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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **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]

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION
(FILED AS A TRO)**

Date: January 31, 2017

Hearing: 8:30 a.m.

Dept.: 53

[Filed concurrently: Supplemental
Declaration of Sophia Bekele Eshete;
Supplemental Declaration of Ethan J. Brown]

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 On January 4, 2017, Plaintiff DotConnectAfrica Trust’s (“DCA”) filed an *ex parte*
4 application for a temporary restraining order (“TRO”). At the hearing the same day, the Court did
5 not rule on the application but stated that the TRO would be considered as a motion for preliminary
6 injunction, which was set for hearing January 31, 2017. The Court also stated that DCA could
7 submit supplemental briefing in support of its motion for a PI. DCA hereby submits supplemental
8 briefing in accordance with that ruling. For the reasons stated herein and the reasons explained in
9 Plaintiff’s January 4, 2017 TRO filing, Plaintiff requests that the Court grant its Motion for a PI.

10 II. DCA DEMONSTRATES A LIKELIHOOD OF SUCCESS ON ITS SECOND AND
11 FIFTH CAUSES OF ACTION

12 A. The Covenant Not to Sue is Unenforceable as to Plaintiff’s Second and Fifth
13 Causes of Action

14 i. The Prospective Release Violates Civil Code Section 1668

15 The Guidebook terms DCA agreed to upon submitting its gTLD application contained a
16 release and covenant not to sue (the “Prospective Release”). (*Id.*, ¶ 12, Ex. 3, at Module 6, ¶ 6.)
17 The Prospective Release is unenforceable because it violates Cal. Civil Code §1668 and is
18 unconscionable. This argument was fully briefed by all parties and this Court agreed with DCA
19 in finding that “the Covenant is likely to be found unenforceable” under either Section 1668 or as
20 unconscionable. (Jan. 3 Brown Decl., Ex. 3.) DCA now moves for a TRO under its causes of
21 action for intentional misrepresentation and unfair competition, *i.e.*, claims for intentional and
22 fraudulent conduct, to which the Prospective Release is unenforceable.

23 “All contracts which have for their object, directly or indirectly, to exempt anyone from
24 responsibility for his own fraud, or willful injury to the person or property of another, or violation
25 of law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code §1668; *See*
26 *also Capri v. L.A. Fitness Int’l, LLC* (2006) 136 Cal.App.4th 1078, 1084 [“[U]nder Section 1668,
27 ‘a party [cannot] contract away liability for his fraudulent or intentional acts...’ regardless of
28

1 whether the public interest is affected.”¹; *see also Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d
2 1148, 1153 [holding a covenant not to sue that released “any and all claims of every nature” void
3 for excluding fraud, intentional acts, and negligent violations of statutory law.]. ICANN’s
4 Prospective Release purports to waive fraud and intentional violations of law, and thus, is void².

5 ii. The Prospective Release is Unconscionable

6 Moreover, the Prospective Release is unconscionable and unenforceable. “If the court as
7 a matter of law finds the contract or any clause of the contract to have been unconscionable at the
8 time it was made the court may refuse to enforce the contract, or it may enforce the remainder of
9 the contract without the unconscionable clause, or it may so limit the application of any
10 unconscionable clause as to avoid any unconscionable result.” Cal. Civ. Code §1670.5(a).
11 “Unconscionability consists of both procedural and substantive elements. The procedural element
12 addresses the circumstances of contract negotiation and formation, focusing on oppression or
13 surprise due to unequal bargaining power. Substantive unconscionability pertains to the fairness
14 of an agreement’s actual terms and to assessments of whether they are overly harsh or one-sided.”
15 *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223,
16 246.

