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8 DOTCONNECTAFRICA TRUST

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a Mauritius
13 charitable trust,

14 Plaintiff,

15 v.

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

20 Defendants.

Case No. BC607494

[Assigned to Hon. Howard L. Halm]

**EX PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: January 4, 2017

Hearing: 8:30 a.m.

Dept.: 53

[Filed concurrently: Declarations of Sophia
Bekele Eshete and Ethan J. Brown;
[Proposed] Order to Show Cause; and
[Proposed] Temporary Restraining Order]

1 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 4, 2017, at 8:30 a.m. or as soon thereafter as
3 the matter may be heard, before the Honorable Howard L. Halm, of the Superior Court of
4 California, Stanley Mosk Courthouse, Department 53, located at 111 N. Hill Street, Los Angeles,
5 CA 90012-3332, Plaintiff DotConnectAfrica Trust (“DCA”) will and does apply *ex parte* for a
6 temporary restraining order enjoining Defendant Internet Company for Assigned Names and
7 Numbers (“ICANN”) from issuing the .Africa generic top level domain (“gTLD”) until this Court
8 sets an Order to Show Cause as to why a Preliminary Injunction should not issue. DCA previously
9 moved for a preliminary injunction, and the Court denied the preliminary injunction for the reasons
10 set forth by Defendant ICANN.¹

11 This Application is made pursuant to Code of Civil Procedure § 527 on the grounds that
12 ICANN fraudulently represented to DCA that it would process gTLD applications in a fair,
13 unbiased and neutral way, misleading DCA to believe it could compete for the gTLD, when
14 ICANN favored Intervenor ZACR the entire time. DCA will suffer the destruction of its company,
15 loss of the sunrise premium domain name contracts, and other irreparable harm, and will be denied
16 the fair determination of who is entitled to the .Africa domain - a determination that ICANN agreed
17 to follow when DCA applied for the domain. On the other hand, ICANN suffers no harm, and
18 DCA’s only competitor, Intervenor ZACR, suffers harm insufficient to justify denying a temporary
19 restraining order. Therefore, ICANN should be prevented from issuing the .Africa gTLD until a
20 preliminary injunction can be heard. There is good cause to justify this *ex parte* application
21 because the .Africa gTLD will be delegated by ICANN to ZACR before a regularly-noticed motion
22 can be heard.

23 This Application is based on this Notice of and *ex parte* application, the papers, records,
24 and pleadings on file in this case, and on such oral argument as the Court allows.

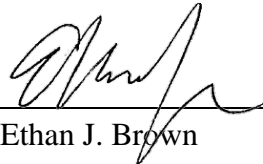
25 Counsel for DCA notified counsel for ICANN and counsel for ZACR on January 3, 2017
26 at 9:49 a.m., via email, phone and voicemail. Counsel for ICANN is Jeffrey LeVee of Jones Day,
27

28 ¹ The Court provided limited explanation for denying DCA’s motion after tentatively granting the preliminary
injunction, stating that “the preliminary injunction is denied, based on the reasoning expressed in the oral and written
arguments of **defense** counsel.” (emphasis added)

1 555 S. Flower Street, 50th Floor, Los Angeles, CA 90071, JLeVee@jonesday.com; counsel for
2 ZACR is David Kesselman, Kesselman, Brantley, Strockinger, LLP, 1230 Rosencrans Ave., Ste.
3 690, Manhattan Beach, CA 90266, dkesselman@kbslaw.com. (Declaration of Ethan J. Brown, ¶
4 8, Ex. 6.) Opposing counsel indicated that they would oppose DCA's application. (*Id.*)

5
6 Dated: January 3, 2017

BROWN NERI SMITH & KHAN LLP

7
8 By: _____
9 Ethan J. Brown

10 *Attorneys for Plaintiff*
11 DOTCONNECTAFRICA TRUST
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On December 22, 2016, this Court heard and ruled upon Plaintiff DotConnectAfrica
4 Trust’s (“DCA”) motion for preliminary injunction (“PI”). The Court had tentatively agreed with
5 DCA’s arguments and had indicated it would grant the PI. The tentative order stated that: (1)
6 “The evidence reflects that the potential harm to DCA significantly outweighs any harm to
7 Defendants;” (2) “that the public interest in having the .Africa gTLD properly awarded through a
8 fair and transparent application process outweighs concerns about the delay in the availability of
9 the .Africa gTLD;” (3) “there is reason to question the legitimacy of ICANN’s purported reason
10 for denying DCA’s application;” and (4) it can reasonably be inferred that the reasons for denying
11 DCA’s application were pretextual and that ICANN... denied DCA a fair evaluation process
12 because it had predetermined that it would award the gTLD to ZACR.” Declaration of Ethan J.
13 Brown (“Brown Decl.”) ¶ 5, Ex. 3.)

14 After the hearing, the court reversed course, denying DCA’s motion for a PI without
15 explanation. The order denying the PI states only that “plaintiff’s motion for ...a Preliminary
16 Injunction is denied, based on the reasoning...of *defense* counsel.” *Id.*, Ex. 4 (emphasis added.)
17 As the Court stated that the ruling was based on *defense* counsel, the Court presumably did not
18 adopt *Intervenor* ZACR’s arguments. ICANN pressed two arguments at the hearing: That DCA
19 could not win on cause of action No. 9 and that the Prospective Release barred any claim. DCA
20 presumes the Court adopted the first because the tentative indicated that it can reasonably be
21 inferred that the denial was pretextual: pretextual denial is by definition willful and intentional
22 and could not be barred by the Prospective Release.

