), 2013 U.S. Dist. LEXIS 40462, at *18 (S.D. Cal. Mar. 21, 2013). But
28 as the court stated in *Werner v. Knoll*, "the only question raised by the pleadings is whether or not
said provision operates to relieve the respondent from the consequences of his own negligence…"

Id., at 477. DCA raises questions of fraud, intentional misrepresentation and negligent misrepresentation and the Prospective Release attempts to relieve ICANN from "any and all claims….that arise out of, are based upon, or are in any way related to…ICANN's…review of this application." *See* ICANN Opp., p. 2:21-28. Because the Prospective Release attempts to resolve ICANN of all liability, including fraud, it violates Section 1668 and is void.

4. *The Prospective Release is Unconscionable and was not Negotiated*

DCA did not negotiate the Prospective Release and ICANN can cite no evidence that it did. ICANN rejected any requests to soften or eliminate the release, including a request from its own committee.[4] ICANN is the only entity which awards gTLDs, and the Prospective Release is procedurally unconscionable.

The Prospective Release is also substantively unconscionable because absolving a private corporation from liability is not justified. "Unconscionability turns not only on a 'one-sided' result, but also on an absence of 'justification' for it." *Walnut Producers of Cal. v. Diamond Foods, Inc.* (2010) 187 Cal.App.4th 634, 647. ICANN claims that absolving itself of liability is a public benefit and justification and cites to *Ruby Glen* to support this. ICANN merely concludes this, because no public benefit exists in granting a private corporation immunity from liability.[5] Judge Anderson stated that "ICANN and frustrated applicants do not bear this harm [that applicants could derail the entire system developed by ICANN] equally." Judge Anderson did not consider that that ICANN bears no harm in rejecting a gTLD application. This also ignores the years spent and expenditures made in applying for a gTLD. ICANN bears none of that loss. Accordingly, the Prospective Release is unconscionable.

5. *The Prospective Release was Procured by Fraud*

ICANN made various false representations to DCA in order to get DCA to agree to the Guidebook and submit an application. These include: (1) that ICANN would review DCA"s

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[4] https://www.icann.org/en/system/files/files/dryden-to-dengate-thrush-23sep10-en.pdf. "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 of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly."

[5] ICANN created a reserve fund especially for potential litigation that currently exceeded $80 million in March 2014. *See* https://www.icann.org/en/system/files/correspondence/goshorn-to-jeffrey-14jun13-en.pdf and https://www.icann.org/en/system/files/files/package-fy14-31mar14-en.pdf (p.9).

application in accordance with its Articles of Incorporation, Bylaws, and the new gTLD Guidebook; (2) that ICANN's IRP was a legitimate process for redress and was not illusory and non-binding; (3) that it would participate in the IRP in good-faith; and (4) that all applicants would be subject to the same agreement, rules, and procedures. These affirmative representations made by ICANN in its Articles of Incorporation, Bylaws, and the Guidebook are false and are expressly identified in DCA's amended complaint. Accordingly, the Prospective Release was procured through ICANN's fraud. For all of the foregoing reasons, DCA respectfully requests this Court find the Prospective Release void as a matter of law as Judge Klaunser did.

C. DCA's Endorsements were Sufficient when Evaluated by ICANN

1. *DCA's endorsements met the fourth and optional criteria.*

ICANN never questioned whether the AUC or UNECA withdrew their support, but only questioned criteria four of the endorsement requirements, and DCA's endorsements met that requirement as well.[6] *See* Declaration of Sophia Bekele, Exs. 13 and 15 . Pursuant to the new gTLD Guidebook, an endorsement letter was evaluated on four separate criteria: (1) the letter must clearly express the public authority's support for or non-objection to the applicant's application; (2) must demonstrate the public authority's understanding of the string being requested; (3) demonstrate the public authority's understanding of the of the string's intended use; and (4) ***should*** demonstrate the public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available. Bekele Decl., Ex. 3, Section 2.2.1.4.3 (emphasis added).

No clarifying questions ICC issued to DCA suggest that DCA had failed to satisfy the first criteria - that "the letter must clearly express the government's or public authority's support for or non-objection to the applicant's application." *See* Bekele Decl., Exs. 13 & 15. In fact, ICANN accepted that criteria 1 was met by DCA's endorsements. Thus, ICANN never relied on any claim that DCA's endorsements were withdrawn or invalid.[7] ICANN concedes that criteria 2 and 3 were met. Only criteria 4 – the only one framed as "should" (or preferred) rather than must -- is at issue.

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[6] ZACR is not responsible for evaluating DCA's endorsements and is its direct competitor. ZACR's arguments should be given little weight.

