

1 Ethan J. Brown (SBN 218814)

2 ethan@bnslawgroup.com

3 Sara C. Colón (SBN 281514)

4 sara@bnslawgroup.com

5 **BROWN NERI & SMITH LLP**

6 11766 Wilshire Boulevard, Suite 1670

7 Los Angeles, California 90025

8 Telephone: (310) 593-9890

9 Facsimile: (310) 593-9980

10 *Attorneys for Plaintiff*

11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

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

14 DOTCONNECTAFRICA TRUST, a
15 Mauritius Charitable Trust;

16 Plaintiff,

17 v.

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

24 Defendants.

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

**PLAINTIFF’S OPPOSITION TO
DEFENDANT ZA CENTRAL
REGISTRY, NPC’S MOTION TO
DISMISS FIRST AMENDED
COMPLAINT; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: May 31, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Request for Judicial Notice filed
concurrently herewith]

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 ZA Central Registry ("ZACR") attempts to cast its role in the Internet
4 Corporation for Assigned Names and Numbers' ("ICANN") review of Plaintiff
5 Dotconnect Africa Trust's ("DCA") application as a mere competitor. However,
6 ZACR was the only other competitor to DCA for the .Africa gTLD and it did
7 everything in its power to assure not only that ICANN passed ZACR's application,
8 but also that ICANN disqualify DCA's application. As an applicant itself, ZACR
9 knew that ICANN promised to review generic Top-level Domain ("gTLD")
10 applications pursuant to its contract with applicants - the Guidebook, its Bylaws
11 and its Articles of Incorporation. Nevertheless, as DCA has alleged, ZACR
12 attempted to derail DCA's qualified application by, *inter alia*, causing the African
13 Union Commission ("AUC") to wrongfully and belatedly withdraw its
14 endorsement of DCA, submitting an application with improper endorsements,
15 representing that DCA did not represent the African community (and that ZACR
16 did, despite not submitting a community application), contributing to improper
17 GAC advice - through a member of ZACR's steering committee - recommending
18 to ICANN that it stop reviewing DCA's application, and improperly entering into a
19 registry agreement with ICANN while an Internal Review Process ("IRP") to
20 review ICANN's handling of DCA's application was pending. ICANN conspired
21 with ZACR to pass its application despite its obvious flaws because ICANN
22 sought the political support of the AUC for its proposal to transition away from the
23 control of the U.S. government.

24 In order to remedy this wrongdoing, DCA has brought claims for declaratory
25 relief, intentional interference with contract, aiding and abetting fraud¹, and relief
26 pursuant to California Business and Professions Code Section 17200. DCA has
27

28 _____
¹ That claim was incorrectly labeled fraud and conspiracy to commit fraud.

1 standing for its declaratory relief claim regarding the validity of the registry
2 agreement and ZACR's application because DCA would have been entitled to a
3 registry agreement with ICANN were it not for ZACR's wrongful actions and
4 interference, and DCA need not be a party to ZACR's application to ask this Court
5 to determine its sufficiency pursuant to ICANN's rules. DCA has stated a claim for
6 intentional interference with contract, because at the very least, ZACR's actions
7 contributed to ICANN breaching its contract with DCA (the Guidebook) in which
8 ICANN promised to review DCA's application pursuant to certain standards. DCA
9 has also properly alleged a claim for aiding and abetting fraud: ZACR encouraged
10 and knew that ICANN had no intention of reviewing DCA's application fairly and
11 ZACR helped ICANN improperly reject DCA's application by lobbying the AUC
12 and misusing the GAC process. For the foregoing reasons, DCA has also properly
13 alleged a claim of unfair competition pursuant to the "unlawful" and "fraudulent"
14 prongs of section 17200

15 Accordingly, the Court should deny ZACR's motion to dismiss or, at a
16 minimum, grant DCA leave to amend.

17 **II. FACTS**

18 **A. DCA and the .Africa gTLD.**

19 ICANN approved the expansion of the number of gTLDs available to eligible
20 applicants as part of its 2012 Generic Top-Level Domain Internet Expansion
21 Program. (FAC ¶18.) Parties, such as DCA, were invited to submit applications to
22 obtain the rights to operate various new gTLDs, including but not limited to, .Lat
23 (Latin America), .Africa, and .Swiss. (*Id.* ¶19.) ICANN promised, and applicants
24 expected ICANN, to conduct application processing in the transparent and fair-
25 handed manner promoted in ICANN's Bylaws and rules set forth in the gTLD
26 Applicant Guidebook (the "Guidebook"). (*Id.* ¶20.) DCA submitted an
27 application for the gTLD .Africa and the \$185,000 fee. (*Id.* ¶¶21-22.)
28

1 According to the Guidebook, .Africa (a geographic gTLD) would be evaluated
2 by a Geographic Names Evaluation Panel. (*Id.* ¶23.) The evaluation criteria are
3 stipulated in Section 2.2.1.4.2 of the Guidebook. (*Id.*) ICANN requires
4 geographic name gTLD applicants to (1) obtain endorsements from 60% of the
5 national governments in the region, and (2) have no more than one written
6 statement of objection to the application from relevant governments and/or public
7 authorities associated with the region. (*Id.*)

