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12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST, a
 15 Mauritius Charitable Trust,
 16
 17 Plaintiff,
 18
 19 v.

20 INTERNET CORPORATION FOR
 21 ASSIGNED NAMES AND
 22 NUMBERS; a California corporation;
 23 ZA Central Registry, a South African
 24 non-profit company; DOES 1 through
 25 50, inclusive,
 26
 27 Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)

*Assigned for all purposes to the
 Honorable R. Gary Klausner*

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 ZACR’S MOTION TO DISMISS
 FOR FAILURE TO STATE A
 CLAIM**

[Notice of Motion and Motion to
 Dismiss for Failure to State a Claim;
 Declaration of David W. Kesselman;
 Request for Judicial Notice; and
 [Proposed] Order Filed Concurrently
 Herewith]

Date: May 31, 2016
 Time: 9:00 a.m.
 Location: Courtroom 850

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TABLE OF AUTHORITIES

Page(s)

Cases

Augustine v. Trucco,
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Bell Atl. Corp. v. Twombly,
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Berryman v. Merit Property Mgmt, Inc.,
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Blank v. Kirwan,
39 Cal. 3d 311 (1985).....9, 11

Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.,
20 Cal. 4th 163 (1999).....6

Douglas v. Don King Productions, Inc.,
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Evans v. Sirius Comput. Sol.s, Inc.,
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2012 U.S. Dist. LEXIS 61552 (D. Or. May 1, 2012).....11

Girafa.com, Inc. v. Alexa Internet, Inc.,
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*Image Online Design Inc. v. Internet Corporation for
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TABLE OF AUTHORITIES (*con't*)

Page(s)

Cases

In re Tobacco II Cases,
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Kearns v. Ford Motor Co.,
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Klein v. Chevron U.S.A., Inc.,
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Korea Supply Co. v. Lockheed Martin Corp.,
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Lazar v. Superior Court,
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Leon v. IDX Sys. Corp.,
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Lovesy v. Armed Forces Benefit Assn.,
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Mardian Equip. Co. v. St. Paul Fire & Marine Ins. Co.,
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Neubronner v. Milken,
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Rabago v. Deutsche Bank Nat’l Trust Co.,
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Rusheen v. Cohen,
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TABLE OF AUTHORITIES (*con't*)

Page(s)

Cases

Summit Machine Tool Mfg. Corp. v. Victor CNC Sys.,
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Tarmann v. State Farm Mut. Auto. Ins. Co.,
2 Cal. App. 4th 153 (1991)4

Vess v. Ciba-Geigy Corp. USA,
317 F.3d 1097 (9th Cir. 2003).....4, 5, 6

Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.,
178 F. Supp. 2d 1099 (C.D. Cal. 2001).....6

Statutes and Rules

Cal. Bus. & Prof. Code §17200.....1, 2, 5, 6

Federal Rule of Civil Procedure 9(b)4, 5, 6, 7

Federal Rule of Civil Procedure 12(b)(6).....3, 13

1 I.

2 **INTRODUCTION**

3 Plaintiff DOTCONNECTAFRICA TRUST (“Plaintiff” or “DCA”) and
4 Defendant ZA Central Registry, NPC (“ZACR”) submitted competing
5 applications for the right to operate the generic top-level domain (“gTLD”)
6 .Africa. Defendant Internet Corporation for Assigned Names and Numbers
7 (“ICANN”) extensively reviewed the applications of both DCA and ZACR and
8 ultimately rejected DCA’s application. Disgruntled and frustrated by its own
9 failure to meet ICANN’s application requirements, DCA filed this lawsuit
10 alleging that a conspiracy existed between ICANN and ZACR to deprive DCA of
11 the .Africa gTLD. There is no merit to DCA’s claims against ZACR, and the
12 lawsuit should be dismissed.