17 The Prospective Release is procedurally unconscionable. In order to apply, DCA was
18 forced to agree to the Guidebook that contained the Prospective Release. (November 10, 2016
19 Declaration of Sophia Bekele (“Nov. 10 Bekele Decl.”)³. ¶¶ 13-16.) As an initial matter, the
20 Prospective Release was near the end of the 360 page Guidebook. (*See* Supplemental Declaration
21 of Sophia Bekele at ¶3, Ex. A at Mod. 6 – 3). The Guidebook does not encourage the parties to
22 consult with an attorney before signing, nor did DCA do so. (Nov. 10 Bekele Decl. ¶7, Ex. 3; ¶
23 11.) ICANN’s own GAC told ICANN that the Prospective Release was too broad, but ICANN
24

25
26 ¹ Although often cited for the claim that public policy must be implicated for a release to be void, *Tunkl v. Regents of*
27 *California* ((1963) 60 Cal.2d 92) does not support that proposition. *See Capri v. L.A. Fitness, Int’l, LLC, supra*. Even
28 under the standard expressed in *Tunkl v. supra*, DCA can establish that ICANN’s Prospective Release is void.

² For this reason, the instant case is distinguishable from *Ruby Glen, LLC v. ICANN* – 2016 U.S. Dist. LEXIS
163710, which ICANN has relied on in the past. Furthermore, the plaintiff there had not exhausted all of its
remedies through ICANN, like an IRP.

³ The November 10, 2016 Declaration of Sophia Bekele was filed on November 15, 2016 in connection with
Plaintiff’s Motion for a Preliminary Injunction.

1 refused to change the language. ICANN cannot allege that DCA had an opportunity to negotiate,
2 because it didn't even accept the GAC's comment. Accordingly, the Prospective Release is
3 procedurally unconscionable.

4 The Prospective Release is also unenforceable because it is substantively unconscionable.
5 "As our Supreme Court has explained, the unconscionability doctrine 'ensures that contracts...do
6 not impose terms that have been variously described as 'overly harsh,' 'unduly oppressive,' 'so
7 one-sided as to 'shock the conscience,' or 'unfairly one-sided.'" *Orcilla v. Big Sur, Inc.* (2016)
8 244 Cal.App.4th 982, 998. The Prospective Release is a textbook example of a one-sided
9 agreement. It requires that DCA give up its right to sue ICANN for *any and all* acts relating to
10 the application but does not require ICANN to give up any right to sue DCA. ICANN is not
11 prevented from suing DCA for any violation of law, negligence, fraud or otherwise. The
12 Prospective Release absolves ICANN of all wrongdoing – but provides no benefit to applicants.
13 Because the contract is both procedurally and substantively unconscionable, the agreement is
14 unenforceable.

15 iii. ICANN's Prospective Release was procured by fraud.

16 ICANN's Prospective Release was procured by fraud and cannot be relied upon to
17 ICANN's benefit. "Fraud in the inducement is a subset of the tort of fraud whereby 'the promisor
18 knows what he is signing but his consent is induced by fraud, mutual assent is present and a
19 contract is formed, which by reason of the fraud is voidable.'" *Hinesley v. Oakshade Town Center*
20 (2005) 135 Cal.App.4th 289, 294-295. DCA agreed to the Guidebook and paid a \$185,000 fee
21 because it was falsely led to believe that the IRP process provided redress in lieu of court review.
22 (Nov. 10 Bekele Decl. ¶ 12, Ex. 3 at Module 6, ¶ 6.) After the IRP ruled against it, ICANN failed
23 to follow the IRP ruling, and disclaimed any binding nature, making the above statement false.
24 (See *Id.*) ICANN procured the provision by fraud, and it would be inequitable and to DCA's
25 detriment to find the Prospective Release binding. Accordingly, under any of the grounds stated
26 above, ICANN's Prospective Release is void and unenforceable.