8 As part of its bid to apply for the delegation rights of the .Africa gTLD, Plaintiff
9 obtained the endorsements of the African Union Commission (hereinafter the
10 “AUC”) in August 2009 and the United Nations Economic Commission for Africa
11 (hereinafter the “UNECA”) in August 2008. (*Id.* ¶24.) Plaintiff was the first to
12 request and obtain official support for .Africa from these organizations. (*Id.*) In
13 April 2010, nearly a year later, and at certain members of ZACR’s encouragement,
14 AUC (in an effort to get the .Africa gTLD for itself) wrote DCA and informed
15 DCA that it had “reconsidered its approach in implementing the subject Internet
16 Domain Name (.Africa) and no longer endorses individual initiatives in this matter
17 related to continental resource.” (*Id.*) However, the letter did not withdraw its
18 endorsement of DCA. (*Id.*) Furthermore, Guidebook Section 2.2.1.4.3 states that a
19 government may only withdraw its endorsement “*if the registry operator has*
20 *deviated from the conditions of original support or non-objection.*” (Emphasis
21 added). (*Id.* ¶25.) There were no conditions on the AUC or UNECA
22 endorsements to DCA. (*Id.*)

23 **B. The AUC’s improper application through ZACR.**

24 Instead of functioning as a disinterested regulator of a fair and transparent
25 gTLD application process, ICANN used its authority and oversight, at the
26 encouragement of ZACR, over that process to unfairly assist ZACR and to
27 wrongfully eliminate the only other applicant, Plaintiff, from the process to the
28 great detriment of Plaintiff (*See id.* ¶3). AUC itself attempted in 2011 in Dakar,

1 Senegal, to obtain the rights to .Africa by requesting from ICANN to include
2 .Africa in the List of Top-Level Reserved Names. This would mean that the .Africa
3 name and its equivalent in other languages would be unavailable for delegation
4 under the ICANN new gTLD Program, which would enable the AUC benefit from
5 a special legislative protection that would allow the AUC to delegate the .Africa
6 gTLD to itself. (*Id.* ¶26). When ICANN denied AUC’s request to reserve .Africa
7 at the immediate insistence of DCA and in compliance with the gTLD guidebook
8 rules, the AUC conspired with ICANN and ZACR to improperly obtain the rights
9 to .Africa through ZACR, for their own benefit, in violation of the new gTLD
10 program guidelines. (*Id.* ¶27).

11 ZACR’s application was flawed from the start. ZACR claimed it was applying
12 on behalf of the African “community.” (*Id.* ¶31.) Therefore, it was required to
13 submit a specific application designed for organizations applying on behalf of a
14 community. (*Id.*) ZACR instead submitted a standard – not community --
15 application. (*Id.*) ZACR did not have adequate endorsements from the relevant
16 governments nor the financial capability to operate .Africa². (*Id.* ¶32.)

17 ZACR wrongfully campaigned against DCA’s application to ICANN and the
18 AUC. ZACR represented to AUC that DCA should not have AUC’s endorsement
19 because it was not a community organization, even though an application by an
20 individual organization is allowed under ICANN’s rules. Ironically, as it turned
21 out, ZACR did not apply as a community applicant despite its wrongful criticism
22 of DCA for that very reason. ZACR also invited the ICANN Independent Objector
23 (“IO”) to object to DCA even though DCA was not subject to the IO’s review
24 because DCA’s application was not a community application. (*Id.* ¶28).

25 With the support of the AUC and its preferred applicant, ZACR, ICANN
26 breached its agreement with Plaintiff to review Plaintiff’s .Africa application in
27

28 ² Nevertheless, ZACR presently continues to misrepresent to the public that its
endorsements are adequate. *See Request for Judicial Notice (“RJN”), Ex. 3.*

1 accordance with its Bylaws, Articles of Incorporation, and the new gTLD rules and
2 procedures in the Guidebook by selecting ZACR's application over DCA's, despite
3 the fact that DCA was qualified and ZACR was not.

4 **C. ICANN Geographic Names Panel**

5 For each application, ICANN's Geographic Names Panel ("GNP") determines
6 which governments are relevant based on the inputs of the applicant, governments,
7 and its own research and analysis. (*Id.* ¶35.) Thus, the GNP determines the
8 validity of gTLD applicant's endorsements. (*Id.* ¶33.) InterConnect
9 Communication ("ICC") contracted with ICANN to perform string similarity and
10 geographic review for the initial stage of gTLD application processing. (*Id.* ¶34.)

11 ICANN was required to inform DCA of any problems with endorsements. (*Id.*
12 ¶40.) Although ZACR's application was placed ahead of DCA's by virtue of a
13 lottery-based selection, ICANN delayed processing ZACR's application. (*Id.*)
14 ZACR would have failed the initial evaluation stage, but ZACR requested and got
15 from ICANN additional time to obtain further endorsements. (*Id.*) According to
16 the Guidebook, evaluation panels are required to act impartially and transparently.
17 ZACR persuaded ICANN to abandon that responsibility here.