13 Each of DCA’s claims against ZACR is substantively deficient as pled.
14 DCA fails to plead even the basic elements of fraud, and further fails to meet the
15 standard under Rule 9(b) for pleading fraud with particularity. DCA lacks
16 standing to bring its declaratory relief claim because DCA is not a party to either
17 of the agreements it challenges. DCA’s claim for intentional interference with
18 contract should be dismissed because it cannot allege that ZACR’s acts
19 proximately caused DCA’s damages; the alleged contract at issue gives ICANN
20 full discretion in approving an application for a new gTLD. Finally, DCA’s claim
21 under Cal. Bus. & Prof. Code §17200 fails because it is based on nothing more
22 than vague and conclusory allegations, fails to allege facts demonstrating an
23 unlawful, unfair or fraudulent business practice, and DCA has no entitlement to
24 restitution against ZACR.

25 For all of these reasons, ZACR respectfully requests that this Court grant
26 the Motion to Dismiss.

1 II.

2 **STATEMENT OF RELEVANT FACTS**

3 DCA submitted an application in or about March 2012 for the rights to
4 operate the gTLD .Africa. FAC ¶ 21. ZACR submitted its own application.
5 DCA's application did not move past the initial evaluation phase. FAC ¶¶ 46-48.
6 ZACR's application, however, passed the initial evaluation phase and moved on
7 to the contracting phase with ICANN. FAC ¶ 48. DCA thereafter sought review
8 of its failed application through the independent review process ("IRP"). FAC ¶
9 51. The IRP Panel issued a final declaration in the matter asking ICANN to allow
10 DCA's application to proceed through the remainder of the gTLD application
11 process. FAC ¶54. ICANN thereafter allowed an extended evaluation of DCA's
12 application but ultimately rejected DCA's application. FAC ¶¶ 60-61. As a result
13 of its failed application, Plaintiff now asserts claims against ZACR for fraud and
14 conspiracy to commit fraud (FAC ¶¶ 83-95), unfair competition under Cal. Bus. &
15 Prof. Code §17200 (FAC ¶¶ 96-99), intentional interference with contract (FAC
16 ¶¶ 108-114), and declaratory relief (FAC ¶¶ 126-132).

17 DCA's purported fraud claim is grounded on vague and conclusory
18 allegations that ZACR, ICANN, and the non-party AUC conspired to violate
19 ICANN's rules and procedures to improperly deny DCA's application and award
20 the .Africa domain to ZACR. *See e.g.*, FAC ¶¶ 83-95. DCA makes no specific
21 allegations to support its §17200 claim and merely refers to its general and
22 conclusory allegations of conspiratorial conduct with ICANN. FAC ¶¶ 96-99.
23 DCA additionally alleges that ZACR intentionally interfered with DCA's contract
24 with ICANN (namely the ICANN Guidebook for applicants of gTLDs) by
25 "wrongfully campaign[ing]" and engaging in "improper lobbying efforts." *See*
26 FAC ¶¶ 28, 111. DCA also alleges that ZACR made multiple misrepresentations
27 to ICANN in its application in an effort to "edge DCA out." FCA ¶ 32. On its
28

1 declaratory relief claims, DCA seeks a declaration from the Court that (1) the
2 registry agreement between ZACR and ICANN be declared null and void and (2)
3 that ZACR’s application for the .Africa gTLD does not meet ICANN’s standards.
4 FAC ¶ 132.

5 **III.**

6 **LEGAL STANDARD**

7 A complaint should be dismissed under Federal Rule of Civil Procedure
8 12(b)(6) when the allegations fail to set forth a set of facts, which if true, would
9 entitle the plaintiff to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A
10 claim must be facially plausible in order to survive a motion to dismiss. *Id.*
11 Importantly, a plaintiff is required to provide “more than labels and conclusions,
12 and a formulaic recitation of the elements of a cause of action will not do. *Bell*
13 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Court is not required to
14 accept as true bare legal conclusions couched as factual allegations. *Iqbal*, 556
15 U.S. at 678. All of DCA’s claims against ZACR fail to state a claim for relief and
16 should be dismissed.