23 DCA believes that all of the reasons that the Court was inclined to grant the PI still stand
24 and that the ground for denial must have been regarding the technical likelihood of success of
25 cause of action No. 9. Accordingly, DCA now moves under alternative causes of action: its
26 second and fifth causes of action, for intentional misrepresentation and unfair business practices,
27 respectively.

28 The gravamen of DCA’s complaint focuses on the improper processing of DCA’s
application for .Africa, and ICANN’s improper assistance to ZACR and the AUC in defeating

1 DCA’s application. DCA was promised, in multiple instances, that ICANN would process all
2 gTLD applications, in a fair, transparent, and unbiased manner. DCA applied for the .Africa gTLD
3 and paid the \$185,000 application fee in reliance on those promises, which ICANN either
4 intentionally misrepresented or made with no intention to perform. DCA’s second and fifth causes
5 of action are based on that conduct. During the IRP, former ICANN employee admitted that
6 ICANN ignored its rules in processing DCA’s application. This taken in consideration with
7 ICANN’s conduct after the IRP, demonstrates that ICANN had intended from the beginning to
8 disregard its rules to favor ZACR and award it the .Africa gTLD. The Court has already tentatively
9 concluded that DCA made out its case for a pretextual denial. Thus, DCA has a likelihood of
10 success on the merits with respect to those claims. DCA continues to face the irreparable harm
11 that justified both the IRP Panel and Judge Klausner in enjoining ICANN from acting further with
12 respect to the .Africa domain.

13 In the event the Court denies DCA’s application for a TRO, DCA respectfully requests this
14 Court clarify its December 22, 2016 order denying the PI and state the grounds for the denial, and
15 for denial of this TRO.

16 **II. RELEVANT FACTS**

17 **A. ICANN**

18 ICANN is a California non-profit, tasked with acting in conformity with relevant principles
19 law and to enable competition and open-entry in Internet-related markets. (Declaration of Sophia
20 Bekele (“Bekele Decl.”), ¶ 3, Ex. 1 at ¶4). ICANN’s Bylaws state that it shall not apply its
21 standards inequitably or treat anyone disparately. (*Id.*, ¶ 8, Ex. 4 at Art. 2 § 3). ICANN claims to
22 be accountable to the Internet community for operating in a manner consistent with its Bylaws and
23 Articles of Incorporation as a whole. (*Id.*, Ex. 4 at Art. 4 § 1). ICANN is the only organization
24 that assigns internet-domain rights, yielding monopolistic power and forcing gTLD applicants to
25 play by its self-serving rules.

26 **B. DCA, the Top-Level Domain Application, and ICANN’s Promises**

27 DCA was formed for the charitable purpose of advancing information technology
28 education in Africa and providing a continental Internet domain name to provide access to internet
services for the people of Africa. (*Id.*, ¶ 31.) DCA’s ultimate endeavor was to obtain .Africa and

1 further its charitable efforts through the revenue .Africa would generate. (*Id.*) DCA only sought
2 to act as the registry of .Africa, unlike Intervenor ZACR. (*Id.*, ¶ 33.) DCA’s operations will likely
3 terminate if the gTLD is delegated to ZACR. (*Id.*, ¶¶ 34 and 35.)

4 In March 2012, DCA applied to ICANN for the delegation of the .Africa top-level domain
5 name in its 2012 General Top-Level Domains Internet Expansion Program (the “New gTLD
6 Program”). (*Id.*, ¶ 3, Ex. 1, ¶3.) In order to apply for a gTLD, all applicants were required to
7 submit to the terms of the gTLD Applicant’s Guidebook (the “Guidebook”). (*Id.*, ¶¶ 6 and 7; Ex.
8 3.) In consideration of ICANN’s promises to abide by its own Bylaws, the Guidebook, and in
9 conformity with the laws of fair competition, Plaintiff paid ICANN a \$185,000.00 mandatory
10 application fee. (*Id.*, ¶ 32.) Included in those governing documents, were ICANN’s promises:

- 11 • To “mak[e] decisions by applying documented policies neutrally and objectively, with
12 integrity and fairness” (*Id.*, Ex. 4, Art. 1, §2, ¶ 8);
- 13 • to “operate to the maximum extent feasible in an open and transparent manner and
14 consistent with procedures designed to ensure fairness” (*Id.*, Art. III, § 1);
- 15 • “be accountable to the [Internet] community for operating in a manner that is
16 consistent with these Bylaws, and with due regard to the core values set forth in Article
17 1 of these Bylaws” (*Id.*, Ex. 4, Art. IV, § 1 [underline in original]);
- 18 • that ICANN would “carry[] out its activities in conformity with relevant principles of
19 international law and application international conventions and local law, and, to the
20 extent appropriate and consistent with these Articles and its Bylaws, through open and
21 transparent processes that enable competition and open entry in Internet-related
22 markets” (*Id.*, Ex. 1, p.20, ¶ 67); and
- ICANN had a dispute resolution program, the Independent Review Process, that
applicants could employ, in the event that an applicant challenged actions of ICANN,
that would provide applicants with redress. (*Id.*, Ex. 3. Module 6-4)).²

