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14 UNITED STATES DISTRICT COURT
15 FOR THE CENTRAL DISTRICT OF CALIFORNIA

16 RUBY GLEN, LLC

17 Plaintiff,

18 vs.

19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS
21 AND DOES 1-50

22 Defendant

Case No.:

**NOTICE OF AND EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

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

2 **PLEASE TAKE NOTICE** that Plaintiff Ruby Glen, LLC (“Plaintiff”) will and
3 does apply *ex parte* for a temporary restraining order, ordering Defendant Internet
4 Company for Assigned Names and Numbers (“ICANN”) to postpone the auction for
5 the .WEB/.WEBS generic-top level domain (“gTLD”), currently scheduled to begin on
6 July 27, 2016 at 6:00 am PT, pending a hearing on Plaintiff’s anticipated motion for
7 preliminary injunction. This application also respectfully requests expedited discovery
8 from ICANN and two third parties, Nu Dotco, LLC (“NDC”) and Neustar, Inc. (“NSR”)

9 This application is made pursuant to Federal Rule of Civil Procedure 65 on the
10 grounds that good cause exists for a temporary restraining order in that ICANN is
11 imminently holding an auction of last resort for the .WEB/.WEBS gTLD (collectively
12 referred to herein as “.WEB”). ICANN has refused to postpone the .WEB auction
13 despite credible evidence that NDC, one of the auction’s putative participants, is
14 ineligible to participate in the auction. Moreover, ICANN has brazenly violated its own
15 policies and guidelines by abdicating its duty to fully and transparently investigate
16 NDC’s eligibility to participate in the auction. ICANN’s conflict of interest renders its
17 actions all the more dubious—ICANN’s inaction will accrue the entire auction
18 proceeds, which will likely be in the tens of millions of dollars, directly to ICANN.
19 ICANN has refused to agree to Plaintiff’s and other bidders’ simple request to postpone
20 the .WEB auction of last resort to allow for a full and transparent investigation into
21 apparent discrepancies in NDC’s .WEB application. The bidders should have
22 transparency into who they are bidding against at auction. Therefore, ICANN should
23 be prevented from holding the .WEB auction of last resort until Plaintiff’s Complaint,
24 which includes a request for a Preliminary Injunction, is resolved.

25 The .WEB contention set is a unique asset and Plaintiff will suffer irreparable
26 harm if the auction occurs with an ineligible and/or opaque bidder. Additionally,
27

1 Plaintiff asks the Court to Order expedited discovery from ICANN, NDC and NSR.
2 (“NSR”) pertaining to namely, (a) changes to NDC’s ownership and management
3 structure, including Mr. Bezsonoff’s role at NDC and/or NSR; (b) ICANN’s
4 investigation of NDC, and (c) the impact that the recent changes have on NDC’s
5 eligibility to participate in the .WEB gTLD auction.

6 This application is based on this Notice, the memorandum of points and
7 authorities, the papers, records, and pleadings on file in this case, and on such oral
8 argument as the Court allows.

9
10 Dated: July 22, 2016 By: /s/ Paula Zecchini
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Ruby Glen, LLC (“Plaintiff”) seeks immediate court intervention to prevent the threatened and inevitable harm caused by the decision of Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) to proceed with the .WEB generic top level domains (“gTLD”) auction, currently scheduled to proceed on July 27, 2016 at 6:00 am PT.

This case concerns ICANN’s bid process for granting the rights to the .WEB. As relevant to this motion, ICANN was delegated the task of issuing gTLDs such as “.COM,” “.ORG,” or, in this case, “.WEB” by the United States Department of Commerce for the benefit of the community of users of the Internet. In 2012, Plaintiff paid ICANN a mandatory \$185,000 application fee for the opportunity to secure the rights to .WEB. It did so in reliance on ICANN’s agreement to administer the bid process in accordance with (a) the transparency and accountability measures set forth in its Articles of Incorporation and Bylaws and (b) the rules and guidelines contained its Applicant Guidebook.

Over the course of the past four years, Plaintiff worked diligently to follow the rules and procedures promulgated by ICANN. In the past month, ICANN has done just the opposite. Rather than functioning as a disinterested regulator of a fair and transparent bid process, over the last month ICANN has used its authority and oversight to unfairly benefit an applicant who is in admitted violation of a number of provisions of the Applicant Guidebook. Even more problematic is that ICANN’s conduct cannot be disassociated from its inherent conflict of interest in investigating the admitted violations by this third party applicant. Indeed, ICANN’s refusal to postpone the auction guarantees that ICANN will be the sole beneficiary of the likely multi-million dollar proceeds from the .WEB auction—a result that ICANN’s own guidelines identify as a “last resort” outcome.

1 ICANN’s decision to forego a harmless postponement of the .WEB auction to
2 conduct a bona fide and transparent investigation into the issues presented by way of
3 Plaintiff’s Complaint raises serious questions regarding ICANN’s ability to be
4 accountable and transparent in its administration of the gTLD program—the very same
5 issues recently addressed by this Court regarding the .AFRICA gTLD. *See*
6 *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers &*
7 *ZA Central Registry*, Case No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016)
8 (granting Plaintiff’s Motion for Preliminary Injunction and converting temporary
9 restraining order enjoining ICANN from issuing the .AFRICA gTLD pending
10 resolution of Plaintiff’s case). Moreover, ICANN’s steadfast refusal to postpone the
11 auction pending a thorough and transparent investigation into the disqualifying
12 admissions made by a .WEB applicant has placed all other .WEB applicants in a
13 situation where they will be forced to bid against a party that has violated ICANN
14 guidelines by obfuscating changes in its ownership or leadership and, as a result, may
15 be subject to disqualification.