17 **IV.**

18 **ARGUMENT**

19 **A. DCA Fails to State a Claim for Fraud or Conspiracy to Commit**
20 **Fraud**

21 DCA has failed to plead even the bare elements of fraud. DCA’s purported
22 fraud claim is grounded on vague and conclusory allegations that ZACR, ICANN,
23 and the non-party AUC conspired to violate ICANN’s rules and procedures to
24 improperly deny DCA’s application and award the .Africa gTLD to ZACR. *See*
25 FAC ¶¶ 84, 85, 87, 88, 89, 92. DCA’s vague allegations are insufficient to state a
26 claim under California law. The elements of a fraud claim are: (1)
27 misrepresentation; (2) knowledge of the falsity; (3) intent to induce reliance; (4)
28

1 justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court*, 12 Cal. 4th
2 631, 638 (1996). In pleading its fraud claim (which is pled as a separate claim
3 from DCA’s cause of action against ICANN for misrepresentation), DCA does not
4 identify any misrepresentations made to it as part of the purported conspiracy,
5 much less allege any of the other elements of fraud. FAC ¶¶ 84-95. Additionally,
6 nothing in the FAC satisfies the particularity requirement of FRCP 9(b). *See, e.g.*
7 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (fraud
8 allegations must include “the who, what, when, where, and how” of the
9 misconduct charged), *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (“The
10 complaint must specify facts as the times, dates, places, benefits received, and
11 other details of the alleged fraudulent activity.”); *Tarmann v. State Farm Mut.*
12 *Auto. Ins. Co.*, 2 Cal. App. 4th 153, 157 (1991) (plaintiff alleging fraud against a
13 corporation must identify the names and authority of the persons allegedly
14 involved in the fraudulent conduct).

15 Even if the Court were to disregard the allegations DCA actually pled in
16 support of its Fourth Cause of Action, there are no allegations in the FAC that
17 state a cause of action for fraud or conspiracy to commit fraud by ZACR. The
18 alleged misrepresentations set forth in the Second Cause of Action relate to
19 representations made by ICANN to applicants in the Guidebook. There is no
20 allegation that ZACR participated in these alleged representations, or that the
21 representations were part of an alleged conspiracy between ZACR and ICANN.
22 Moreover, DCA utterly fails to plead the elements of conspiracy: “(1) formation
23 and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a
24 wrongful act done in furtherance of the common design.” *Rusheen v. Cohen*, 37
25 Cal. 4th 1048, 1062 (2006).

26 Accordingly, DCA’s Fourth Cause of Action should be dismissed.
27
28

1 **B. DCA Fails To State A Claim Under the UCL**

2 DCA pleads in conclusory fashion that ICANN and ZACR have engaged in
3 “unlawful, unfair, and fraudulent business acts or practices” under Cal. Bus. &
4 Prof. Code § 17200. FAC ¶¶ 96 – 99. “Allegations of unlawful, unfair, or
5 fraudulent acts under the UCL must be pled with a reasonable degree of
6 particularity.” *Lovesy v. Armed Forces Benefit Assn.*, 2008 U.S. Dist. LEXIS
7 93479, at *18 (N.D. Cal. Nov. 7, 2008). DCA is required to identify and allege
8 facts showing the unfair, unlawful and fraudulent nature of the practice. *Id.* at
9 *19. Moreover, where a unified course of fraudulent conduct is alleged to support
10 a claim, Rule 9(b) requires that the pleading of that claim as a whole satisfy the
11 particularity requirement. *Vess*, 317 F.3d at 1103-04. Thus, to the extent that
12 DCA relies on its vague fraud claims to support each of the prongs under the
13 UCL, each claim must be pled with particularity pursuant to Rule 9(b). DCA has
14 failed to meet these standards. Instead it merely lumps the three prongs of the
15 UCL together and refers back to the body of the FAC for supporting allegations
16 without specifying which alleged facts support which prong. Moreover, the
17 allegations of what could be construed as an unfair, unlawful or fraudulent
18 behavior by ZACR are scant, conclusory and vague. *See* FAC ¶¶ 27 – 32;
19 *Twombly*, 550 U.S. at 555. For these independent reasons, DCA fails to state a
20 claim under the UCL.