22 ICANN’s promises were false, or at the least made with no intention of performing them.

23 C. ZACR and the AUC’s Top Level Domain Application

24 In 2011, the African Union Commission attempted to preclude any other party from
25 obtaining the rights to .Africa, by requesting that ICANN set aside .Africa, in a list of Top-Level
26 Reserved Names. (*See Id.*, ¶ 14, Ex. 10.) DCA protested that this violated the gTLD guidelines,
27 and ICANN denied the AUC’s request. (*Id.*) But instead of remaining impartial and fair in the

28 _____
² The Prospective Release that states applicants would be afforded redress was also placed near the end of the 360
page Guidebook.

1 process as it had promised to do, ICANN informed the AUC how it could obtain the rights to
2 .Africa through a proxy (ZACR) while simultaneously defeating DCA’s application. (*Id.*) The
3 AUC only “selected” ZACR to apply for .Africa, because ZACR agreed to assign “all rights
4 relating to the dotAfrica TLD” to the AUC if successful in its application. (*Id.*, ¶ 22, Ex. 16, ¶ 22
5 (7).) Significantly, members of the AUC committee who selected ZACR as the AUC’s “official
6 endorsement” were also members of ZACR-affiliated organizations. (*Id.*, ¶ 21.)

7 **D. The Geographic Names Panel and InterConnect Communications**

8 ICANN required that geographic gTLD (such as .Africa) applicants obtain endorsements
9 from 60% of the region’s national governments, and no more than one written objection from
10 relevant regional governments and/or regional public authorities. (*Id.*, ¶ 5, Ex. 3 at § 2.2.1.4.2.)

11 DCA obtained the endorsements of the AUC and United Nations Economic Commission
12 for Africa (UNECA), among others. (*Id.*, ¶ 10, Ex. 6; ¶ 14, Ex. 10.) DCA was the first to obtain
13 official endorsements/letters of support from these organizations. In April 2010, nearly a year
14 later, the AUC wrote DCA and informed DCA that it had “reconsidered its approach in
15 implementing the subject Internet Domain Name (.Africa) and no longer endorses individual
16 initiatives in this matter[.]” (*Id.*, ¶ 11, Ex. 7.) This letter was also sent directly to ICANN.³
17 Subsequently, in June 2015 (and after DCA’s application should have been processed), UNECA
18 responded to a *request from the AUC*, and stated that it did not consider itself to be a valid endorser.
19 (*Id.*, ¶ 13, Ex. 9.) But ICANN considered the endorsements from both the AUC and UNECA, only
20 objecting to the sufficiency of the letters on a discretionary factor.⁴ (*Id.*, Exs. 11 and 13.)

21 ICANN contracted with InterConnect Communications (“ICC”), to act as ICANN’s
22 Geographic Names Panel and evaluate the endorsements. (*See Id.*, ¶ 25, Ex. at 18.) According to
23 the Guidebook, the following factors “must” be present in an endorsement: (1) the government’s
24 or public authority’s support for or non-objection to the applicant’s application; (2) the
25 government’s or public authority’s understanding of the string being requested; (3) the
26 government’s or public authority’s understanding of the string’s intended use. Finally, the
27

28 ³ ICANN only argued the letter was withdrawn after litigation commenced.

⁴ ICANN initially rejected endorsements from the AUC and UNECA. Subsequently, ICC staffer Mark McFadden, argued that ICANN should accept the AUC as a valid endorser. By doing so, ICANN would also have to accept UNECA. (Bekele Decl., ¶ 26, Ex. 19.) ICANN agreed to do so and admitted to such in the IRP.

1 Guidebook includes a fourth non-mandatory factor the endorsement *should* demonstrate the
2 government’s or public authority’s understanding that the string is being sought through the gTLD
3 application process and that the applicant is willing to accept the conditions under which the string
4 will be available. (emphasis added). (*Id.*, ¶ 5, Ex. 3, § 2.2.1.4.3.)

5 ICANN only questioned the fourth, non-mandatory factor of DCA’s endorsements. (*Id.*,
6 Exs. 11 & 13.) ICANN presumably used this as a pretext to justify its planned disposition of the
7 gTLD.

8 **E. The GAC**

9 ICANN has a Governmental Advisory Committee (“GAC”) whose purpose, according to
10 ICANN’s Bylaws, is to “consider and provide advice on the activities of ICANN as they relate to
11 concerns of governments.” (*Id.*, ¶ 8, Ex. 4, at Art. 11 § 2(1)(a).) Three months after it was denied
12 its request to place the .Africa gTLD on the reserved-names list, the AUC became a member of
13 the GAC on the advice of ICANN. (*Id.*, ¶ 14, Ex. 12, at 1.)