27 **B. DCA WILL PREVAIL ON ITS CAUSE OF ACTION FOR INTENTIONAL**
28 **MISREPRESENTATION**

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

6 i. ICANN's Misrepresentations

7 Here, ICANN made the following misrepresentations to DCA as a gTLD applicant: (1) that
8 it would "make decisions by applying documented policies neutrally and objectively, with integrity
9 and fairness;" (2) that it would "operate the maximum extent feasible in an open and transparent
10 manner and consistent with procedures designed to ensure fairness;" (3) that it would "be
11 accountable to the Internet community for operating in a manner that is consistent with these
12 Bylaws, and with due regard to the core values set forth in Article 1 of [its] Bylaws;" (4) that it
13 would carry[] out its activities in conformity with relevant principles of international law and
14 application of international conventions and local law..."; and (5) that the IRP provided actual
15 redress to applicants. ICANN made all of these statements in its Articles of Incorporation, Bylaws,
16 and the Guidebook. (January 3, 2017 Declaration of Sophia Bekele ("Jan. 3 Bekele Decl."⁴), ¶ 3,
17 Ex. 1, ¶¶ 94-98.)

18 ii. ICANN Knew the Misrepresentations Were False⁵

19 In it's tentative on Plaintiff's previous motion for a PI, the Court found that "there is reason
20 to question the legitimacy of ICANN's purported reason for denying DCA's application[.]" and
21 that "it can be reasonably inferred that the reasons for denying DCA's application were pretextual
22 and that ICANN, which improperly entered into a registry agreement with ZACR while the IRP
23 review was pending, denied DCA a fair evaluation process because it had predetermined that it
24
25

26 ⁴ The January 3rd, 2017 Declaration of Sophia Bekele was filed on January 4, 2017 concurrently with Plaintiff's *ex*
27 *parte* application for a TRO.

28 ⁵ As Plaintiff pointed out in its TRO filing, even if ICANN did not know the misrepresentations were false at the
time that it made them, its demonstrated lack of intention to keep its promises constitutes fraud: "A promise to do
something necessarily implies the intent to perform; hence, where a promise is made without such intention, there is
an implied misrepresentation of fact that may be actionable fraud." *Lazar, supra*, 12 Cal.4th at 639; Civil Code §
1710.

1 would award the gTLD to ZACR.” (January 3, 2017 Declaration of Ethan Brown⁶ (“Jan. 3 Brown
2 Decl.”) ¶ 5, Ex. 3). That ICANN had a predetermined outcome for the award of the .Africa gTLD
3 necessarily implies that it knew the representations regarding fairness, application of the
4 Guidebook Rules, and transparency were false. The falsity of these statements when made is also
5 evidenced by ICANN’s obstructing DCA’s meritorious application⁷ and favoring ZACR’s at every
6 turn:

7 • **ICANN’s Governmental Advisory Committee (“GAC”) Advice:**

- 8 ○ Under the direction of the African Union Commission (effectively an applicant for
9 .Africa through its proxy ZACR), which joined the GAC last minute, improperly
10 issued “consensus advice” that DCA’s application should not proceed. (Jan. 3
11 Bekele Decl., ¶ 3, Ex. 1, ¶ 104.) The GAC gave no indication that DCA’s
12 application was problematic, violated law or was sensitive - the required standard.
13 (*Id.*)
- 14 ○ ICANN posed sending clarifications for DCA endorsements but never sent the
15 clarifying questions because it accepted the GAC’s faulty advice, failed to conduct
16 any investigation, and stopped reviewing DCA’s application while ZACR’s
17 application continued. (*Id.*, ¶ 3, Ex. 1 ¶¶ 80, 106; ¶ 28, Ex. 31.) This collusion
18 prejudiced DCA as they did not receive clarifying questions until after the IRP.
19 *See* Jan. 3 Bekele Decl. ¶16. Interestingly ZACR’s application should have been
20 evaluated before DCA’s and failed due to lack of individual African government
21 endorsements, but ICANN made a 360 degree turn in policy to accept the AUC
22 endorsement, which they ghostwrote to accommodate ZACR to pass the
23 geographic names panel. (Brown Decl., Ex. 5, [Declaration of Sara Colón (“Colón
24 Decl.”)], ¶ 4, Ex. 3.) Although ICANN could have also reconsidered the GAC
25 decision under its rules, but it refused to do so. (*Id.*, ¶ 10, Ex. 1, ¶ 6; ¶ 8, Ex. 4,
26

27 ⁶ The January 3, 2017 Declaration of Ethan Brown was filed concurrently with Plaintiff’s *ex parte* Application for a
TRO.