21 Even if the Court evaluates the allegations as to each of the UCL’s separate
22 prongs, DCA’s claim must be dismissed. First, DCA can only maintain an
23 unlawful prong claim if it is properly predicated on some other violation of the
24 law. *Berryman v. Merit Property Mgmt, Inc.*, 152 Cal. App. 4th 1544, 1554
25 (2007) (“Under its ‘unlawful’ prong, ‘the UCL borrows violations of other laws . .
26 . and makes those unlawful practices actionable under the UCL.’”) Because
27 DCA has failed to state a claim for fraud and intentional interference with
28

1 contract, it cannot state a claim under the UCL based on an unlawful business
2 practice. *See e.g., Rabago v. Deutsche Bank Nat'l Trust Co.*, No. 5:10-CV-01917-
3 JST (DTBx), 2011 U.S. Dist. LEXIS 60262 at *14-15 (C.D. Cal. June 1, 2011).

4 Second, DCA's claim that ZACR engaged in an unfair business practice
5 also fails. DCA and ZACR are competitors for the .Africa gTLD. A plaintiff who
6 alleges that it has been injured by a direct competitor's unfair act must plead
7 "conduct that threatens an incipient violation of an antitrust law, or violates the
8 policy or spirit of one of those laws because its effects are comparable to or the
9 same as a violation of the law, or otherwise significantly threatens or harms
10 competition." *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th
11 163, 186-87 (1999). DCA has not alleged that ZACR violated an antitrust law and
12 it has not alleged any harm to competition. DCA has only alleged harm to itself.
13 *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1119
14 (C.D. Cal. 2001) (under *Cel-Tech*, plaintiff must show significant threat of harm
15 to competition consistent with the policies of the Sherman and Clayton Acts, not
16 merely harm to the plaintiff's own commercial interests); *Girafa.com, Inc. v.*
17 *Alexa Internet, Inc.*, No. C-08-02745 RMW, 2008 U.S. Dist. LEXIS 78260, at *5-
18 6 (N.D. Cal. Oct. 6, 2008) (holding that plaintiff must show an impact on
19 competition, not just harm to a competitor to state claim under §17200).

20 Third, DCA fails to properly allege a fraudulent business practice. The
21 Ninth Circuit has specifically held that Rule 9(b)'s heightened pleading standard
22 applies to claims for violations of the "unfair" prong of the UCL. *Kearns v. Ford*
23 *Motor Co.*, 567 F. 3d 1120, 1124-25 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp.*
24 *USA*, 317 F.3d 1097, 1103-1104 (9th Cir. 2003). To satisfy this prong of the
25 UCL, DCA is held to a heightened pleading requirement and must identify "the
26 who, when, where, and how" of the alleged misconduct, "what is false and
27 misleading about a statement, and why it is false." *Vess*, 317 F.3d at 1106.

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1 Instead, DCA only alleges that ZACR made misrepresentations to ICANN. FAC
2 ¶ 32. DCA alleges no misrepresentations were made by ZACR to DCA. While
3 DCA purports to allege, in conclusory language, a vague conspiracy between
4 ZACR and ICANN to award the rights of .Africa to ZACR, DCA fails to detail
5 how the conspiracy worked, where it was carried out, who carried it out and when
6 it was carried out. The FAC only alleges that ZACR aggressively lobbied for its
7 application to be granted and that ICANN improperly allowed ZACR's
8 application to proceed. These allegations are insufficient to meet the heightened
9 pleading standard under 9(b), and the claim should be dismissed.