16 Conversely, ICANN will suffer no harm in being enjoined from conducting the
17 .WEB auction of last resort during the pendency of the requested TRO. Indeed, the
18 status quo—refraining from bringing .WEB to market—has remained unchanged since
19 2012. In addition to the direct harm to Plaintiff if the .WEB auction of last resort goes
20 forward, the ramifications of yet another breakdown in ICANN’s transparency and
21 accountability obligations will further harm ICANN and the Internet community at
22 large by (a) broadening the public perception that ICANN lacks either the ability or the
23 willingness to effectively combat the appearance of disparate treatment among gTLD
24 applicants; (b) increasing the outcries by certain members of the United States Congress
25 and others that ICANN lacks the accountability and transparency discipline to be able
26 to transition out of a contract with the United States Governments; and (c) advising

1 gTLD applicants that there will be neither penalty nor recourse for failing to abide by
2 the obligations set forth in the Application Guidebook.

3 In light of the fact that all the relevant factors favor the issuance of a temporary
4 restraining order barring ICANN from conducting the .WEB auction of last resort until
5 this case is resolved, Plaintiff respectfully requests this Court grant the relief requested
6 herein.

7 **II. RELEVANT FACTUAL BACKGROUND**

8 **A. ICANN**

9 ICANN is a nonprofit corporation established “for the benefit of the Internet
10 community as a whole, carrying out its activities . . . through open and transparent
11 processes that enable competition and open entry in Internet-related markets.”
12 Declaration of Paula Zecchini (“Zecchini Decl.”) ¶ 2, Exh. A at Art. IV. ICANN’s
13 Bylaws require ICANN, its Board of Directors, and its staff to act in an open,
14 transparent and fair manner, and with integrity. Specifically, the ICANN Bylaws
15 require ICANN, its Board of Directors, and staff to:

- 16 (a) “Mak[e] decisions by applying documented policies neutrally and
17 objectively, with integrity and fairness,” *id.* at ¶ 3, Exh. B at Art. I, § 2.8;
- 18 (b) “[Act] with a speed that is responsive to the needs of the Internet while, as
19 part of the decision-making process, obtaining informed input from those
20 entities most affected,” *id.*, Exh. B at Art. I, § 2.9;
- 21 (c) “Remain[] accountable to the Internet community through mechanisms
22 that enhance ICANN’s effectiveness,” *id.*, Exh. B at Art. I, § 2.10;
- 23 (d) Ensure that it does not “[a]pply its standards, policies, procedures, or
24 practices inequitably or single out any particular party for disparate
25 treatment unless justified by substantial and reasonable cause, such as the
26 promotion of effective competition,” *id.*, Exh. B at Art. II, § 3; and
27

1 (e) “Operate to the maximum extent feasible in an open and transparent manner
2 and consistent with procedures designed to ensure fairness,” *id.*, Exh. B at
3 Art. II, § 3.

4 **B. The New gTLD Program**

5 In or about 2011, ICANN approved the expansion of a number of the gTLDs
6 available to eligible applicants as part of its 2012 Generic Top Level Domains Internet
7 Expansion Program (the “New gTLD Program”). *See* Declaration of Jonathon Nevett
8 (“Nevett Decl.”) at ¶ 2. In January 2012, ICANN invited eligible applicants to submit
9 applications to obtain the rights to operate various new gTLDs, including .WEB and
10 .WEBS. *See id.*

11 **1. The Application Requirements**

12 As part of the New gTLD Program, ICANN adopted an Applicant Guidebook,
13 which set forth the procedure for applying for the .WEB and .WEBS gTLDs. *See*
14 Zecchini Decl. at ¶ 4, Exh. C. Each gTLD applicant was required to submit an
15 application to ICANN, *see e.g.*, Applicant Guidebook at § 1.1.2, and pay ICANN a
16 “gTLD evaluation fee” of \$185,000, *id.* at § 1.5.1.¹ ICANN then evaluated each
17 application to determine “whether the applicant has the requisite technical, operational,
18 and financial capabilities to operate a registry.” *Id.* at § 1.1.2.5. As part of that
19 evaluation process, “applicants (including all parent companies, subsidiaries, affiliates,
20 agents, contractors, employees and any all others acting on [their] behalf)” were
21 required to provide extensive background information in their respective applications,
22 including the identity of all persons responsible for managing and operating each
23 applicant. *See* Zecchini Decl. at ¶ 4, Exh. C., § 6 at Intro.

24
25
26 ¹ In May 2012, Plaintiff submitted application number 1-1527-54849 for the .WEB
27 contention set, and paid ICANN the required \$185,000 participation fee. *See* Nevett
28 Decl. at ¶ 3.

1 In addition to the initial information required, applicants were under an ongoing
 2 obligation to notify ICANN of any changes to its application with the failure to do so
 3 resulting in the possible denial of an application. *See e.g., See Zecchini Decl.* at ¶ 4,
 4 Exh. C., at § 1.2.7 (stating ongoing duty to update “applicant-specific information such
 5 as changes in financial position and changes in ownership or control of the applicant”);
 6 § 6.1 (confirming that “[a]pplicant agrees to notify ICANN in writing of any change in
 7 circumstances that would render any information provided in the application false or
 8 misleading”). Similarly, under Section 6.10 of the Applicant Guidebook, an applicant
 9 may not “resell, assign, or transfer any of applicant’s rights or obligations in connection
 10 with the application”; violating this provision may independently result in the
 11 disqualification of an active application. *Id.* at § 6.10.

12 **2. ICANN’s Obligations and Investigatory Powers**

13 The Applicant Guidebook obligates ICANN to fully and transparently investigate
 14 each applicant’s background. This investigative authority, willingly provided by each
 15 applicant as part of the terms and conditions set forth in the guidelines contained in the
 16 Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

17 **8. ... In addition, Applicant acknowledges that [sic] to**
 18 **allow ICANN to conduct thorough background screening**
 19 **investigations:**

20 ...

21 c. Additional identifying information may be required to
 22 resolve questions of identity of individuals within the applicant
 23 organization; ...

24 ...

25 **11. Applicant authorizes ICANN to:**

- 1 a. Contact any person, group, or entity to request, obtain,
 2 and discuss any documentation or other information that, in
 3 ICANN’s sole judgment, may be pertinent to the application;
 4 b. Consult with persons of ICANN’s choosing regarding
 5 the information in the application or otherwise coming into
 6 ICANN’s possession...