28 ⁷ ZACR and ICANN have suggested throughout this proceeding that DCA is somehow less qualified than ZACR to
operate .Africa. However, DCA is already operational and the fact that DCA has never operated a gTLD in the past
is not a basis for disqualifying DCA or favoring ZACR. *See* Supp. Bekele Decl. ¶12, Ex. E.

1 Art. 4 § 2.2.) ICANN also was not required to stop processing DCA's application
2 under its rules. (*Id.*, ¶ 5, Ex. 3, Module 3-3.)

- 3 ○ ICANN's own witness, GAC Chairperson Heather Dryden, admitted that the GAC
4 did not act with transparency or in a manner designed to ensure fairness. (*Id.*, ¶ 3,
5 Ex. 1, ¶ 102.) Ms. Dryden also admitted that the GAC made its decision without
6 providing any rational, or legitimate grounds, but rather based on politics. (*Id.*, ¶
7 3, Ex. 1, ¶ 104.)

8 • **ZACR's Inadequate Application:**

- 9 ○ ICANN denied the AUC's request to reserve .Africa, but assisted AUC in
10 obtaining the .Africa delegation rights through a proxy – ZACR and explained in
11 a letter denying the reservation of names how the AUC could block other
12 applicants. (*See Id.*, ¶ 14, Ex. 10.) In exchange for the AUC's endorsement, ZACR
13 agreed to allow the AUC to "retain all rights relating to the dotAfrica TLD." (*Id.*,
14 ¶ 41, Ex. 26, ¶ 22 (7).) The members of the AUC committee formed to choose
15 who to endorse for the .Africa gTLD were also members of organizations affiliated
16 with ZACR. (*Id.*, ¶ 32.)
- 17 ○ Furthermore, ZACR represented that it was applying for the .Africa gTLD on
18 behalf of the "African community", as per the AUC Request for Proposals, which
19 issued endorsements only for those applying on behalf of the "African
20 Community" and not for a Standard gTLD, which .Africa is according to ICANN
21 rules (*See Id.*, ¶ 34, Ex. 20.) However, ZACR failed to submit the required type
22 of application for organizations applying on behalf of a "community" which is a
23 term of designation and differentiation for gTLDs. (*See Id.*, ¶33, Ex. 19, ¶ 19.)
24 Nevertheless, ICANN processed ZACR's "standard" application.
- 25 ○ ICANN passed ZACR on the geographic names review, conducted by a third party
26 company called InterConnect Communications ("ICC"), even though all of
27 ZACR's letters were issued to the AUC by African governments for the rejected
28 "reserve" names initiative for the AUC and not ZACR. None of those letters
reference ZACR by name. (*Id.*) Compounding their wrongdoing, ICANN later

1 ghostwrote an endorsement for ZACR to submit to the AUC for its signature.
2 (Brown Decl., Ex. 5, [Declaration of Sara Colón (“Colón Decl.”)], ¶ 4, Ex. 3.) At
3 the time of the GAC advice DCA had sufficient endorsements from the AUC and
4 UNECA⁸, but because ICANN decided to wait until after the improper GAC
5 advice to review DCA’s application, the geographic names panel did not issue a
6 decision regarding their adequacy. (Jan. 3 Bekele Decl., ¶ 3, Ex. 1 ¶¶ 80, 106; ¶
7 28, Ex. 31.)