10 DCA's claim under the fraudulent prong of the UCL is also deficient for
11 failure to plead reliance. *In re Facebook PPC Advert. Litig.*, 709 F. Supp. 2d 762,
12 771 (N.D. Cal. 2010) (to state a claim under the fraudulent prong of the UCL
13 plaintiff must plead reliance). “[R]eliance is proved by showing that the
14 defendant's misrepresentations or nondisclosure was ‘an immediate cause’ of the
15 plaintiff's injury-producing conduct.” *Id.* (quoting *In re Tobacco II Cases*, 46 Cal.
16 4th 298, 326 (2009)). As stated above, DCA has alleged no misrepresentations to
17 DCA by ZACR that could have caused any injury to DCA.

18 Finally, DCA's UCL claim is deficient because DCA seeks to recover “full
19 disgorgement of all profits obtained by Defendants.” However, an individual
20 plaintiff in a UCL claim may only recover restitution. *Korea Supply Co. v.*
21 *Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003). In *Korea Supply*, the
22 Supreme Court specifically addressed whether disgorgement of profits that is non-
23 restitutionary in nature is recoverable under the UCL, and held that “an individual
24 may recover profits unfairly obtained to the extent that these profits *represent*
25 *monies given to the defendant . . . an order for restitution is one ‘compelling a*
26 *UCL defendant to return money obtained through an unfair business practice to*
27 *those persons in interest from whom the property was taken’*” (Emphasis
28

1 added.) Here, DCA makes no allegation that it paid any money to ZACR and
2 thus, fails to state a claim for restitution against ZACR.¹

3 **C. DCA Fails to State A Claim for Intentional Interference With**
4 **Contract**

5 DCA's claim for intentional interference with contract should be dismissed.
6 DCA fails to plead any intentional acts by ZACR designed to induce ICANN to
7 breach its obligations to DCA under the terms of the Guidebook. Additionally,
8 DCA has not, and cannot, allege that there was an actual breach or disruption of a
9 contract or that ZACR's acts proximately caused DCA's damages.²

10 **1. The Complaint Fails to Allege Facts Showing that ZACR**
11 **Intentionally Acted to Cause a Breach of Contract**

12 DCA fails to allege facts showing that ZACR induced ICANN to breach its
13 contract with DCA, i.e. the Guidebook. Indeed, the FAC only makes sparse and
14 conclusory allegations, including that ZACR "wrongfully campaigned" and
15 engaged in "improper lobbying efforts." See FAC ¶¶ 28, 111. DCA's allegations,
16 which are not tethered to any actual disruption of the Guidebook, should be
17 dismissed because they are conclusory and without factual support. *Image Online*
18 *Design Inc. v. Internet Corporation for Assigned Names & Nos.*, No. CV 12-
19 08968-DDP (JCx), 2013 U.S. Dist. LEXIS 16896 at *28 (C.D. Cal. Feb. 7, 2013)
20 (dismissing claims for intentional interference with contract where allegations

21 _____
22 ¹ It is unclear from the FAC whether DCA seeks injunctive relief against ZACR
23 under the UCL. A request for injunctive relief should be specifically stated
24 pursuant to Rule 8(a)(3). Both the Fifth Cause of Action and the prayer for relief
25 fail to state whether DCA is seeking injunctive relief under the UCL.

26 ² To plead a claim for intentional interference with contract, DCA must allege: (1)
27 a valid contract between DCA and ICANN, (2) ZACR's knowledge of the
28 contract, (3) ZACR's intentional acts designed to induce breach or disruption of
the contract, (4) actual breach or disruption, and (5) resulting damages. *Image*
Online Design Inc. 2013 U.S. Dist. LEXIS 16896 at *27.