[7] ICANN again misleadingly states that DCA never submitted the purported withdrawal letter from the AUC to ICANN, but ICANN's CEO was copied on the letter. *See* Bekele Decl., Ex. 7.

But DCA's endorsements specifically demonstrated that it was applying for the gTLD through ICANN and obviously implies that it would be subject to ICANN's rules. Then ICC submitted clarifying questions to DCA, the clarifying questions to the AUC and UNECA's endorsement letters stated: "the letter [from the AUC and UNECA] does not meet criteria 4 above." *Id.*, ¶¶ 27 and 29, Exs. 13 and 15. The letter continues: "For criteria 4, 'the applicant….[willingness] to accept the conditions under which the string will be available' can be satisfied by meeting the requirement of the first part of the criteria: 'demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process." *Id.* DCA's endorsements letters from the AUC and UNECA state, respectively, "…your organization is applying for delegation of a regional identifier top level domain – '.africa' from the Internet Corporation for Assigned Names and Numbers…" and "your organization is applying to the Internet Corporation for Assigned Names and Numbers (ICANN) for the delegation of the regional identifier top level domain – 'africa.'" *Id.*, ¶¶ 19 and 21, Exs. 6 and 8. Thus, both the AUC and UNECA were aware that DCA was applying for .Africa through ICANN. ICANN does not argue how this specific language would not inform the endorsing body that the gTLD was being sought through ICANN's gTLD program.

DCA also shows that criteria 4 was merely discretionary or preferred, and not mandatory. ICANN does not explain why it specifically changed the term from "must" in all three other criteria, to "should" for the fourth criteria. "[A]ny ambiguity in the contract should be resolved against the draftsman." *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 695; *Civ*. Code § 1654. Therefore DCA's interpretation of the criteria as discretionary should prevail.

As to the purported withdrawal of the AUC's and UNECA's endorsement, ICANN nor ICC never raised the issue. ICANN argues that the only express section addressing withdrawal of an endorsement letter was (1) not in the Guidebook when DCA applied and (2) that it does not limit the grounds upon which a withdrawal can occur.[8] ICANN again attempts to change the rules or apply them to DCA's disadvantage. Moreover, it is entirely inequitable to expect an applicant to spend years obtaining an endorsement only to have the political winds shift. The Guidebook

[8] Ms. Willet also testified that she would "expect it [withdrawal] could be for a multitude of reasons." Brantly Decl., Ex. 2, p.72:17-18.

only states that a government may withdraw support if the registry operator (or successful applicant) deviates from the conditions of original support. Bekele Decl., Ex. 3, Section 2.2.1.4.3. There were no conditions here and ICANN should not be allowed to play loose with its rules.[9]

As to the purported withdrawal of UNECA's endorsement, this occurred far after the processing of DCA's application – in September 2015. It was indisputably past the time for evaluation for it to be considered withdrawn. Conspicuously, the letter is neither addressed to DCA nor ICANN. Instead it is addressed to, and made in response from a request by the AUC. ICANN did not consider this withdrawn because it could not.

Thus, although the fourth criteria was not mandatory, DCA met it. For the foregoing reasons, DCA has demonstrated a likelihood of success on the merits.

2. *The Court should ignore the misstatements and mischaracterizations.*

ICANN and ZACR misleading suggest that DCA conceded it lacked sufficient endorsements by testifying that DCA was not permitted to "skip" the geographic names review. ICANN Opp., p. 13:25-26; ZACR Opp., p.5:6-9. But that statement only stands for the proposition that applicants had to pass the geographic names review and nothing else. Ms. Bekele had previously testified that the endorsements from the AUC and UNECA that DCA submitted with its application "absolutely" were sufficient to meet ICANN's requirements.[10] Ms. Bekele explains later in her testimony that DCA's request for an additional 18 months to acquire endorsements, was made if ICANN refused to accept the AUC and UNECA as proper endorsements.[11] Thus, contrary to the misrepresentations, DCA has conceded nothing.

As to ZACR's claim that DCA admitted the AUC's endorsement letter was withdrawn (ZACR Opp. p. 3:12-13), DCA stated in that very letter that it believed its "original endorsement that was given by the AU Chairperson remains valid.") Yedaly Decl., ¶ 11, Ex. D.

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[9] ICANN also states DCA conceded that other methods of withdrawal were available. Not true again. Ms. Bekele stated: "Q: If the AUC properly withdrew the endorsement in 2010, was there anything that prevented them from doing that. A: No, but they didn't do that." LeVee Declaration, Ex. H, p.180:21-24.

[10] Levee Decl. ¶4 Ex. H, p. 180:9-12. ("Q: So you're taking the position that letters you had received in 2008 and 2009 were sufficient to meet the guidebook requirements in 2012? A: Absolutely.")