18 **D. The Governmental Advisory Committee.**

19 ICANN also has a Governmental Advisory Committee ("GAC") whose purpose
20 is to "consider and provide advice on the activities of ICANN as they relate to
21 concerns of governments." (*Id.* ¶42.) GAC membership is open to representatives
22 of all national governments, and at the GAC Chair's invitation, to "[e]conomies as
23 recognized in the international fora, and multinational governmental organizations
24 and treaty organizations. (*Id.*)

25 ZACR also used this process to its advantage. On the apparent advice of
26 ICANN, the AUC – ZACR's sponsor -- became a member of the GAC in June
27 2012. (*Id.* ¶43.) The AUC has no voting authority, like the EU, because it has no
28 regulatory authority over its member states. (*Id.*) But ICANN allowed the AUC to

1 offer advice on behalf of ZACR, and against ZACR’s competitor DCA, against
2 DCA’s .Africa Application. (*Id.* ¶44.) ICANN allowed the GAC to issue
3 “consensus advice” to deny DCA’s Application from advancing. (*Id.*) Under
4 ICANN rules, the GAC can only recommend ceasing review of an application if
5 *all* GAC members agree; Kenya’s representative did not agree. (*Id.* ¶¶44-45.)
6 Instead, Kenya’s *former* GAC advisor, Alice Munyua – a *representative for the*
7 *AUC and a member of ZACR’s steering committee* – purportedly made a statement
8 on behalf of Kenya denouncing DCA’s Application. (*Id.* ¶45.) The then current
9 Kenyan GAC advisor – and only person with authority to make any decision –
10 informed ICANN shortly afterwards that Kenya did not support Ms. Munyua’s
11 position. (*Id.*) ICANN ignored Kenya’s official position. (*Id.*)

12 DCA informed ICANN that GAC committee members had conflicts of interest
13 and, if DCA’s application was halted on the advice of the GAC, ZACR’s
14 application should suffer the same fate. (*Id.* ¶46.) But ZACR and the AUC
15 persuaded ICANN to play favorites and pass ZACR’s application regardless of its
16 deficiencies. ICANN accepted the GAC’s advice, and continued to process
17 ZACR’s application. (*Id.*) This despite the fact that, nearly all of ZACR’s
18 endorsement letters do not actually reference ZACR, but instead support the
19 AUC’s request to reserve .Africa as a Top-Level Reserved Name. (*Id.* ¶48.)

20 **E. The Independent Review Process.**

21 The Guidebook provides that applicants may challenge ICANN’s application
22 processing through an Independent Review Process (“IRP”). (*Id.* ¶49.) However,
23 despite the fact that DCA had already initiated an IRP regarding ICANN’s failure
24 to finish review its application, ICANN entered into a registry agreement for
25 .Africa with ZACR. (*Id.* ¶60.) ZACR executed that agreement with full
26 knowledge that DCA was going through the IRP process on its .Africa application.
27 Of course, ZACR knew that delegation of the .Africa gTLD to it would have, as a
28 practical matter, sounded the death knell for DCA’s application regardless of the

1 result of the IRP. The IRP concluded that ICANN failed to follow its Guidebook,
2 Bylaws, and Articles of Incorporation in its processing of DCA’s application. (*Id.*
3 ¶54.) There was no finding that DCA’s application was insufficient. (*Id.*) The
4 IRP also held that its decision was binding and that ICANN should “continue to
5 refrain from delegating the .Africa gTLD and permit DCA Trust’s application to
6 proceed through the remainder of the new gTLD application process.” (*Id.*) It was
7 the first IRP decision regarding a new gTLD application where ICANN did not
8 prevail. (*Id.* ¶55.)

9 **F. ICANN’s processing of DCA’s Application after the IRP ruling.**

10 After the IRP, ICANN took the position of re-evaluating DCA’s geographic
11 endorsements – the endorsements that ICC recommended ICANN accept and the
12 endorsements that passed ZACR’s application.³ (*Id.* ¶58.) ICANN ultimately
13 denied DCA’s application. (*Id.* ¶60.) Apparently succumbing to pressure from
14 ZACR and AUC once again, ICANN held a special and apparently previously
15 unplanned board meeting – just after DCA filed its application for a TRO in this
16 Court – to confirm its intention to delegate .Africa to ZACR.

17 Accordingly, ZACR wrongfully interfered with ICANN’s agreement with
18 DCA, conspired with ICANN to commit fraud against DCA, and competed
19 unfairly with DCA. Therefore ZACR’s motion to dismiss should be denied.

20 **III. LEGAL STANDARD**

21 A Rule 12(b)(6) motion tests the *legal sufficiency* of the claim or claims stated
22 in the complaint. *Strom v. United States*, 641 F.3d 1051, 1067 (9th Cir. 2011).
23 “Rule 12(b)(6) motions are viewed with disfavor. Dismissal without leave to
24 amend is proper only in ‘extraordinary’ cases. When ruling on a 12(b)(6) motion,
25 the complaint must be construed in the light most favorable to the plaintiff. The
26 court must accept as true all material allegations in the complaint, as well as any
27 reasonable inferences to be drawn from them.” *Broam v. Brogan*, 320 F.3d 1023,
28

1 1028 (9th Cir. 2003) [internal citations omitted]. “[A] well-pleaded complaint may
2 proceed even if it strikes a savvy judge that actual proof of those facts is
3 improbable, and ‘that a recovery is very remote and unlikely.’” *Bell Atl. Corp. v.*
4 *Twombly*, 550 U.S. 544, 556 (2007). In addition, “[t]he court may properly
5 consider matters of the public record (e.g. pleadings, orders and other court papers
6 on file in another action pending in the court, records and reports of administrative
7 bodies; or the legislative history of laws, rules or ordinances) ... as long as the
8 facts noticed are not subject to reasonable dispute.” *Intri-Plex Technologies, Inc. v.*
9 *Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

10 **IV. ARGUMENT**

11 DCA has adequately stated claims against ZACR for declaratory relief,
12 intentional interference with contract, aiding and abetting fraud, and unfair
13 competition. For the following reasons, the Court should deny ZACR’s motion to
14 dismiss those claims.