7 Zecchini Decl. at ¶ 4, Exh. C at §§ 6.8, 6.1.

8 **3. String Contention Resolution**

9 When multiple qualified applicants contend for the same or similar gTLD string
 10 or strings, ICANN oversees a “string contention” process for awarding the gTLD
 11 contention set.² *Id.* at § 1.1.2.10; § 4.1. ICANN encourages applicants to settle string
 12 contention amongst themselves. *Id.* at § 4.1.3. If the applicants are able to do so, then
 13 ICANN receives only the \$185,000 participation fee from each bidder. *See* Nevett Decl.
 14 at ¶ 4.

15 If a private resolution cannot be reached within a certain timeframe, ICANN will
 16 hold what is called “an auction of last resort.” *Id.* § 4.3. Notably, ICANN can delay
 17 the auction at its discretion and under a variety of conditions. *See id.* Unlike the private
 18 resolution of the contention set, ICANN not only receives the participation fee from
 19 each applicant, but it also receives 100% of the proceeds from the auction. *See* Nevett
 20 Decl. at ¶ 4. Since 2014, ICANN has conducted 15 auctions of last resort resulting in
 21 its receipt of \$101,357,812. *See* Zecchini Decl. at ¶ 5, Exh. D. The most profitable
 22 gTLDs from those auctions commanded winning bids of \$41,501,000 (.SHOP),
 23 \$25,001,000 (.APP), \$6,706,000 (.TECH), \$5,588,888 (.REALTY), \$5,100,175
 24 (.SALON) and \$3,359,000 (.MLS). *Id.*

26 ² ICANN groups “identical or similar applied-for gTLD strings” into a “contention
 27 set.” *Id.* at § 4.1.1.

C. Discrepancies in NDC’s .WEB Application

1. NDC’s Initial Application Responses

On June 13, 2012, NDC submitted application number 1-1296-36138 for .WEB. See Zecchini Decl. at ¶ 6, Exh. E. Among other things, the application required NDC to provide “the identification of directors, officers, partners, and major shareholders of that entity.” Zecchini Decl. at ¶ 4, Exh. C (Applicant Guidebook) at § 1.2.1. In its application, NDC provided the following response to Sections 7 and 11:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

1 See Zecchini Decl. at ¶ 6, Exh. E.

2 **2. NDC's Refusal to Agree to a Private Resolution**

3 On June 1, 2016, Plaintiff learned that NDC was the only member of the .WEB
4 contention set unwilling to agree to participate in resolving the contention set by way
5 of a private resolution. See Nevett Decl. at ¶ 5. Of the 9 previous New gTLD Program
6 resolutions that NDC has participated in, this was the first auction in which NDC pushed
7 for an auction of last resort. *Id.* NDC is the only .WEB contention set member that
8 refused to resolve the process privately. *Id.*

9 **3. NDC's Admissions of Changes in Control, Ownership and/or**
10 **Management**

11 On June 7, 2016, Plaintiff contacted NDC to inquire as to whether NDC might
12 reconsider its decision to forego resolution of the .WEB contention set prior to
13 ICANN's auction of last resort. See Nevett Decl. at ¶ 6, Exh. A. In response, NDC
14 stated that its position had not changed. See *id.* NDC also advised, however, that
15 Nicolai Bezsonoff, who is identified on NDC's .WEB application as Secondary
16 Contact, Manager, and COO, is "no longer involved with [NDC's] applications." *Id.*
17 NDC also indicated a potential change in both its management and the ownership,
18 including an admission that the board of NDC had changed to add "several others." *Id.*

19 **D. Plaintiff's Requests for a Transparent and Thorough Investigation**

20 On June 22, 2016, Plaintiff diligently contacted ICANN staff in writing regarding
21 the discrepancies in NDC's application. See *id.* at ¶ 7. Plaintiff also formally raised the
22 issue with the ICANN Ombudsman on or about June 30, 2016, and discussed the matter
23 with ICANN staff and the Ombudsman at ICANN's recent meeting in Helsinki,
24 Finland. See *id.* On July 10, 2016, Plaintiff submitted correspondence to the ICANN
25 Ombudsman in which it provided further information related to the statements made by
26 NDC. See *id.*

1 At every opportunity, Plaintiff raised the need for a postponement of the .WEB
2 auction to allow ICANN (and the other applicants) time to investigate and address the
3 contradictory representations made by NDC in relation to its pending application and
4 status as an auction participant. *See id.* at ¶ 8. On July 11, 2016, Radix (on behalf of
5 DotWeb Inc.) and Schlund Technologies GmbH, each members of the .WEB contention
6 set, sent correspondence to ICANN stating their own concerns in proceeding with the
7 .WEB auction as currently scheduled. The correspondence stated:

8
9 We support a postponement of the auction, to give ICANN and the other
10 applicants time to investigate whether there has been a change of
11 leadership and/or control of another applicant, NU DOT CO LLC. To do
12 otherwise would be unfair, as we do not have transparency into who leads
and controls that applicant as the auction approaches.

13 *See Zecchini Decl.* at ¶ 7, Exh. F.

14 On July 13, 2016, ICANN issued a statement denying the collective request of
15 multiple members of the .WEB contention set to postpone the July 27, 2016 auction to
16 allow for a full and transparent investigation into apparent discrepancies in the NDC
17 application, as highlighted by NDC's own statements. *See id.* at ¶ 8, Exh. G. Without
18 providing any detail, ICANN simply stated as follows:

19
20 Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter,
21 and to date we have found no basis to initiate the application change request process or postpone the
22 auction.

23 *See id.*

24 **E. Ruby Glen's Request for Reconsideration**

25 ICANN's Bylaws provide an established accountability mechanism by which an
26 entity that believes it was materially affected by an action or inaction by ICANN staff
27 that contravened established policies and procedures may submit a request for

1 reconsideration or review of the conduct at issue. ICANN's Board Governance
2 Committee conducts the review. *See* Zecchini Decl. at ¶ 4, Exh. C at Art. IV, §2.2.