1 were conclusory and, among other things, no facts were alleged identifying the
2 actual disruption of the contract); *Twombly*, 550 U.S. at 555.

3 The only other allegation that ZACR can decipher that might be read to
4 support DCA's intentional interference claim is the contention that: "ZACR made
5 multiple misrepresentations to ICANN in an effort to edge DCA out, including (1)
6 that it had a large number of qualifying endorsements from African governments
7 sufficient to meet the 60% threshold under ICANN rules, and (2) that it had
8 requisite financial capability to operate as a gTLD operator." FAC ¶ 32. Yet,
9 DCA fails to properly allege how these purported misrepresentations were
10 intended to disrupt ICANN's alleged contractual obligations to DCA under the
11 Guidebook. Because DCA has utterly failed to allege any intentional acts by
12 ZACR to induce a breach of contract – which DCA has limited to the Guidebook
13 itself – its claim should be dismissed.³

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17 ³ Importantly, the Guidebook did not require ICANN to award the rights to .Africa
18 to DCA. It merely sets forth the terms and conditions for applying for a gTLD
19 and leaves the decision on whether to approve an application "entirely at
20 ICANN's discretion." *See* Request for Judicial Notice Ex. A (Module 6 ¶3).
21 Thus, DCA's chances of being awarded the rights to .Africa were only
22 prospective, at best. To the extent DCA seeks leave to allege a claim for
23 intentional interference with prospective business relations, that claim would still
24 fail because: (1) DCA alleges nothing more than that ZACR lobbied for approval
25 of its own application in a competitive bidding process; and (2) DCA cannot show
26 that ZACR proximately caused it any damages. *Summit Machine Tool Mfg. Corp.*
27 *v. Victor CNC Sys.*, 7 F.3d 1434, 1442 (9th Cir. 1993) (plaintiff must show
28 something more than competition); *Blank v. Kirwan*, 39 Cal. 3d 311, 330-331
(1985) (affirming order sustaining demurrer because plaintiff could plead no
protectable expectancy and only hope for an economic relationship and a desire
for future benefit).

1 **2. ICANN Did Not Breach The Terms of the Guidebook**

2 The Guidebook’s terms explicitly allow ICANN full discretion in approving
3 an application for a new gTLD. See Request for Judicial Notice (“RJN”) Ex. A
4 (gTLD Applicant Guidebook, Module 6) at ¶ 3. Indeed, the Guidebook states
5 that “ICANN makes no assurances that an application will be approved or will
6 result in the delegation of a gTLD proposed in an application.” *Id.*; *Klein v.*
7 *Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (court “must determine
8 whether the alleged agreement is ‘reasonably susceptible’ to the meaning ascribed
9 to it in the complaint.”)

10 Judge Pregerson has already ruled, in dismissing a breach of contract claim
11 against ICANN in *Image Online Design*, 2013 U.S. Dist. LEXIS 16896 at *10,
12 that “the explicit terms of the Agreement (an application to ICANN for a TLD
13 from the year 2000) contradict the notion that ICANN had an obligation to do
14 anything beyond considering [the plaintiff’s] application.” DCA concedes in its
15 own allegations that ICANN considered DCA’s application. Accordingly, DCA
16 has failed to allege any cognizable breach or disruption of the terms of the
17 Guidebook.