15 **A. DCA has standing to make its Declaratory Relief claim.**

16 DCA has standing to seek a declaration from the court that (1) the registry
17 agreement between ZACR and ICANN is null and void and (2) that ZACR’s
18 application to ICANN is deficient. 28 U.S.C. Section 2201(a) allows a court in a
19 "case of real controversy" to "declare the rights and other legal relations of *any*
20 *interested party* seeking such declaration, whether or not further relief is or could
21 be sought." 28 U.S.C. §2201(a) (emphasis added). The basic elements of standing
22 are that: (1) plaintiff must have suffered an injury in fact that is concrete and
23 particularized, (2) there must be a causal connection between the injury and
24 defendant's conduct, and (3) it must be likely, as opposed to speculative, that the
25 injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*,
26 504 U.S. 555, 560-61, (1992). In order to have standing for declaratory relief with
27 regard to a contract claim, a claimant need not be a party to the contract but must
28 have “a stake in the controversy”. *Newcal Indus. v. Ikon Office Sol.*, 513 F. 3d

1 1038, 1056 (9th Cir. 2008). DCA has a stake in the controversy because ICANN
2 and ZACR infringed on its right to have its application processed fairly, as per its
3 agreement with ICANN. *See* FAC Ex. 1 at ¶¶105 - 109; 135, 144- 146; FAC ¶¶
4 45- 46, and 61⁴.

5 In support of its argument to the contrary, ZACR cites a case from the Northern
6 District of Nevada and another from the District of Oregon. Both of these cases
7 are readily distinguishable from the facts at hand. In *Douglas v. Don King*
8 *Productions, Inc.*, 736 F.Supp. 223, 224 (D. Nev. 1990), the promoter asking for
9 declaratory relief regarding a contract between Douglas and Don King Productions
10 did not have firm contract with plaintiff. *Id.* at 224. The promoter’s contract was
11 contingent upon a waiver by Don King Productions or a court order on the
12 declaratory relief cause of action. *Id.* The Court found that the promoter was in
13 the “same posture as other would-be promoters who would like to promote
14 Douglas” and that “since the contingencies in the Mirage-Douglas agreement may
15 never occur, the contract is too speculative to constitute an actual or threatened
16 injury cognizable at this time.” *Id.*

17 In contrast to the facts of *Douglas*, DCA is the only other applicant for .Africa
18 and, as the IRP panel found when it granted DCA emergency relief, ICANN
19 improperly entered into a registry agreement with ZACR *before* DCA’s application
20 had been properly adjudicated. Therefore, DCA was actually injured by ICANN’s
21 signing of the registry agreement with ZACR because it was not afforded the
22 process it was entitled. DCA is also threatened with injury because – as the only
23 other (and qualified) applicant – DCA may lose its right to act as .Africa’s registry
24 due to the improper agreement between ZACR and ICANN. *See* FAC ¶60.

25 _____
26 ⁴ ZACR argues that the IRP findings cannot support DCA’s claim for declaratory
27 relief because ZACR was not a party to the IRP. Motion at 12:5 – 12:17.
28 However, the finding that *ICANN* improperly issued the registry agreement while
the IRP was pending is subject to res judicata because ICANN and DCA were
parties to the IRP.

1 In *Evans v. Sirius Comput. Sols., Inc.*, No. 3:12-cv-46-AA, 2012 U.S. Dist.
2 LEXIS 61552, (D. Or. May 1, 2012), defendant purchased plaintiff's former
3 employer. The plaintiff and his former employer had signed an agreement to
4 prevent the plaintiff from taking his former employer's customers if he left the
5 company. *Id* at *2. The defendant sued the plaintiff to enforce that agreement. *Id*
6 at *3-4. In *Evans*, the controversy only involved future or speculative rights.
7 Here, DCA's rights have already been violated by ICANN's entering into the
8 registry agreement with ZACR because ICANN has refused to fairly consider
9 DCA's application as a result. See See FAC ¶¶57-60.

10 *Mardian Equip. Co. v. St. Paul Fire & Marine Ins. Co.*, No. CV-05-2729-PHX-
11 DGC, 2006 U.S. Dist. LEXIS 60213 (D. Ariz. Aug. 22, 2006) is inapposite
12 because the plaintiff and defendant had "no present adverse legal interests." *Id.* at
13 *16. Here, DCA has a present legal interest adverse to ICANN and ZACR because
14 the existence of the registry contract violated DCA's rights under its agreements,
15 as a gTLD applicant, with ICANN. See FAC ¶¶57-60, 68.

16 But even if DCA did not have standing to seek declaratory relief that the
17 registry agreement is null and void, it does have standing to seek a declaration
18 from the Court that ZACR's application does not meet ICANN's standards. ZACR
19 argues that DCA does not have standing because it "is not a party to...ZACR's
20 application to ICANN." Motion at 11:18. However, DCA is not seeking
21 declaratory relief with regard to the *validity* of ZACR's application to ICANN as a
22 contract between ZACR and ICANN; instead, DCA is seeking declaratory relief
23 regarding the *sufficiency* of ZACR's application under ICANN's own standards.
24 As evidenced by this lawsuit, there is an actual legal controversy as to whether
25 ICANN properly denied DCA's application while passing ZACR's. ZACR cites
26 no case law that support supports any argument to the contrary.