[11] Levee Decl. ¶4 Ex. H., p.205:12-18.

D. DCA's Harm Outweighs the Harm to ZACR, ICANN, or Others

1. *The destruction of DCA's business is detrimental and irreparable harm*

The second factor for the court to consider is "the relative interim harm to the parties from the issuance or non-issuance of the injunction." *SB Liberty, LLC, supra*, 217 Cal.App.4th at 280.[12] If the preliminary injunction is denied, DCA will have to terminate operations as its funding will cease and such harm outweighs the harm of any other interested parties. Neither opposition addresses the destruction of DCA's business. As to redelegation, ZACR, but not ICANN, argues that redelegation is possible. ICANN may have procedures for such, but redelegation is a complicated, if not nearly impossible task as a practical matter. Finally, ZACR's argument that DCA can be made whole by monetary relief is irrelevant. *See Blackwater Lodge & Training Ctr. v. Boughton*, 2008 U.S. Dist. LEXIS 49371, at *28 (S.D. Cal. 2008) [granting a preliminary injunction despite plaintiff seeking monetary relief].

2. *ZACR's "harm" is the result of an invalid registry agreement.*

ZACR's "lost costs" are the result of an improper registry agreement and based on the assumption that it has been properly awarded the .Africa gTLD; all of these costs have already occurred and cannot be the basis for balancing the harms of a preliminary injunction. After DCA had initiated the IRP for review of ICANN's improper rejection of its application, DCA requested that ICANN refrain from taking any further action with respect to the .Africa gTLD, until the IRP was resolved. Bekele Decl., ¶ 10, Ex. 1, p. 4, ¶ 20. ICANN refused, and responded by entering into a registry agreement with ZACR immediately after. *Id.*, Ex. 1, p. 3, ¶ 14. DCA petitioned the IRP, seeking to enjoin ICANN, and the request was granted. *Id.* ZACR cannot complain of injury that has resulted from its inequitable conduct. *See* Cal. Civil Code § 3517.

As to ZACR's remaining damages, ZACR has not explained why it continues to incur these damages and why they cannot be mitigated. *See State Dept. of Health Services, v. Superior Court* (2003) 31 Cal.4th 1026, 1043. ZACR asserts that it has implemented "cost saving measures" and reduced the amount by roughly $1,700/month, but has failed to explain why it cannot mitigate the damages completely. ZACR merely concludes that it is incurring costs of $16,632 for

[12] DCA is not required to demonstrate "irreparable harm" as ZACR suggests (ZACR Opp. p. 13:12).

1 “consultants, marketing, sponsorships and related expenses” without any definitive proof.[13] The
2 Court should not consider ZACR’s purported harm.

3 3. *The proper award of the .Africa gTLD is in the public’s best interest.*

4 The public interest in having the .Africa gTLD properly awarded is of higher interest than
5 those advanced by ZACR. In support of its opposition, ZACR submits a declaration from Moctar
6 Yedaly – head of the AUC’s Infrastructure and Energy Department – for evidence of the public
7 harm. DCA requests this Court reject Mr. Yedaly’s biased declaration, based upon the AUC’s
8 interest and secured rights to the .Africa gTLD pursuant to the agreement with ZACR, and give no
9 weight to the declaration as the Judge Klausner did. *See* Brown Decl., Ex. 2, pp. 7-8. Neither
10 defendant has shown that the African or international community will be harmed by waiting for a
11 proper delegation determination. For the foregoing reasons, DCA demonstrates both a likelihood
12 of success and a balance of the equities in its favor.

13 **E. ZACR’s Estimated Damages for a Bond are Untenable**

14 As stated above, ZACR’s damages are based almost entirely on an invalid registry
15 agreement it entered into with ICANN. If the Court requires DCA to post a bond it should only
16 be based on actual damages.

17 **III. CONCLUSION**

18 Two separate judicial fora have examined, and concluded that DCA’s interests in enjoining
19 ICANN were superior to all others. DCA respectfully requests this Court enjoin ICANN to allow
20 for the proper delegation of the .Africa gTLD.

21 Dated: December 15, 2016 **BROWN NERI SMITH & KHAN LLP**

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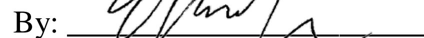
23 By: 
24 Ethan J. Brown

25 *Attorneys for Plaintiff*
26 DOTCONNECTAFRICA TRUST

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[13] The federal court case was remanded on October 20, and the Parties agreed to hold off on delegation until this motion could be heard, further demonstrating the lack of harm to ZACR in the interim. Willet Decl., ¶ 15.