14 Under the direction of the AUC, the GAC improperly issued “consensus advice” that
15 DCA’s application should not proceed. (*Id.*, ¶ 3, Ex. 1, ¶ 104.) The GAC gave no indication that
16 DCA’s application was problematic, violated law or was sensitive - the required standard. (*Id.*)

17 ICANN then accepted the GAC’s faulty advice, failed to conduct any investigation, and
18 rejected DCA’s application while ZACR’s application continued. (*Id.*, ¶ 3, Ex. 1 ¶¶ 80, 106; ¶ 28,
19 Ex. 31.) Although ICANN could have also reconsidered this decision under its rules, it refused to
20 do so. (*Id.*, ¶ 10, Ex. 1, ¶ 6; ¶ 8, Ex. 4, Art. 4 § 2.2.) ICANN also was not required to stop
21 processing DCA’s application under its rules. (*Id.*, ¶ 5, Ex. 3, Module 3-3.)

22 Meanwhile, ZACR passed the initial evaluation and entered the contracting phase with
23 ICANN. (*Id.*, ¶ 3, Ex. 1 ¶ 13; ¶ 28, Ex. 31.) ZACR filed purported “endorsement letters” that
24 endorsed the AUC’s “Reserved Names” initiative, along with declarations made by the AUC
25 regarding its intention to reserve .Africa for its own use along with its appointment letter from the
26 AUC as evidence of such support. (*Id.*, ¶ 24.) Most of ZACR’s letters did not even reference
27 ZACR by name. (*Id.*) ICANN later ghostwrote an endorsement for ZACR to submit to the AUC
28 for its signature. (Brown Decl., Ex. 5, [Declaration of Sara Colón (“Colón Decl.”)], ¶ 4, Ex. 3.)

1 **F. The Independent Review Process**

2 The Guidebook terms DCA agreed to upon submitting its gTLD application contained a
3 release and covenant not to sue (the “Prospective Release”). (*Id.*, ¶ 5, Ex. 3, at Module 6, ¶ 6.)
4 ICANN purports to provide applicants with an independent review process (“IRP”) as an
5 alternative, but informs applicants that the IRP is not binding after ICANN is challenged. (*Id.*, ¶ 5,
6 Ex. 3 §§ 3.2.3; 6.) The IRP is effectively an arbitration, operated by the International Centre for
7 Dispute Resolution of the American Arbitration Association, comprised of an independent panel
8 of arbitrators. (*Id.*, ¶ 5, Ex. 3 § 3.2.3.) In October 2013, DCA successfully sought an IRP to review
9 ICANN’s processing of its application, including ICANN’s handling of the GAC opinion. (*Id.*, ¶
10 3, Ex. 1 at ¶ 9.) DCA became aware that ICANN sought to delegate the .Africa gTLD prior to
11 the conclusion of the IRP. (*Id.*, ¶ 3, Ex. 1, ¶¶ 9-11.)

12 ICANN subsequently signed an improper registry agreement with ZACR. (*Id.*) DCA
13 petitioned the IRP for emergency relief, which the IRP granted unanimously. (*Id.*) The Panel
14 concluded that “it would have been ‘**unfair and unjust** to deny DCA Trust’s request for interim
15 relief when the need for such relief...[arose] out of ICANN’s failure to follow its own Bylaws and
16 procedures.” (Bekele Decl., ¶ 3, Ex. 1, ¶ 22.) (emphasis added)

17 After hearing on the merits, the Panel stated that it was:

18 “of the unanimous review that certain actions and inactions of the ICANN Board...with
19 respect to the application of DCA Trust ...were inconsistent with the Articles of
20 Incorporation and Bylaws of ICANN.” (*Id.*, ¶ 3, Ex. 1, ¶ 93.)

21 ICANN is bound...to act fairly, neutrally, non-discriminately and to enable competition.
22 Article 4 of ICANN’s Articles of Incorporation sets this out explicitly:

23 4. The Corporation shall operate...in conformity with relevant principles of
24 international law and applicable international conventions and local law and, to the
25 extent appropriate and consistent with these Articles and its Bylaws, through open
26 and transparent processes that enable competition and open entry in Internet-related
27 markets. [...]

28 ICANN is also bound by its Bylaws to act and make decisions ‘neutrally and objectively
with integrity and fairness.’[...]

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent
bodies shall operate to the maximum extent feasible in an open and transparent
manner and consistent with procedures designed to ensure fairness. [Underlining
and bold is that of the Panel]”

1 ICANN’s own witness, GAC Chairperson Heather Dryden, admitted that the GAC did not
2 act with transparency or in a manner designed to ensure fairness. (*Id.*, ¶ 3, Ex. 1, ¶ 102.) Ms.
3 Dryden also admitted that the GAC made its decision without providing any rational, or legitimate
4 grounds, but rather based on politics. (*Id.*, ¶ 3, Ex. 1, ¶ 104.) The Panel held that:

5 “The above [admissions by Ms. Dryden], combined with the fact that DCA Trust was
6 never given any notice or an opportunity...to make its position known or defend its own
7 interests before the GAC reached consensus on the GAC Objection Advice, and that the
8 Board of ICANN did not take steps to address this issue, leads this Panel to conclude that
9 both the actions and inactions of the Board with respect to the application of DCA Trust
relating to the .AFRICA gTLD were not procedures designed to insure fairness required
by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation
and Bylaws of ICANN.”

10 The IRP Panel went on to state:

11 “[T]here are perhaps a number of other instances, including certain decisions made by
12 ICANN, that did not proceed in the manner and spirit in which they should have under the
Articles of Incorporation and Bylaws of ICANN.”