27 Accordingly, the Court should deny ZACR's motion to dismiss.
28

1 **B. DCA states a claim for Intentional Interference with Contract.**

2 In order to state a claim for intentional interference with contract, a Plaintiff
3 must allege (1) a valid contract between plaintiff and a third party; (2) defendant's
4 knowledge of the contract; (3) defendant's intentional acts designed to induce
5 breach or disruption of the contract; (4) actual breach or disruption; and (5)
6 resulting damage." *Family Home & Fin. Ctr. v. Fed. Home Loan Mortg. Corp.*,
7 525 F.3d 822, 825 (9th Cir. 2008)⁵. DCA has adequately alleged these elements.

8 **1. ZACR intended to induce ICANN to disregard its own rules.**

9 DCA alleges that ZACR's conduct, as described in the first amended complaint,
10 induced ICANN to breach the contract or made its performance more difficult.
11 FAC ¶111. DCA notes that ICANN was required to follow the rules in the
12 Guidebook including Section 2.2.1.4.2 regarding geographic name endorsements
13 and Section 2.2.1.4.3 regarding withdrawals of those endorsements. *Id.* ¶¶20, 23,
14 and 25. Specifically, DCA complains of the following actions by ZACR, which
15 ZACR intended to cause ICANN to unfairly delegate .Africa to it instead of DCA,
16 in contravention of the Guidebook:

17 - "ZACR wrongfully campaigned against DCA's application both to ICANN
18 and the AUC. ZACR also represented to AUC that DCA should not have
19 AUC's endorsement because it was not a community organization, even
20 though an application by an individual organization is perfectly acceptable
21 under ICANN's rules. ZACR also invited the ICANN Independent
22 Objector ("IO") to object to DCA even though DCA was not subject to the
23 IO's review because DCA's application was not a community application."
24 *Id.* ¶28.

25 - "ZACR represented that it was applying for the .Africa gTLD on behalf of
26 the African 'community.' However, it failed to submit the required type of
27

28 ⁵ ZACR does not contest that DCA has adequately alleged the first two of these elements.

1 application for organizations applying on behalf of a ‘community,’ which is
2 a term of designation and differentiation for gTLDs. Nevertheless, ICANN
3 processed ZACR’s ‘standard’ application. A ‘standard’ application does
4 not require an applicant to show that it represents a community.” *Id.* ¶31.

5 - ZACR represented “(1) that it had a large number of qualifying
6 endorsements from African governments sufficient to meet the 60%
7 threshold under ICANN rules, and (2) that it had the requisite financial
8 capability to operate as a gTLD operator.” *Id.* ¶32. Those representations
9 were false. *See Id.* ¶48.

10 - “Alice Munyua, Kenya’s former GAC advisor and a member of the ZACR
11 Steering Committee as well as a GAC representative for the AUC, made a
12 statement purportedly on behalf of Kenya denouncing DCA’s application
13 for .Africa. The current Kenya GAC advisor wrote to the GAC Chairperson
14 later that evening to inform her that Ms. Munyua no longer represented
15 Kenya and that Kenya did not share her viewpoints on .Africa but ICANN
16 Board nonetheless accepted the GAC advice rendered without consensus.”
17 *Id.* ¶45.

18 - “ZACR did not have sufficient country specific endorsements to meet the
19 ICANN requirements for geographic gTLDs. Only five of the purported
20 endorsement letters submitted by ZACR from African governments actually
21 referenced ZACR by name. Presumably, ZACR passed on the basis of the
22 same regional endorsements that ICANN and GAC had used to derail
23 Plaintiff’s application. ZACR filed purported support letters where African
24 governments were endorsing the AUC’s “Reserved Names” initiative, along
25 with declarations made by the AUC regarding its intention to reserve
26 .Africa for its own use along with its appointment letter from the AUC as
27 evidence of such support. Had ICANN used fair and even-handed criteria,
28 DCA’s application would have passed.” *Id.* ¶48.

1 - “ZACR’s improper relationship with AUC is evident in the signed contract
2 in which ZACR signed over all its rights to .Africa to the AUC.
3 Specifically, that the ‘AUC shall retain all the rights relating to the
4 dotAfrica TLD [Top Level Domain], including in particular, intellectual
5 property and other rights to the registry databases required to ensure the
6 implementation of the agreement between the AUC and the ZACR, and the
7 right to re-designate the registry function.’” *Id.* ¶91.

8 In addition to these specific acts the gravamen of the FAC is that ZACR and
9 AUC were improperly using their political clout (given the transition issue) to
10 encourage ICANN to favor them and disfavor DCA at every turn – and in fact,
11 ICANN bowed to that pressure at every turn to the great detriment of DCA.
12 Despite ZACR’s argument to the contrary, these activities are tethered to the
13 disruption of the Guidebook. ZACR’s involvement with the GAC opinion alone
14 contributed to ICANN’s violation of the Guidebook as the IRP already determined
15 that the GAC opinion was not in accordance with Guidebook Rules 1.1.2.7 or 3.1.
16 *Id.*, Ex. 1 at ¶¶105 - 109; DCA’s RJN, Ex. 1. ZACR’s other actions, including
17 lobbying to the AUC and submitting improper endorsements induced ICANN to
18 deny DCA’s application when in fact DCA had met the Guidebook’s standards but
19 ZACR had not. DCA alleges that all of these actions induced ICANN to breach
20 the Guidebook or at least disrupted ICANN’s processing of DCA’s application
21 pursuant to the Guidebook.