8 • **ICANN Signs a Registry Agreement With ZACR During the IRP:**

- 9 ○ In October 2013, DCA successfully sought an IRP to review ICANN’s processing
10 of its application, including ICANN’s handling of the GAC opinion. (Jan. 3 Bekele
11 Decl., ¶ 3, Ex. 1 at ¶ 9.) DCA became aware that ICANN sought to delegate the
12 .Africa gTLD prior to the conclusion of the IRP. (*Id.*, ¶ 3, Ex. 1, ¶¶ 9-11.)
13 ○ ICANN subsequently signed an improper registry agreement with ZACR. (*Id.*)
14 DCA petitioned the IRP for emergency relief, which the IRP granted unanimously.
15 (*Id.*) The Panel concluded that “it would have been **‘unfair and unjust** to deny
16 DCA Trust’s request for interim relief when the need for such relief...[arose] out
17 of ICANN’s failure to follow its own Bylaws and procedures.” (*Id.*, ¶ 3, Ex. 1, ¶
18 22.) (emphasis added)

19 • **The Post – IRP Processing of DCA’s Application:**

- 20 ○ After the IRP Panel made its final ruling, ICANN sent DCA to the same panel at
21 the ICC that was clearly biased against DCA. One of the evaluators at the ICC,
22 Mark McFadden who dared provided a declaration of his action in opposition to
23 DCA’s prior motion for a preliminary injunction, worked closely with ICANN to
24 reject DCA’s application and even stated in an email to ICANN at one point: “**The**
25 **ball is now in Sophia’s court – if she wants to invoke Independent Review,**
26 **then good luck to her.**” Supp. Brown Decl. ¶3, Ex.B [ICANN-

27
28 ⁸ As stated in Section II. B. ii, the only objection ICANN ever made to DCA’s endorsements was that DCA was missing a discretionary factor in its AUC letter, and ICANN only made this objection after the IRP proceeding. (Jan. 3 Bekele Decl., Exs. 11 & 13.)

1 AFRICA00000476] (emphasis added). ICANN'S board inquired after the IRP
2 how much time would be required to re-constitute the geographic names panel
3 (presumably to avoid bias, which is clearly mandated in the code of conduct for
4 independent evaluators in the Guidebook) but apparently determined that the 10
5 month waiting period was too long for ZACR to wait, given that ICANN had
6 already improperly signed a registry agreement with them. *See* Supp. Brown Decl.
7 ¶2, Ex. A.

8 ○ According to the Guidebook, the following factors "must" be present in an
9 endorsement: (1) the government's or public authority's support for or non-
10 objection to the applicant's application; (2) the government's or public authority's
11 understanding of the string being requested; (3) the government's or public
12 authority's understanding of the string's intended use. Finally, the Guidebook
13 includes a fourth non-mandatory factor the endorsement *should* demonstrate the
14 government's or public authority's understanding that the string is being sought
15 through the gTLD application process and that the applicant is willing to accept
16 the conditions under which the string will be available. (emphasis added). (Jan.
17 3 Bekele Decl., ¶ 5, Ex. 3, § 2.2.1.4.3.) ICANN only questioned the fourth, non-
18 mandatory factor of DCA's endorsements. (*Id.*, Exs. 11 & 13.) ICANN
19 presumably used this as a pretext to justify its planned disposition of the gTLD.

20 ○ ICANN's CEO, Mr. Fadi Chehade, wrote to the AUC's Infrastructure and Energy
21 Commissioner on or about June 15, 2014 and said that ICANN not only did not
22 approve of the IRP proceedings but also that ICANN promised to proceed
23 expeditiously with delegating .Africa to the AUC's improper proxy ZACR. (Supp.
24 Brown Decl. ¶4 Ex. C).

25 iii. ICANN Intended to Induce DCA's Reliance on the Misrepresentations

26 ICANN could only have made the aforementioned misrepresentations with the intent to
27 induce gTLD applicants to apply. No entities would have applied to ICANN had ICANN
28 represented that it would treat applicants disparately or that there was no actual availability of

1 redress if an applicant was wrongfully rejected, given the large application fee at stake as well as
2 time and other resources required to prepare an application.