3 On July 17, 2016, Plaintiff and Radix FZC, another member of the .WEB
4 contention set, jointly submitted a Reconsideration Request to ICANN, in response to
5 the actions and inactions of ICANN staff in connection with the decision set forth in the
6 ICANN's July 13, 2016 correspondence. *See* Zecchini Decl. ¶ 9, Exh. H. The
7 Reconsideration Request sought reconsideration of (a) ICANN's determination that it
8 "found no basis to initiate the application change request process" in response to the
9 contradictory statements of NDC and (b) ICANN's improper denial of Applicants' (and
10 at least one other .WEB applicant's) request to postpone the .WEB auction, currently
11 scheduled for July 27, 2016, which would have provided ICANN and the .WEB
12 applicants the time necessary to conduct a full and transparent investigation into
13 material discrepancies in NDC's application and its eligibility as a contention set
14 member, as well as provide all the applicants transparency into the entity with which
15 they are competing. *See id.*

16 On July 21, 2016, ICANN denied the Request for Reconsideration. *See id.* ¶ 10,
17 Exh. I. In doing so, ICANN simply relied on statements from NDC that directly
18 contradicted those contained in NDC's earlier correspondence. *Id.* Once again, despite
19 the clear credibility issues raised by NDC's own contradictory statements, ICANN
20 failed and refused to contact Mr. Bezsonoff or interview the other individuals identified
21 in Sections 7 and 11 of NDC's application prior to reaching its conclusion. *Id.*
22 ICANN's response effectively doubled-down on its initial decision, without any
23 meaningful investigation into the clearly contradictory statements made by NDC within
24 in the span of a month by stating that there was "no evidence to suggest that [NDC's]
25 application was no longer accurate." *Id.*

1 On July 22, 2016, Plaintiff initiated ICANN's Independent Review Process by
2 filing ICANN's Notice of Independent Review. See Nevett Decl. at ¶ 9. Pursuant to
3 ICANN's New gTLD Program Auctions guidelines, a contention set would only
4 proceed to auction where all active applications in the contention set have "**no pending**
5 **ICANN Accountability Mechanisms**," i.e., no pending Ombudsman complaints,
6 Reconsideration Requests or IRPs. See ICANN's New gTLD Program Auctions page,
7 available at <https://newgtlds.icann.org/en/applicants/auctions> (emphasis added); see
8 also Zecchini Decl., Exh. B at Art. IV.

9 **F. ICANN's .WEB Auction of Last Resort is Imminent**

10 ICANN's .WEB auction of last resort is presently scheduled for July 27, 2016.
11 In denying the Reconsideration Request, ICANN confirmed that it would not postpone
12 the July 27, 2016 to conduct a further investigation as requested. See Zecchini Decl. at
13 ¶ 10, Exh. I.

14 **III. GOOD CAUSE EXISTS TO GRANT THIS APPLICATION ON AN EX**
15 **PARTE BASIS**

16 To warrant *ex parte* relief, the moving party must show (1) that its "cause will be
17 irreparably prejudiced if the underlying motion is heard according to regular noticed
18 motion procedures," and (2) that "the moving party is without fault in creating the crisis
19 that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect."
20 *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F.Supp. 488, 492 (C.D. Cal. 1995).
21 As set forth more fully herein, Plaintiff easily makes such a showing.

22 The parties are before this Court because ICANN refused requests by multiple
23 members of the .WEB contention set to *briefly* postpone the pending auction of last
24 resort in order to allow for a fair and open investigation into the contradictory statements
25 made by NDC in relation to its application. ICANN has indicated that .WEB will
26 proceed to auction on July 27, 2016 at 6:00 a.m. PT. As a result, there is now an
27

1 imminent threat of irreparable harm caused not only by (a) the conduct of the .WEB
2 auction itself but also by (b) the resulting issuance of the .WEB to the winning bidder.
3 As of the filing of this Application, the auction date is less than three business days
4 away.

5 The facts presented with this Application demonstrate that Plaintiff had no part
6 in creating this emergency. To the contrary, Plaintiff diligently raised the issue relating
7 to admitted changes in the disclosures made in NDC's application upon discovery. To
8 the extent fault must be allocated, the urgency underlying this application was created
9 by ICANN's decision to abdicate responsibility for conducting the bid process in a
10 transparent manner. To avoid this motion, ICANN needed only to abide by its own
11 rules and guidelines in fully investigating each applicant's background, and changes
12 thereto, even if such an investigation would result in a slight postponement of the .WEB
13 auction of last resort.

14 **IV. Plaintiff Is Entitled to Issuance of a Temporary Restraining Order**

15 The purpose of a temporary restraining order is to preserve the status quo pending
16 a more complete hearing. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters &*
17 *Auto Truck Drivers Local No. 70 of Alameda County*, 415 U.S. 423, 439 (1974).
18 Allowing ICANN to complete the impending auction would thus disturb the current
19 status quo before Plaintiff has an opportunity to have its case heard on the merits.
20 Plaintiff therefore requests that this court issue a temporary restraining order pursuant
21 to Rule 65(b) of the Federal Rules of Civil Procedure.

22 "The standard for issuing a temporary restraining order is the same as the
23 standard for issuing a preliminary injunction." *U.S. Cellular Inv. Co. of Los Angeles,*
24 *Inc. v. AirTouch Cellular*, No. CV 99-12606 DT BQRX, 2000 WL 349002, at *5 (C.D.
25 Cal. 2000); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp.
26
27

1 1320, 1323 (N.D. Cal. 1995). The standards for granting of a preliminary injunction in
2 the Ninth Circuit are well established.