22 ZACR’s cite to *Image Online Design Inc. v. Internet Corp. for Assigned Names*
23 *and Nos.* is readily distinguishable. There the court found that the allegations were
24 conclusory where the plaintiff did not allege “any facts identifying the particular
25 contracts, the actual disruption of these contracts, or any actual damage” to the
26 plaintiff. *Image Online Design Inc. v. Internet Corp. for Assigned Names and*
27 *Nos.*, No. CV 12 – 08968-DDP, 2013 U.S. Dist. LEXIS 16896 at *28 (C.D. Cal.

1 Feb. 7, 2013). In contrast and as detailed above, DCA has alleged numerous facts
2 in each of these categories.

3 **2. DCA alleges that ICANN breached the Guidebook.**

4 DCA also adequately alleges that ICANN breached the Guidebook, as the IRP
5 panel already found. Even ICANN abandoned its motion to dismiss asserting the
6 same failed argument. *See* Docket Nos. 78, 79. DCA alleges that ICANN failed to
7 comply with provisions in the Guidebook regarding: 1) gTLD program rules of
8 transparency and fair competition, 2) the geographic names evaluation process; and
9 3) GAC procedures (*Id.* ¶¶ 68-71). DCA also alleges that “a. ICANN represented
10 to Plaintiff that Plaintiff’s application for .Africa would be reviewed in accordance
11 with, ICANN’s Articles of Incorporation, and the new gTLD Applicant
12 Guidebook; all of which promise a fair and transparent bid process, fair
13 competition, and non-interference with an applicant’s application by a competitor
14 or third-party” and “ICANN represented that all applicants for the .Africa gTLD
15 would be subject to the same agreement, rules, and procedures.” (*Id.* ¶74.)

16 ZACR argues that the discretion to “determine not to proceed with any and
17 all applications for new gTLDs” means that it cannot have breached the
18 Guidebook. ICANN cannot accept an \$185,000 application fee and then refuse to
19 abide by the provisions of the Guidebook and the rules that ICANN incorporated
20 therein. In any event, ICANN’s “discretion” clause is at best ambiguous. It cannot
21 mean that ICANN can decide to reject a qualified applicant for any reason
22 whatsoever. It must be read in context and in conjunction with the numerous other
23 provisions in the Guidebook which limit and define that discretion⁶. Cal. Civ.
24

25 ⁶ The language regarding “discretion” should also be read in connection with
26 ICANN’s requirements under its contract – SA 1301-12-CN-0035-- with the U.S.
27 government. That contract, among other things, expressly requires ICANN to
28 follow “its own policy framework” in the delegation process. With leave, DCA
would add allegations regarding this contract, which further shows that ICANN is
contractually bound to the US government not to disregard its own rules.

1 Code §1641. The Guidebook establishes certain requirements and standards by
2 which it will judge applications, and it would be superfluous to have those
3 provisions if ICANN could arbitrarily accept or deny an application for any reason
4 whatsoever. *See generally* RJN Ex. 1, pp. 134 [Section 1.2.1 (Eligibility)]; p.138
5 [Section 1.2.2 (Required Documents)]; and p.155 [Section 1.5 (Fees and
6 Payments)]. Of course, ICANN may *appropriately* use its discretion in rejecting
7 gTLD applications for legitimate reasons – but it must still apply the rules that it
8 agreed to in the Guidebook in exercising that discretion.

9 In this case, any ambiguities in the Guidebook should be interpreted in DCA’s
10 favor because ICANN drafted the Guidebook. Cal. Civ. Code §1654; *See*
11 *Oceanside 84, Ltd. v. Fidelity Federal Bank*, 56 Cal.App.4th 1441, 1448-1449
12 (1997) [“If a contract is capable of two different reasonable interpretations, the
13 contract is ambiguous. A well-settled maxim states the general rule that
14 ambiguities in a form contract are resolved against the drafter.”]; *See Garcia v.*
15 *Stonehenge, Ltd.*, No. C-97-4368-VRW, 1998 U.S. Dist. LEXIS 23565, at *6
16 (N.D. Cal. Mar. 2, 1998) [“[F]ederal courts may apply general principles of state
17 law regarding contract interpretation.”]. Furthermore, because of the ambiguity
18 parole evidence will be admissible and therefore discoverable. *Chastain v.*
19 *Belmont*, 43 Cal.2d 45, 51 (1954).

20 *Image Online Design, Inc. v. Internet Corp. for Assigned Names and Nos.* does
21 not support the notion that ICANN could not have breached the Guidebook,
22 because the language the court examined there was from a year 2000 application
23 not the 2012 Guidebook at issue here. *Image*, 2013 U.S. Dist. LEXIS 16896 at *3
24 - *4. Moreover, the language the court examined in *Image* was different from the
25 language ZACR points to from the Guidebook. *See id.*, at *10.