13 Throughout these proceedings, ICANN has maintained that the IRP was a non-binding arbitration.
14 (*Id.*, ¶ 3, Ex. 1, ¶ 23.) ICANN had a duty, through its promises, to treat DCA’s application in a
15 fair and transparent manner.

16 **G. ICANN’s Processing of DCA’s Application After the IRP Declaration**

17 ICANN never challenged DCA’s endorsements as invalid in the 12 months between
18 application and the improper GAC advice. After the IRP, ICANN re-reviewed DCA’s
19 endorsements. ICANN had already decided to accept endorsements from regional authorities such
20 as AUC and UNECA, and the only objection it went on to raise post-IRP to DCA’s endorsements,
21 was based on a non-mandatory factor set forth in the Guidebook – “[the endorsement] ***should***
22 demonstrate the government’s or public authority’s understanding that the string is being sought
23 through the gTLD application process[.]” (*Id.*, ¶ 5, Ex. 3, § 2.2.1.4.3 (emphasis added).) ICANN
24 then issued DCA clarifying questions regarding this factor. (*Id.*, ¶ 16, Ex. 11.) DCA requested an
25 extended evaluation so ICANN could provide further explanation why DCA’s endorsements were
26 insufficient. (*Id.*, ¶ 19, Ex. 14.) Instead of explaining the insufficiencies to DCA, ICANN merely
27 asked the same questions, clearly a pretext to deny DCA’s application. (*Id.*, ¶ 18, Ex. 13.) After
28 all, ICANN had already signed a registry agreement with ZACR.

1 **H. Court Proceedings After Improper Rejection of DCA’s Application**

2 In federal court, DCA moved for and was granted a TRO and subsequently the PI, enjoining
3 ICANN from delegating .Africa until the case was resolved. (Brown Decl., ¶¶ 3 & 4, Exs. 1 & 2.)

4 **I. ZACR as Registrar and Registry and the Premium Name Sunrise Period**

5 Recently, ZACR announced that it became an ICANN accredited registrar.⁵ A registrar is
6 different from a registry, in that the registrar is the entity that contracts with the individual domain
7 purchasers for the sale of domains. The registry – what both DCA and ZACR applied to become
8 with respect to .Africa – holds the rights to the gTLD .Africa and contracts with the registrar to
9 register the individual domains. Usually, a registrar and a registry are separate entities. This was
10 a long-time rule that ICANN adhere to until the New gTLD Program. (Bekele Decl., ¶ 38.)

11 Significantly for this application, there is a “sunrise” period for premium domain names,
12 prior to public availability of individual domain names. (*Id.*, ¶ 42.) During the “sunrise” period,
13 a registry reserves certain domains that are highly sought after, and either conducts sales or
14 auctions for them. *Id.* Since ZACR would be both the registrar and registry, it would receive the
15 benefits of the sunrise registrations, and preclude DCA from creating and negotiating those
16 contracts and profits for premium domain names. (*Id.*, ¶¶ 38-41.) If the .Africa domain is awarded
17 to ZACR before this case resolves, because of the cross-ownership, those domain names will be
18 sold and contracted to ZACR immediately. (*Id.*)

19 In addition to the irreparable harm of the destruction of its business, DCA would also suffer
20 the harm from the loss of these highly beneficial contracts.

21 **III. ARGUMENT**

22 **A. DCA is justified in bringing this *ex parte* application**

23 DCA is justified in bringing this *ex parte* application because the .Africa domain will be
24 issued soon by ICANN to ZACR and DCA meets the standard for a TRO. A TRO may issue when
25 “[i]t appears from the facts shown by affidavit or by the verified complaint that great or irreparable
26 injury will result to the applicant before the matter can be heard on notice...” Code Civ. P. §
27 527(c)(1). The Court should grant the TRO where the likelihood is that the Plaintiff will prevail
28

⁵ https://twitter.com/ZA_CR/status/802073337065259008 (accessed on January 2, 2017).

1 on the merits at trial, and where the interim harm to the Plaintiff without the TRO outweighs the
2 likely harm to the defendant if the order is issued. *Church of Christ in Hollywood v. Superior*
3 *Court* (2002) 99 Cal.App.4th 1244, 1251. The issuance of a TRO is not a determination of the
4 merits of the controversy. All that is determined is whether the TRO is necessary to maintain the
5 status quo pending the noticed hearing on the application for preliminary injunction. *Landmark*
6 *Holding Group v. Superior Court*, (1987) 193 Cal.App.3d 525, 528; *See also* Code Civ. P. § 528.

7 The Los Angeles County Local Rules provides that: “Where the Rules permit an *ex parte*
8 application ...in an emergency situation, a lawyer should make such an application... only where
9 there is a bona fide emergency such that the lawyer’s client will be seriously prejudiced by a failure
10 to make the application ...on regular notice. Los Angeles County Court Rules, Guidelines for
11 Civility in Litigation, Appendix 3.A § (j)(3). “An applicant must make an affirmative showing in
12 a declaration ...of irreparable harm, immediate danger, or any other statutory basis for granting
13 relief *ex parte*.” Cal. Rules of Court, Rule 3.1202(c). ICANN will not refrain from delegating the
14 .Africa gTLD until a regularly noticed hearing can be held. Accordingly, DCA demonstrates the
15 necessary harm for bringing this application on an *ex parte* basis.