3 A party seeking a preliminary injunction must fulfill one of two standards,
4 described in this circuit as “traditional” and “alternative”:

5 Under the traditional standard, a court may issue preliminary
6 relief if it finds that (1) the moving party will suffer irreparable
7 injury if the relief is denied; (2) the moving party will probably
8 prevail on the merits; (3) the balance of potential harm favors
9 the moving party; and (4) the public interest favors granting
10 relief.

11 Under the alternative standard, the moving party may meet its
12 burden by demonstrating either (1) a combination of probable
13 success and the possibility of irreparable injury or (2) that
14 serious questions are raised and the balance of hardships tips
15 sharply in its favor.

16 *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987) (citations omitted) (paragraph
17 breaks added). The “traditional test” and the “alternative test” represent “a continuum
18 of equitable discretion whereby the greater the relative hardship to the moving party,
19 the less probability of success must be shown.” *Regents of Univ. of Calif. v. ABC, Inc.*,
20 747 F.2d 511, 515 (9th Cir. 1984).

21 Because of the urgency involved and the limited time that temporary restraining
22 orders remain in effect, declarations and other supporting evidence need not conform to
23 strict evidentiary standards. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394
24 (9th Cir. 1984). Instead, “[t]he weight to be given such evidence is a matter for the
25 Court’s discretion, upon consideration of the competence, personal knowledge and
26 credibility of the affiant.” *Bracco v. Lackner*, 462 F.Supp.436, 442 (N.D. Cal. 1978).

1 Plaintiff is entitled to the issuance of a temporary restraining order if either the
2 traditional or the alternative standard is met. Here, the evidence satisfies both the
3 traditional and the alternative standards, which justifies the issuance of a temporary
4 restraining order.

5 **A. Plaintiff Is Entitled to Issuance of a Temporary Restraining Order**
6 **under the Traditional Standard**

7 **1. Plaintiff Has A Probability of Prevailing on Each of Its Claims**

8 The evidence establishes that Plaintiff will probably prevail on the merits on one
9 or more of the claims set forth in the Complaint. ICANN has openly violated its own
10 policies and guidelines in refusing to transparently investigate NDC and to ensure the
11 accountability and legitimacy in the ongoing .WEB bid process. ICANN's actions give
12 rise to a likelihood that Plaintiff will prevail on each of the claims set forth in its
13 Complaint.

14 a. ICANN Breached the Parties' Agreement

15 The elements of a cause of action for breach of contract are: (1) the existence of
16 the contract; (2) performance by the plaintiff or excuse for nonperformance; (3) breach
17 by the defendant; and (4) damages. *First Commercial Mortgage Co. v. Reece*, 89
18 Cal.App.4th 731, 745 (2001). Here, Plaintiff and ICANN entered into an agreement
19 whereby ICANN agreed to allow Plaintiff to participate in the contention set procedure
20 for .WEB in exchange for the payment of \$185,000 participation fee. Plaintiff
21 completed the required application, made the requisite payment, and ICANN approved
22 Plaintiff for participation on July 19, 2013. As part of the parties' agreement, ICANN
23 required each applicant, including Plaintiff, to agree to various rules and procedures as
24 set forth in the Applicant Guidebook.

25 The Applicant Guidebook obligates ICANN to, among other things, conduct a
26 thorough investigation into each of the applicants' backgrounds. The Applicant
27

1 Guidebook further requires applicants to update their relevant background information
2 if and when changes occur. This investigation is necessary to ensure the integrity of the
3 auction process and the existence of a level playing field among those competing to the
4 secure the rights to a particular new gTLD. It properly identifies the members of a
5 contention set and also ensures that each applicant is capable of administering any new
6 gTLD that it may secure at auction, thereby benefiting the public at large. As a result,
7 this obligation was a material term in the parties' agreement.

8 ICANN breached its obligation to conduct a thorough investigation into the
9 change in management and possible change of ownership of NDC and to determine
10 whether NDC remained eligible to participate in the contention set process. Instead,
11 ICANN unapologetically rushed through an inadequate, cursory inquiry of NDC as a
12 pretext to confirm its qualification so that the auction of last resort could remain on
13 calendar as scheduled. These facts support a finding that Plaintiff is likely to prevail on
14 its claim for breach of contract.

15 b. ICANN Breached the Covenant of Good Faith and Fair Dealing

16 The same is true with respect to Plaintiff's claim for breach of the implied
17 covenant of good faith and fair dealing. "[E]very contract imposes upon each party a
18 duty of good faith and fair dealing in the performance of the contract such that neither
19 party shall do anything which will have the effect of destroying or injuring the right of
20 the other party to receive the fruits of the contract." *Storek & Storek, Inc.v. Citicorp*
21 *Real Estate, Inc.*, 100 Cal.App.4th 44, 55 (2002). Here, ICANN's refusal to conduct a
22 good faith investigation into the disqualifying admissions of NDC in order to secure the
23 results of the auction of last resort for its own self-serving benefits constitutes an
24 undeniable breach of the good faith and fair dealing required of ICANN in conducting
25 its obligations. As such, Plaintiff is likely to prevail on its second cause of action.
26
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1 c. ICANN's Failure to Conduct a Thorough and Transparent
2 Investigation Is, At Minimum, Negligence

3 “Negligence is the failure to use reasonable care to prevent harm to oneself or to
4 others. A person is negligent if he or she does something that a reasonably careful
5 person would not do in the same situation or fails to do something that a reasonably
6 careful person would do in the same situation.” *Coppola v. Smith*, F.Supp.2d 993, 1013
7 (E.D. Cal. 2013). “Actionable negligence is traditionally regarded as involving the
8 following: (1) a *legal duty* to use due care; (2) a *breach* of such legal duty; (3) the breach
9 as the *proximate or legal cause* of the resulting injury;” and (4) damages. *Jackson v.*
10 *AEG Live, Inc.*, 233 Cal.App.4th 1156, 1173 (2015) (citation and internal quotations
11 omitted).