26 Accordingly, ICANN’s self-described “discretion” does not somehow trump all
27 of the other Guidebook requirements and does not grant it absolute immunity or
28 protection from breaches of the agreement between the parties. At best the issue of

1 ICANN’s discretion in reviewing DCA’s application is a factual question not
2 proper for consideration on a motion to dismiss. DCA has therefore alleged a
3 breach or disruption of the terms of Guidebook.

4 **3. DCA alleges that ZACR proximately caused its damages.**

5 DCA alleges that ZACR’s actions were a proximate cause to ICANN’s
6 breach of the Guidebook, its bylaws, and its articles of incorporation. *See* FAC
7 ¶¶84, 92, 113. ZACR argues that DCA cannot have been harmed by ZACR’s
8 actions because there was no guarantee that DCA would have otherwise been
9 delegated .Africa. Motion at 10:26 – 11:8. However, if ICANN had followed its
10 own rules – which despite its “discretion” it was required to do as explained in
11 Section IV.B.2, *supra*, - and had ZACR not interfered, DCA would have had more
12 than a “hope” of being delegated .Africa. DCA had passed all phases of the initial
13 evaluation but for the geographic names evaluation, which ZACR disrupted
14 through Alice Munyua’s (a member of the ZACR steering committee) involvement
15 with the GAC. FAC ¶45. If ICANN had properly dismissed ZACR’s application
16 for lack of proper endorsements and failure to submit an application as a
17 community applicant, which ZACR purported to be, DCA would have been the
18 only applicant for .Africa and would have moved to the delegation phase of the
19 application process. But even were this not the case, ICANN had an agreement
20 with DCA to review its application fairly and pursuant to ICANN’s rules in the
21 Guidebook, the Bylaws, and its Articles of incorporation. FAC ¶20. It was this
22 agreement that ICANN violated due to the influence ZACR intentionally exerted.

23 Moreover, the truth of DCA’s allegation that “ZACR’s actions were a
24 substantial factor in causing Plaintiff’s harms” is a question of fact and therefore
25 not an issue the Court should consider on a motion to dismiss. Neither of the cases
26 ZACR cites support its argument here. In *Augustine v. Trucco*, unlike here, the
27 complaint was clearly deficient on its face because “plaintiff had no contract with
28 the Truccos, but in addition to that fatal fact, there is no allegation in the complaint

1 or in the proposed sixth count that Allen or Dwyer intentionally or actively induced
2 or persuaded the Truccos to breach any contract with plaintiff. There is no
3 allegation that the Truccos would otherwise have performed any contract with
4 plaintiff, or that it was breached or abandoned by any wrongful act of Allen or
5 Dwyer, or that any act of Allen or Dwyer was the moving cause of the Truccos'
6 breaching the contract.” *Augustine v. Trucco*, 124 Cal. App. 2d 229, 246-247
7 (1954). *Blank v. Kirwan*, 39 Cal.3d 311 (1985) is inapposite because it deals with
8 a claim for intentional interference with prospective economic advantage, not
9 contract, and that claim has materially different elements.

10 **C. DCA states a claim for Aiding and Abetting Fraud**⁷.

11 Although not titled as a separate cause of action, DCA has adequately alleged a
12 claim for aiding and abetting fraud. The test is whether the facts, as alleged,
13 support any valid claim entitling the plaintiff to relief, not necessarily that intended
14 by the plaintiff. *Johnson v. City of Shelby, Miss* 135 S.Ct. 346, 346 - 347 (2014);
15 *Alvarez v. Hill*, 518 F.3d 1152, 1158 (9th Cir. 2008). “In California, liability may
16 be imposed on one who aids and abets the commission of an intentional tort,
17 including fraud, if the person (a) knows the other's conduct constitutes a breach of
18 duty and gives substantial assistance or encouragement to the other to so act or (b)
19 gives substantial assistance to the other in accomplishing a tortious result and the
20 person's own conduct, separately considered, constitutes a breach of duty to the
21 third person.” *Marcelos v. Dominguez*, No. C-08-00056 WHA, 2008 U.S. Dist.
22 LEXIS 91155 at *24 - *25 (N.D. Cal. July 18, 2008) (internal citations and
23 quotations omitted). DCA has shown that ZACR aided and abetted ICANN under
24 both prongs.

25
26
27 ⁷ DCA acknowledges that it has not stated a claim for conspiracy to commit fraud
28 against ZACR. With leave to amend, DCA will re-label this cause of action as a
claim for aiding and abetting fraud.

1 With regard to the first test, by alleging that ICANN “conspired” with ZACR to
2 commit fraudulent acts, DCA has alleged that ZACR had knowledge of ICANN’s
3 fraud. FAC ¶84. Moreover, as an applicant itself, ZACR knew of the contents of
4 the Guidebook and ICANN’s bylaws, which DCA alleges promise non-
5 interference with an application by a competitor and review of applications
6 pursuant to the same agreement, rules, and procedures. *Id.* ¶74. ZACR knew that
7 ICANN’s representations were false, as ICANN unfairly assisted ZACR from the
8 beginning of the application process and throughout the application review. *See*
9 *e.g. Id.* ¶¶28, 31, 32, 45, 48, 53, 69(e), 75(b), 76, 85. The FAC also describes in
10 detail how ZACR encouraged ICANN to disregard its rules regarding fairness and
11 procedural safeguards to award ZACR the .Africa gTLD. *See e.g. Id.* ¶¶28, 31, 32,
12 45, 48, 91.