3 iv. DCA Justifiably Relied on ICANN's Misrepresentations

4 DCA also relied upon the promises of a fair and transparent process, and the binding nature
5 of the IRP, and was justified in relying upon those representations by ICANN. DCA believed that
6 it would be subject to the fair and unbiased application processing that ICANN promised. (Supp.
7 Bekele Decl. ¶10). Indeed, DCA would not have applied for the .Africa gTLD, paid the non-
8 refundable fee, and would not have spent years campaigning for the endorsements and preparing
9 an application, if it knew that ICANN would have favored the AUC's proxy, ZACR, throughout
10 the process. (Supp. Bekele Decl. ¶11). ICANN also represented that the IRP provided redress,
11 then claimed it was not binding when they were challenged. (Jan. 3 Bekele Decl., ¶ 3, Ex. 1, ¶
12 23.) "A party to a contract cannot rationally calculate the possibility that the other party will
13 deliberately misrepresent terms critical to that contract." *Robinson Helicopter Co., Inc. v. Dana*
14 *Corp* (2004) 34 Cal.App.4th 979, 993. Accordingly, DCA justifiably relied upon ICANN's
15 promises.

16 v. DCA Was Damaged by ICANN's Misrepresentations

17 DCA was damaged by ICANN's misrepresentations because it paid \$185,000 for its
18 application, and has spent countless resources in pursuit of the .Africa gTLD, a path DCA would
19 not have taken had it been aware of ICANN's misrepresentations. (Supp. Bekele Decl. ¶11). DCA
20 is now in a position where ZACR stands to take advantage of the Sunrise period where it can sell
21 premium domain names. ICANN has yet to show that it has done any substantial number of re-
22 delegations in the post-Sunrise period.

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

25 **C. DCA WILL PREVAIL ON ITS CLAIM FOR VIOLATION OF**
26 **CALIFORNIA BUS. & PROF. CODE § 17200**

27 DCA will prevail on its claim for a violation of California Business and Professions Code
28 Section 17200, which defines unfair competition as "any unlawful, unfair or fraudulent business

1 act or practice.” As determined by the IRP, ICANN’s promises and subsequent failure to follow
2 those promises was unfair treatment of DCA. (Jan. 3 Bekele Decl., ¶ 3, Ex. 1, ¶ 110.) To test
3 whether a business practice is unfair “the court must weigh the utility of the defendant’s conduct
4 against the gravity of the harm to the alleged victim.” *State Farm Fire & Casualty Co v. Superior*
5 *Court* (1996) 45 Cal.App.4th 1093, 1103-1104. Here, ICANN represented that it would (1) make
6 decisions by applying documented policies neutral and objectively, with integrity and fairness; (2)
7 operate...in an open and transparent manner and consistent with procedures designed to ensure
8 fairness, (3) be accountable...for operating in a manner consistent with those principles, and (4)
9 use open and transparent processes that enable competition. (Jan. 3 Bekele Decl. ¶ 3, Ex. 1, ¶¶ 94-
10 98.)


11 However, ICANN has continuously thwarted DCA’s application in favor of ZACR’s. (*See*
12 *Section II.B.ii, supra*). As a result of ICANN’s unfair practice toward DCA, DCA has been
13 arbitrarily rejected from serving as the registry for the .Africa gTLD. As indicated in the IRP, and
14 admitted to by former GAC chair Heather Dryden in her testimony, ICANN provided no rational
15 or legitimate justification for acting as it did. (*Id.*, ¶ 3, Ex. 1, ¶ 104.) Thus, ICANN entices
16 consumers to apply for gTLDs on the basis that they will be treated fairly, when in reality it acts
17 arbitrarily and with bias. No utility exists in allowing ICANN to continue this unfair practice, and
18 DCA demonstrates success on the merits for its section 17200 claim on this prong alone.

19 **III. CONCLUSION**

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

22
23 Dated: January 6, 2017

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24
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