12 ICANN owed Plaintiff and every other member of the contention set a duty to
13 act with proper care and diligence in administering the .WEB auction process in
14 accordance with its own Bylaws, Articles of Incorporation, and the rules and procedures
15 as stated in the Applicant Guidebook. ICANN breached the duty owed Plaintiff by
16 failing to use reasonable care in conducting an adequate investigation into apparent
17 violations of the Applicant Guidebook raised by NDC's disqualifying admissions to
18 Plaintiff. For example, ICANN only relied on the self-serving representations of NDC
19 and failed to conduct any interviews of any of the persons identified by NDC in its
20 disqualifying admissions or to require the production of documents and related
21 agreements to determine whether a change of management or ownership occurred since
22 2012 when NDC submitted its application.

23 Plaintiff will also undoubtedly be harmed as a proximate cause of ICANN's
24 negligence. Plaintiff agreed to participate in .WEB contention set based on its
25 understanding that ICANN would act fairly, objectively, and with transparency, that
26 ICANN would honor its obligation to ensure the continued compliance of all
27

1 participants, and that Plaintiff would be participating on a fair and even playing field.
2 Now, Plaintiff and the other applicants' find themselves forced to go to auction against
3 an unknown and unvetted competitor. ICANN's negligence would result in the lost
4 opportunity for such participation, it would render Plaintiff's payment of \$185,000 to
5 participate superfluous, and it would result in substantial financial losses and goodwill.

6 In light of the above, Plaintiff is likely to prevail on its negligence claim.

7 d. ICANN's Actions Violate California's Unfair Competition Law
8 ("UCL")

9 Section 17200 of California's Business & Professions Code prohibits "any
10 unlawful, unfair or fraudulent business act or practice." *Cel-Tech Communications v.*
11 *Los Angeles Cellular Telephone*, 20 Cal.4th 163, 180 (1999). The statute is written in
12 the disjunctive, so it is violated where a defendant's conduct violates any of the
13 foregoing prongs. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th
14 Cir. 2012). Courts have consistently interpreted the language of the UCL broadly. *See*
15 *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal.App.4th 499, 519 (1997). It is not necessary
16 to show that the defendant intended to injure anyone. *See id.* at 520 (citing *State Farm*
17 *Fire & Casualty Co. v. Superior Court*, 45 Cal.App.4th 1093, 1102 (1996)).

18 1. *ICANN's Conduct Violates the Unlawful Prong*

19 The "unlawful" prong under Section 17200 "borrows violations of other laws . .
20 . and makes those unlawful practices actionable under the UCL." *Lazar v. Hertz Corp.*,
21 69 Cal.App.4th 1494, 1505 (1999). "[V]irtually any law or regulation—federal or state,
22 statutory or common law—can serve as [a] predicate for a . . . [section] 17200
23 "unlawful" violation." [Citation.]" *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal.App.4th
24 659, 681 (2006).

25 In this case, ICANN's requirement that Plaintiff waive and release any redress
26 against ICANN *without limitation* violates California Code of Civil Procedure section
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1 1668. Specifically, Section 1668 provides: “All contracts which have for their object,
2 directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful
3 injury to the person or property of another, or violation of law, whether willful or
4 negligent, are against the policy of the law.” Cal. Civ. Code §1668; *see also Reudy v.*
5 *Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116 (N.D. Cal. 2010) (“[A] party
6 cannot contract away liability for his fraudulent or intentional acts or for his negligent
7 violations of statutory law, regardless of whether the public interest is affected.”)
8 (internal citations and quotations omitted).

9 Despite this statutory prohibition, ICANN mandates that all contention set
10 members agree to the following language in the Applicant Guidebook:

11 Applicant hereby releases ICANN . . . from any and all claims by applicant
12 that arise out of, are based upon, or are in any way related to, any action,
13 or failure to act, by ICANN . . . in connection with ICANN’s . . . review of
14 this application. . . . Applicant agrees not to challenge . . . and irrevocably
waives any right to sue or proceed in court.

15 Zecchini Decl. at ¶ 4, Exh. C at § 6.6. This mandate violates Civil Code section 1668
16 and, in turn, constitutes a violation of the UCL. As such, Plaintiff is likely to prevail on
17 this prong of the UCL.

18 *2. ICANN’s Conduct Violates the Fraudulent Prong of the*
19 *UCL*

20 ICANN’s actions independently violate the fraudulent prong of the UCL.
21 “‘Fraudulent,’ as used in the statute, does not refer to the common law tort of fraud but
22 only requires a showing that members of the public “are likely to be deceived.”
23 *Saunders v. Superior Court*, 27 Cal.App.4th 832, 839 (citing *Bank of the West v.*
24 *Superior Court*, 2 Cal.4th 1254, 1267). “This means that a [fraudulent prong] violation,
25 unlike common law fraud, can be shown even if no one was actually deceived, relied
26

1 upon the fraudulent practice, or sustained any damage.” *State Farm Fire & Casualty*
2 *Co. v. Superior Court*, 45 Cal.App.4th 1093, 1105 (1996).

3 Here, the members of the public, namely Plaintiff and the other contention set
4 members, were likely to be deceived by ICANN’s conduct. ICANN affirmatively
5 represented to Plaintiff and others that it would:

- 6 (1) make all decisions in administering the .WEB auction process “by
7 applying documented policies neutrally and objectively, with integrity and
8 fairness;”
- 9 (2) “[act] with a speed that is responsive to the needs of the Internet while, as
10 part of the decision-making process, obtaining informed input from those
11 entities most affected;”
- 12 (3) “[r]emain[] accountable to the Internet community through mechanisms
13 that enhance ICANN’s effectiveness;”
- 14 (4) “apply its standards, policies, procedures, or practices inequitably or single
15 out any particular party for disparate treatment;” and
- 16 (5) require applicants to update their applications with “any change in
17 circumstances that would render any information provided in the
18 application false or misleading,” including “applicant-specific information
19 such as changes in financial position and changes in ownership or control
20 of the applicant.”