16 **B. DCA Demonstrates a Likelihood of Success**

17 DCA is entitled to a TRO because DCA demonstrates a likelihood of success in its claims
18 against ICANN and DCA’s harm outweighs any other harm.

19 **i. Claim for Intentional Misrepresentation**

20 DCA applied for the .Africa gTLD based on ICANN’s false representations that it would
21 receive a fair, unbiased, and transparent application processing. To prove its claim, DCA must
22 show (1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge
23 of falsity (or ‘scienter’); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and
24 (5) resulting damage. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 683; Civil Code § 1709.

25 Here, ICANN made the following misrepresentations: (1) that it would “make decisions
26 by applying documented policies neutrally and objectively, with integrity and fairness;” (2) that it
27 would “operate the maximum extent feasible in an open and transparent manner and consistent
28 with procedures designed to ensure fairness;” (3) that it would “be accountable to the Internet

1 community for operating in a manner that is consistent with these Bylaws, and with due regard to
2 the core values set forth in Article 1 of [its] Bylaws;” (4) that it would carry[] out its activities in
3 conformity with relevant principles of international law and application of international
4 conventions and local law...”; and (5) that the IRP provided actual redress to applicants. ICANN
5 made all of these statements in its Articles of Incorporation, Bylaws, and the Guidebook. (Bekele
6 Decl., ¶ 3, Ex. 1, ¶¶ 94-98.) These statements proved false when made, when ICANN admitted
7 during the that it arbitrarily rejected DCA’s application on the receipt of GAC advice. (*Id.*, ¶ 3,
8 Ex. 1, ¶ 110.) Ms. Dryden testified that no reason was provided for rejecting DCA’s application
9 and it was merely made for political reasons. (*Id.*) After DCA succeeded at the IRP, ICANN did
10 not provide further explanation as to why DCA’s application was insufficient

11 To demonstrate an intent to defraud, “it must be shown that the defendant...intended to
12 induce the plaintiff to act to his detriment in reliance upon the false representation.” *Conrad v.*
13 *Bank of America* (1996) 45 Cal.App.4th 133, 157. These false statements could only have been
14 made to induce gTLD applicants to apply. No entities would have applied to ICANN had ICANN
15 represented that it would treat applicants disparately or that there was no actual availability of
16 redress if an applicant was wrongfully rejected

17 DCA also relied upon the promises of a fair and transparent process, and the binding nature
18 of the IRP, and was justified in relying upon those representations by ICANN. “Reliance exists
19 when the misrepresentation or nondisclosure was an immediate cause of the plaintiff’s conduct
20 ...and when without such misrepresentation or nondisclosure, he or she would not, in all
21 reasonable probability, have entered into the contract or other transaction.” *Alliance Mortgage*
22 *Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239-1240. DCA believed that it would be subject to the
23 fair and unbiased application processing that ICANN promised. Indeed, DCA would not have
24 applied for the .Africa gTLD, paid the non-refundable fee, and would not have spent years
25 campaigning for the endorsements and preparing an application, if it new that ICANN would have
26 favored ZACR throughout the process. ICANN also represented that the IRP provided redress,
27 then claimed it was not binding when they were challenged. (Bekele Decl., ¶ 3, Ex. 1, ¶ 23.) “A
28 party to a contract cannot rationally calculate the possibility that the other party will deliberately

1 misrepresent terms critical to that contract.” *Robinson Helicopter Co., Inc. v. Dana Corp* (2004)
2 34 Cal.App.4th 979, 993. Accordingly, DCA justifiably relied upon ICANN’s promises.

3 “There are two measures of damages for fraud: out of pocket and benefit of the bargain.”
4 *Alliance Mortgage Co., supra*, 10 Cal.4th at 1239. “The ‘benefit of the bargain’ measure... awards
5 the difference in value between what the plaintiff actually received and what he was fraudulently
6 led to believe he would receive.” (*Id.*) In order to give DCA the ‘benefit of the bargain’ DCA
7 would be entitled to a fair and unbiased processing of its application and the enjoinder of ICANN
8 throughout this proceeding until it occurs.

9 In *Robinson Helicopter Co. Inc. v. Dana Corp*, the Court held that the defendant’s inclusion
10 of false certifications in the contract constituted fraud against the plaintiff. Reiterating the policy
11 behind the decision, the Court stated “Courts will generally enforce the breach of a contractual
12 promise through contract law, except when the actions that constitute breach violate a social policy
13 that merits the imposition of tort law. [...] In pursuing a valid fraud action, a plaintiff advances the
14 public interest in punishing intentional misrepresentations and in deterring such misrepresentations
15 in the future.” “California also has a legitimate and compelling interest in preserving a business
16 climate free of fraud and deceptive practices.” 34 Cal.4th 979, 992 (2004).

17 Here, ICANN promised DCA that it would act fair, neutral, transparently, and in
18 conformity with relevant laws, and subsequently broke all those promises. The IRP determined
19 that ICANN did so. ICANN then gave no explanation why DCA’s endorsements and responses
20 were insufficient, but merely sent the same exact clarifying questions to justify rejecting DCA’s
21 again. ICANN’s outcome was predetermined, because its promises were false.