18 **3. DCA Cannot Allege That ZACR Proximately Caused Its**
19 **Damages**

20 DCA cannot allege that ZACR’s conduct proximately caused it damages.
21 “A plaintiff, seeking to hold one liable for unjustifiably inducing another to break
22 a contract, must allege that the contract would have otherwise been performed,
23 and that it was breached and abandoned by reason of the defendant’s wrongful act
24 and that such act was the moving cause thereof. Unless the act complained of was
25 the proximate cause of the injury, there is no liability.” *Augustine v. Trucco*, 124
26 Cal. App. 2d 229, 246 (1954). Here, because the Guidebook provided that
27 ICANN had full discretion in approving an application for a new gTLD, and that
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1 “ICANN makes no assurances that an application will be approved,” DCA can
2 allege nothing more than that it had a desire for future economic benefit. In such
3 cases proximate cause for interference with contract is lacking and the claim
4 should be dismissed. *See e.g., Blank v. Kirwan*, 39 Cal. 3d 311, 330-331 (1985)
5 (affirming dismissal because “[i]n light of the city council’s broad discretion to
6 grant or deny a license application, plaintiff has not pleaded and can plead no
7 protectable ‘expectancy,’ but at most a hope for an economic relationship and a
8 desire for future benefit.”); RJN Ex. A at ¶¶ 3-4. DCA’s claim for intentional
9 interference with contract should be dismissed.

10 **D. DCA’s Tenth Cause of Action for Declaratory Relief Fails to**
11 **State a Claim**

12 DCA’s Tenth Cause of Action for Declaratory Relief should be dismissed
13 because DCA lacks standing to challenge the validity of agreements or procedures
14 to which it is not a party. DCA seeks declarations from the Court that: (1) the
15 registry agreement between ZACR and ICANN be declared null and void; and
16 (2) that ZACR’s application does not meet ICANN’s standards. FAC ¶ 132.
17 However, it is undisputed that DCA is not a party to either the registry agreement
18 or ZACR’s application to ICANN.

19 Numerous courts have held that a party does not have standing to request a
20 declaratory judgment regarding the validity of a contract to which it is neither a
21 party nor a third-party beneficiary. *See Douglas v. Don King Productions, Inc.*,
22 736 F. Supp. 223, 224 (D. Nev. 1990) (fact that invalidation of promotion contract
23 between third-parties would allow plaintiff to obtain promotion rights did not
24 create standing to seek declaration voiding the contract); *Evans v. Sirius Comput.*
25 *Sols, Inc.*, No. 3:12-cv-46-AA, 2012 U.S. Dist. LEXIS 61552, *4-6, (D. Or. May
26 1, 2012) (applying general rule that only party in privity can seek declaratory
27 judgment on validity of contract); *Mardian Equip. Co. v. St. Paul Fire & Marine*
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1 *Ins. Co.*, No. CV-05-2729-PHX-DGC, 2006 U.S. Dist. LEXIS 60213, *16-18 (D.
2 Ariz. Aug. 22, 2006) (plaintiff failed to demonstrate requisite present adverse
3 legal interest where it was neither party nor third-party beneficiary to contract at
4 issue).

5 DCA alleges that it is entitled to the declarations sought on the ground of
6 *res judicata*, claiming that “the holdings and findings of fact found in the IRP are
7 conclusive for purposes of this proceeding.” FAC ¶ 130. However, even assuming
8 *arguendo* that an IRP decision can provide a basis for *res judicata*, *res judicata* can
9 only be invoked “when the earlier suit: (1) reached a final judgment on the merits;
10 (2) involved the same cause of action or claim; and (3) involved identical parties
11 or privies.” *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 962 (9th Cir. 2006). Here, not
12 only was ZACR not a party to the IRP proceeding, the IRP barred ZACR from
13 even attending the hearing – at DCA’s request. FAC Ex. A (IRP at ¶¶ 40-43).
14 Additionally, the IRP did not involve the same causes of action and the panel did
15 not adjudicate the merits of the ZACR’s Africa application or the validity of the
16 registry agreement between ZACR and ICAAN. Accordingly, *res judicata* cannot
17 support DCA’s request for relief.

18 DCA’s Tenth Cause of Action should be dismissed.

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CONCLUSION

Defendant ZACR respectfully requests that this Court grant ZACR’s Rule 12(b)(6) motion to dismiss. Each of the claims in DCA’s First Amended Complaint is substantively deficient and fails to meet applicable pleading standards.

DATED: April 26, 2016

Respectfully submitted,
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