21 Despite these representations, ICANN failed to adhere to its promises to Plaintiff and
22 the other contention set members. Plaintiff, and the other contention set members, were
23 not only likely to be deceived into believing that ICANN would honor its
24 representations, but they were actually deceived as each paid ICANN a participation
25 fee of \$185,000 based on the transparent process promised. As such, Plaintiff is likely
26 to prevail under the fraudulent prong of the UCL.

1 e. Plaintiff Is Entitled to Declaratory Relief

2 Plaintiff seeks a declaration from the Court that the Prospective Release
3 contained in the Applicant Guidebook is void as against public policy. As set forth
4 above, ICANN mandated that each of the contention set members, including Plaintiff,
5 prospectively release ICANN and waive any right to sue it in this or any other court for
6 any reason. This prospective release and waiver violates California Civil Code section
7 1668 and thus, should be deemed void as against public policy. *See Baker Pacific Corp.*
8 *v. Suttles*, 220 Cal.App.3d 1148, 1157 (1990) (holding void a covenant not to sue that
9 released “for, from and against any and all liability whatsoever” of “any and all claims
10 of every nature” because it excluded fraud, intentional acts, and violations of statutory
11 law).

12 2. Plaintiff Will Suffer Irreparable Harm If The .WEB Auction
13 Proceeds As Scheduled

14 Plaintiff will be irreparably harmed if this TRO is not granted. The auction of
15 last resort is scheduled to occur at 6:00 a.m. on July 27, 2016. ICANN has refused to
16 postpone that date in order to conduct a thorough and transparent investigation into the
17 admissions by NDC that there has been a change in its management and possibly
18 ownership since its original application in 2013, potentially disqualifying NDC as a
19 .WEB contention set member. NDC’s potential disqualification is material because
20 NDC is the only applicant under suspicion of any violations and the sole objector to the
21 private process. As a result of NDC’s objection and ICANN’s refusal to postpone, the
22 auction of last resort will proceed as scheduled absent an order from this Court.

23 The auction is called “last resort” for a reason – once the auction occurs, there is
24 no turning back. The purchaser will be required to pay ICANN the successful bid price
25 in the amount of tens of millions of dollars. As the successful bidder, the winner can
26 reasonably be expected to take immediate steps to monetize their substantial investment
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1 by bringing .WEB to market as quickly as possible. Indeed, by the time a final
2 resolution of the merits in this case is adjudicated, the purchaser of .WEB will likely
3 have already launched the gTLD publicly for which rescission would likely be
4 inequitable both to the purchaser and the public at large.

5 Even if the auction itself could be undone, it will nonetheless result in the
6 disclosure of how each of the applicant's valued .WEB as well as the bidding strategies
7 for each bidder. This highly confidential information will become irrevocably known
8 to each of the contention set members as the auction of last resort process plays out.
9 The auction of last resort is a staged bidding process with the lowest bidder(s) failing
10 to advance to the next round. *See Zecchini Decl. at Exh. J* (describing this process
11 known as a "simultaneous ascending clock auction"). Although the bidders do not
12 know the identity of those who fall out, all of the bidders discover the valuations placed
13 on .WEB by the other participants. While the disclosure of this information is without
14 consequence in a regular bidding process, each of the participants will be armed with
15 this information if the last resort auction unwound thereby fundamentally prejudicing
16 the next bid process.

17 Moreover, should an auction proceed with a potentially ineligible participant,
18 there is significant risk of compromise to the ICANN auction's integrity resulting in the
19 winner paying an unfairly inflated price. For example, should Plaintiff win the ICANN
20 auction with NDC as the second highest bidder, under the ICANN auction rules the
21 price Plaintiff pays would be the last bid made by NDC. *See Zecchini Decl. at Ex. J, §*
22 *47(b)*. If NDC is ineligible, however, the winning bid should have been the amount
23 paid by the third highest bidder. *Id.* The only party to gain in this patently unfair
24 scenario would be ICANN. As an additional aggravating factor, given the public nature
25 of the ICANN auction of last resort, all applicants like Plaintiff who directly or
26 indirectly through affiliates have other gTLDs that have yet to be resolved would be
27

1 irreparably harmed by the unfair and untimely reveal of their bidding amounts and
2 strategies.

3 Nor can Plaintiff or the other contention set members be adequately compensated
4 for their participation in the currently tainted auction process. The auction of last result
5 will resort in a lost opportunity for Plaintiff and the other contention set members to
6 secure .WEB through the private process, particularly in the event that it is determined
7 after a reasonable investigation that NDC should have been disqualified. In that event,
8 the auction of last resort will result in a lost opportunity for Plaintiff and/or other
9 contention set members from becoming the prevailing party and securing both the
10 financial benefits and the goodwill associated with being the exclusive .WEB registry.
11 Even if the auction is unwound, the members' bidding strategies and values will be
12 irrevocably disclosed. Monetary damages cannot adequately compensate Plaintiff (or
13 the other contention set members) for these losses. Thus, absent a TRO, Plaintiff will
14 suffer irreparable harm.

15 Only three months ago this district recognized that irreparable harm would occur
16 in nearly identical circumstances. Specifically, the Central District held that irreparable
17 harm would result if ICANN was permitted to assign the .AFRICA gTLD during the
18 pendency of an action filed by a contention set member alleging ICANN's breach of its
19 obligations under promulgated guidelines for that gTLD. *See DotConnectAfrica Trust*
20 *v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*, Case
21 No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016) (granting Plaintiff's Motion for
22 Preliminary Injunction enjoining ICANN from issuing the .AFRICA gTLD pending
23 resolution of Plaintiff's case).