22 If ICANN’s actions do not constitute actual fraud, at the least, they constitute promissory
23 fraud. “‘Promissory fraud’ is a subspecies of the action for fraud and deceit. A promise to do
24 something necessarily implies the intent to perform; hence, where a promise is made without such
25 intention, there is an implied misrepresentation of fact that may be actionable fraud. *Lazar, supra*,
26 12 Cal.4th at 639; Civil Code § 1710. “In a promissory fraud action, ‘the *essence* of the fraud is
27 the *existence of an intent at the time of the promise* not to perform it.’ *Beckwith v. Dahl* (2012)
28 205 Cal.App.4th 1039, 1062 (italics in original). Hence, if ICANN did not make the statements
knowing that they were false, ICANN must have made the statements with no intention to perform.

1 As stated above, ICANN made various representations to DCA, induced DCA to apply for the
2 .Africa gTLD, and subsequently disregarded the promises that it made to induce DCA to apply for
3 the .Africa gTLD. Either ICANN made them knowing they were false, or made them with no
4 intention of performing.

5 In this Court’s tentative ruling on the motion for preliminary injunction, the Court found
6 that “there is reason to question the legitimacy of ICANN’s purported reason for denying DCA’s
7 application[,]” and that “it can be reasonably inferred that the reasons for denying DCA’s
8 application were pretextual and that ICANN, which improperly entered into a registry agreement
9 with ZACR while the IRP review was pending, denied DCA a fair evaluation process because it
10 had predetermined that it would award the gTLD to ZACR.” Brown Decl., ¶ 5, Ex. 3. Thus, the
11 Court agreed with DCA that ICANN’s actions were pretextual, and based on a predetermined
12 outcome.

13 Accordingly, DCA has demonstrated a likelihood of success as to its cause of action for
14 intentional misrepresentation.

15 **ii. Claim for Violation of California Bus. & Prof. Code § 17200**

16 DCA demonstrates a strong likelihood of success on the merits as to its Unfair Competition
17 claim, because the IRP had expressly ruled that (1) ICANN violated its promises to act in a
18 transparent manner that encourages competition and (2) treated DCA unfairly. “[T]o state a claim
19 under section 17200, a plaintiff ‘need not plead and prove the element of a tort. Instead, one need
20 only show that ‘members of the public are likely to be deceived.’” *Bank of the West v. Superior*
21 *Court* (1992) 2 Cal.4th 1254, 1267. “[A] practice is prohibited as ‘unfair’ or ‘deceptive’ even if
22 not ‘unlawful’ and vice versa.” *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1153.

23 As determined by the IRP, ICANN’s promises and subsequent failure to follow those
24 promises was unfair treatment of DCA. (Bekele Decl., ¶ 3, Ex. 1, ¶ 110.) To test whether a business
25 practice is unfair “the court must weigh the utility of the defendant’s conduct against the gravity
26 of the harm to the alleged victim.” *State Farm Fire & Casualty Co v. Superior Court* (1996) 45
27 Cal.App.4th 1093, 1103-1104. Here, ICANN represented that it would (1) make decisions by
28 applying documented policies neutral and objectively, with integrity and fairness; (2) operate...in
an open and transparent manner and consistent with procedures designed to ensure fairness, (3) be

1 accountable...for operating in a manner consistent with those principles, (4) use open and
2 transparent processes that enable competition, and (5) that the IRP was binding *Infra*, section II.b.
3 As a result of ICANN's unfair practice toward DCA, DCA has been arbitrarily rejected from
4 serving as the registry for the .Africa gTLD. As indicated in the IRP, and admitted to by former
5 GAC chair Heather Dryden in her testimony, ICANN provided no rational or legitimate
6 justification for acting. (Bekele Decl., ¶ 3, Ex. 1, ¶ 104.) Thus, ICANN entices consumers to apply
7 for gTLDs on the basis that they will be treated fairly, when in reality it acts arbitrarily and with
8 bias. No utility exists in allowing ICANN to continue this unfair practice, and DCA demonstrates
9 success on the merits for its section 17200 claim on this prong alone.

10 Additionally, the public is likely to be deceived by ICANN's promises because DCA was
11 actually deceived. "Unlike common law fraud, a [B&P] section 17200 violation can be shown
12 even without allegations of actual deception, reasonable reliance, and damage." *Brakke v.*
13 *Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 772. For the reasons stated above, DCA
14 was deceived into believing that it applied for a fair and unbiased processing of its application, and
15 that ICANN would maintain the integrity in the system that it created.

16 Furthermore, "Section 17203, which incorporates the broad, statutory definition of 'unfair
17 competition,' permits 'any court of competent jurisdiction' to enjoin '[a]ny person performing or
18 proposing to perform an act of unfair competition...' The section also authorizes courts to make
19 such orders as 'may be necessary to restore to any person in interest any money or property, real
20 or personal, which may have been acquired by means of such unfair competition.'" *Bank of the*
21 *West, supra*, 2 Cal.4th at 1267. Here, the only order that could restore DCA of its interest in
22 legitimately competing for the .Africa gTLD is an order enjoining ICANN from delegating the
23 domain to ZACR. DCA demonstrates a strong likelihood of success on its claims for unfair
24 competition against ICANN and respectfully requests this Court enjoin ICANN from delegating
25 .Africa to ZACR.