13 DCA has also satisfied the second test. For the reasons just explained, ZACR
14 gave substantial assistance to ICANN in committing intentional misrepresentation
15 through its insistence on selecting ZACR’s application instead of DCA’s. This
16 assistance included ZACR’s improper involvement in the GAC process, its
17 campaigning to ICANN and the AUC against DCA, and its entering into a registry
18 agreement with ICANN during the IRP process. ZACR’s actions in and of
19 themselves constituted intentional interference with contract, as described in
20 section IV.B., *supra*, and anti-competitive behavior, as explained in Section IV.D.,
21 *infra*. The aforementioned allegations have put ZACR on sufficient notice of the
22 nature of the claim against it and are therefore plead with sufficient particularity.
23 *Marcelos*, 2008 U.S. LEXIS 91155 at *27.

24 **D. DCA states a claim under the UCL.**

25 DCA has properly alleged that ZACR engaged in “unlawful, unfair, and
26 fraudulent business acts or practices” under the “unfair” and “fraudulent prongs of
27 Cal. Bus. & Prof. Code section 17200. DCA has alleged that ZACR engaged in
28 unlawful practices through its claim for intentional interference with contract

1 against ZACR and its claim (though not separately stated) that ZACR aided and
2 abetted ICANN in its fraud. *See e.g.* FAC ¶¶83-95, and 108-114. Under section
3 17200, a "fraudulent" practice is defined more broadly than common law fraud and
4 only requires a showing that "members of the public are likely to be deceived."
5 *Multimedia Patent Trust v. Microsoft Corp.*, 525 F.Supp.2d 1200, 1217 (S.D. Cal.
6 2007). Rule 9(b) requirements do not apply where common law fraud is not the
7 basis of a UCL claim. *Multimedia*, 525 F.Supp.2d at 1217. Here DCA has alleged
8 that ZACR has made misrepresentations with regard to its application and
9 campaigned against DCA's application, which makes it likely that the public⁸ will
10 be deceived with respect to the validity of ZACR's application as compared to
11 DCA's. FAC ¶¶28, 31, 32, 45, 48, 91. Furthermore DCA, a member of the public,
12 has alleged that it has been harmed due to ZACR's deceptive actions. DCA can
13 allege that the U.S. government, representative of the U.S. people, has been
14 harmed by ZACR's actions by encouraging the government's contractor (ICANN)
15 to act inconsistently with its duties under the contract. DCA's RJN Ex. 2.
16 Therefore, DCA has also stated a claim pursuant to section 17200's "fraud" prong.

17 ZACR argues that DCA's UCL claim is deficient because it seeks disgorgement
18 of profits obtained by Defendants which ZACR argues is not restitutionary.
19 Motion at 7:18 – 19. However, the case ZACR cites to, *Korea Supply Co. v.*
20 *Lockheed Martin Corp.*, 29 Cal. 4th 1134 (2003), was *decided before* the California
21 Supreme Court case of *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310 (Cal.
22 2011). *Kwikset* explains that alleging an economic injury in the form of lost
23 customers and sales revenue is sufficient to satisfy standing under UCL and that
24 whether a party will ultimately be unable to prove damages does not mean a UCL
25 claim is inadequate. *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 335-336
26 (Cal. 2011); *Luxul Tech Inc. v. Nectarlux, LLC*, 78 F.Supp.3d 1156 (N.D. Cal.

27
28 ⁸ The application review process and correspondence with the parties is publicly
available on ICANN's website.

1 2015). Moreover, discovery will likely reveal facts allowing DCA to allege that
2 ZACR has taken potential customers from it and damaged its reputation – as an
3 example, ZACR’s website already suggests that it will be the operator for .Africa.

4 **E. At the very least, leave to amend should be granted.**

5 In the event that the Court finds any of DCA’s allegations insufficient, DCA
6 can amend its claims with particular facts. “The court should freely give leave [to
7 amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). “It is black-letter law
8 that a district court must give plaintiffs at least one chance to amend if their
9 complaint was held insufficient.” *Nat’l Council of La Raza v. Cegavske*, 800 F.3d
10 1032, 1041 (9th Cir. 2015). DCA can make amendments regarding its contract
11 with the U.S. government supporting both its intentional interference with contract
12 claim and its unfair competition claim. DCA can also make amendments more
13 clearly stating its aiding and abetting fraud claim.

14 ZACR’s opposition to DCA’s pleadings is the first challenge to the adequacy of
15 DCA’s complaint – DCA voluntarily amended its complaint after the case was
16 removed to federal court. ZACR makes no showing that amendment by DCA is
17 futile. DCA requests leave to amend if the Court finds its allegations insufficient.

18 **V. CONCLUSION**

19 For the foregoing reasons, DCA requests that this Court deny ZACR’s Motion
20 to Dismiss or, at a minimum, grant DCA leave to amend any deficiencies.

21
22 Dated: May 10, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown

Ethan J. Brown

Attorneys for Plaintiff

DOTCONNECTAFRICA TRUST

CERTIFICATE OF SERVICE

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

I am a partner at the law firm of Brown Neri & Smith, LLP, with offices at 11766 Wilshire Blvd., Los Angeles, California 90025. On May 10, 2016, I caused the foregoing **PLAINTIFF’S OPPOSITION TO DEFENDANT ZA CENTRAL REGISTRY, NPC’S MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on May 10, 2016

/s/ Ethan J. Brown