26 **C. DCA's harm significantly outweighs any harm to Defendants.**

27 DCA stands to suffer more harm than ZACR or ICANN will suffer if a TRO is not issued.
28 DCA received funding from various investors and DCA's funding is conditional upon its ability
to obtain the .Africa gTLD. (Bekele Decl., ¶¶ 34 and 35.) DCA's funding will cease if the .Africa

1 gTLD is delegated, and DCA as a business entity will be destroyed. (*Id.*) Unlike DCA, ZACR
2 acts as a registry for other various domains (*Id.*, ¶ 33.)

3 In addition to the destruction of its business, DCA will suffer the additional harm of being
4 denied the premium domain name “sunrise” registration period. (*Id.*, ¶ 42.) After a gTLD is
5 delegated, but before the domains are made publicly available for purchase, the registry – here
6 DCA or ZACR – holds a premium-name sunrise registration period. This sunrise registration
7 period reserves certain highly valuable and sought after domain names. (*Id.*) There is an
8 uncommon situation here where ZACR, if awarded the gTLD, would act as both the registry
9 (gTLD rights holder) and registrar (entity responsible for registering individual domain names)
10 and would reap the benefits of registering premium domain names through its cross-ownership.
11 (*Id.*, ¶¶ 38-42.) In a usual case, multiple registrars negotiate the sales of premium domain name
12 sales with individual purchasers and the registry. If ZACR has cross-ownership as registry and
13 registrar, ZACR would be able to take full advantage of the premium domain name sale sunrise
14 period, and DCA would be unable to unwind those deals and renegotiate a more lucrative result,
15 if the domain is delegated prematurely. (*Id.*) The only way to avoid the contracts and sales of the
16 premium domain names, is to prevent the delegation of the domain until this case is resolved.

17 Finally, although theoretically possible, it would be difficult as a practice matter for the
18 gTLD to be effectively re-delegated if DCA ultimately prevails. (*Id.*, ¶ 8.) ICANN has established
19 procedures for re-delegating a gTLD to a new registry, but this typically occurs when a registry
20 agreement expires or before a domain is contractually delegated. (Brown Decl., Ex. 5 [Colón
21 Decl.] ¶ 3, Ex. 2 (Masilela Declaration).) In most cases, ICANN has only re-delegated a gTLD
22 prior to a gTLD going live. Therefore, the procedure for gTLD re-delegation is uncertain at best.

23 ICANN cannot demonstrate any harm, because no harm occurs to ICANN if the .Africa
24 gTLD is not issued. ZACR will suffer little harm with respect to being delayed from operating the
25 .Africa domain. ZACR has claimed losses of nearly \$20 million previously. (*See* Brown Decl.,
26 Ex. 5 [Colón Decl.], Ex. 2.) However, ZACR’s anticipated costs are conclusory and speculative,
27 without any sufficient evidence demonstrating how those costs are incurred or why they could not
28 be mitigated. ZACR could submit invoices, or receipts for the costs incurred, but has previously
only submitted a spreadsheet with unsubstantiated numbers. They also appear to be based largely

1 on time that has already passed. Furthermore, ZACR operates other domains whereas DCA's
2 business is built around serving as the registry for .Africa.

3 At this point, significant discovery has taken place and the delay in issuing .Africa will be
4 negligible at best. This case was originally set for trial at the end of February 2017. The case can
5 be promptly re-set for trial. Any harm to ZACR is minimal. The lack of harm to ZACR and
6 ICANN as compared to the irreversible injury that would be suffered by DCA, coupled with
7 DCA's likelihood of success, warrants the granting of DCA's application for a TRO.

8 **D. ICANN's waiver argument is void.**

9 The Prospective Release quoted in Section II.F, *supra*, is unenforceable because it violates
10 Cal. Civil Code §1668 and is unconscionable. This argument was fully briefed by all parties and
11 this Court agreed with DCA in finding that "the Covenant is likely to be found unenforceable"
12 under either Section 1668 or as unconscionable. (Brown Decl., Ex. 3.) DCA now moves for a
13 TRO under its causes of action for intentional misrepresentation and unfair competition, *i.e.*,
14 claims for intentional and fraudulent conduct, to which the Prospective Release does not apply.

15 Accordingly, as the Court recognized previously, the Covenant Not to Sue is invalid.

16 **E. In the Alternative, DCA Requests Clarification**

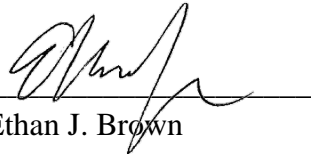
17 If this court is not inclined to grant DCA's TRO, DCA respectfully requests this Court
18 clarify its December 22, 2016 order denying DCA's motion for a PI. *See Ballas v. Ballas* (1963)
19 217 Cal.App.2d 129, 133 [holding that the Court "has the power to construe and clarify its orders"].

20 **IV. CONCLUSION**

21 For the foregoing reasons, DCA is entitled to the issuance of a TRO and respectfully
22 requests that this Court grant such.

23
24 Dated: January 3, 2017

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25
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