24 In issuing both a TRO and a preliminary injunction, the Central District in *DCA*
25 *Trust* recognized the unique nature of gTLDs and the irreparable harm that will result
26 if an injunction did not issue. As the Court explained, "without preliminary relief, DCA
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1 will lose the opportunity to fairly have its application reviewed by ICANN. If DCA
2 loses this opportunity, DCA will suffer irreparable harm because .Africa can be
3 delegated only once, and only by ICANN. [citations omitted]. Further, only one entity
4 can operate .Africa. [citations omitted].” *DCA Trust*, Case No. 2:16-cv-00862-RGK-
5 JC, Dkt. 75 at p. 7. As a result, the court found that “due to the unique nature of .Africa,
6 [DCA] will likely suffer irreparable harm without preliminary relief.” *Id.*

7 The same is true here. Plaintiff seeks to preserve the opportunity to have its
8 application as well as the applications of the other contention set members reviewed
9 fairly, including a determination after a thorough and reasonable investigation by
10 ICANN regarding whether NDC remains qualified to participate in light of its recent
11 admissions that its management—and possibly its ownership—has changed. In the
12 event NDC misrepresented to ICANN that no such change had occurred despite its
13 written admissions to Plaintiff to the contrary, then NDC should be disqualified from
14 the contention set and the remaining contention set members would be free to complete
15 the process in an unadulterated ICANN auction of last resort or by private resolution.

16 ICANN has denied Plaintiff and the other contention set members the
17 accountability mechanisms required under the Applicant Guidelines. As a result, but
18 for the issuance of the TRO as requested, ICANN will delegate .WEB to the highest
19 bidder at the auction of last resort scheduled for 6:00 a.m. on July 27, 2016. The winner
20 of that bid will be the only registry authorized to operate .WEB.

21 **3. Balancing of the Harms Favors Plaintiff**

22 The irreparable harm discussed above also firmly favors granting a TRO under a
23 balancing of the harm analysis. Unlike the irreparable harm looming over Plaintiff as
24 a result of the July 27, 2016 auction of last resort, ICANN cannot claim any actual harm
25 as a result of any brief postponement of the auction of last resort. ICANN has no vested
26 interest in the outcome of the auction process unless and until the contention set
27

1 members are unable to reach an agreement amongst themselves regarding who should
2 become the registry for the .WEB. Only if the process ends up in an auction of last
3 resort would ICANN then receive the windfall of the auction results. Here, the only
4 contention set member who is objecting to the private process is NDC, a member who,
5 by its own admission, may be disqualified from objecting to the private process. If,
6 indeed, NDC is disqualified, then ICANN cannot be harmed by the postponement of
7 the auction of last resort because no such auction would otherwise occur.

8 Moreover, even if there is a final determination after a thorough, transparent, and
9 reasonable investigation that NDC is qualified to continue its participation in the auction
10 process, then the brief delay will result in only *de minimis* harm, if any, to ICANN. The
11 auction process has been ongoing for more than four years. ICANN first announced its
12 intention to auction the .WEB in 2012. Almost four years later, in April 2016, ICANN
13 finally opened the auction process to the contention set members and set an auction of
14 last resort three months later. Plaintiff only discovered the issues giving rise to this case
15 on June 1, 2016. Despite Plaintiffs and other contention set members pleas for ICANN
16 to conduct a thorough, transparent, and reasonable investigation into the disqualifying
17 admission made by NDC, ICANN has refused to do so. A brief postponement of the
18 July 27, 2016 auction as part of this four-year process will not cause any appreciable
19 harm to ICANN. Nor will it cause any harm to the other contention set members as all
20 but NDC wish to pursue the .WEB through the private process rather than the auction
21 of last resort.

22 In fact, a postponement of the .WEB auction would benefit ICANN by providing
23 it with the time to (a) conduct the thorough investigation being requested, including
24 interviewing persons with relevant knowledge and reviewing current records to
25 determine NDC's eligibility status, and (b) avoid the protracted litigation that will ensue
26 if ICANN were to proceed to auction under the current circumstances. By taking this
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1 approach, the court also ensures that greater effect can be given to the resulting vote
2 down the line, reducing future litigation costs and transactional and liability uncertainty.

3 The weighing of the harms substantially favor Plaintiff.

4 **4. Denying the Relief Requested By Plaintiff Would Ultimately**
5 **Harm the Public Interest**

6 In this case, the failure to grant a TRO would actually *harm* the public interest
7 because it would enable ICANN to escape its obligation to ensure the authenticity of
8 the gTLD application process, and benefit enormously in the process. “The public
9 interest analysis for the issuance of a preliminary injunction requires [the Court] to
10 consider whether there exists some critical public interest that would be injured by the
11 grant of preliminary relief.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,
12 1138 (9th Cir. 2011).

13 Ensuring compliance with the fair and transparent processes that ICANN touts
14 are undoubtedly in the public interest. Furthermore, as a United States Government-
15 authorized monopoly, ICANN is charged with the enormous responsibility to regulate
16 the Internet’s domain name system, the world’s largest public asset. Enforcing the full
17 and transparent process that ICANN promised in discharging this responsibility would
18 preserve and foster the public interest, not harm it. Ensuring that the same rules apply
19 to all applicants in the .WEB auction, and that the applicants are all *qualified* to
20 participate, is more important than forcing a process that will subsequently be
21 challenged and, potentially, unwound.

22 Moreover, allowing .WEB to go through the auction of last resort would likely
23 result in .WEB being available to the public only for the possibility that it may have to
24 be suspended if it was determined that NDC was not qualified to participate in the
25 contention set process and thus, the auction of last resort was fundamentally flawed.
26 The requested TRO will avoid any adverse impact to the public.

1 **B. Plaintiff Is Entitled to Issuance of a Temporary Restraining Order**
2 **Under Either Alternative Standard**

3 Alternatively, Plaintiff is entitled to issuance of a temporary restraining order
4 because either: (1) a combination of probable success on the merits and the possibility
5 of irreparable injury warrant issuing a TRO; or (2) serious questions are raised and the
6 balance of hardships tips sharply in Plaintiff's favor. Although Plaintiff need only meet
7 one of the two criteria mentioned above, here, Plaintiff meets both.

8 **1. Plaintiff Has Demonstrated Both a Probability of Success and a**
9 **Possibility of Irreparable Harm**

10 As discussed in detail above, Plaintiff is likely to succeed on the merits of its
11 claims. ICANN's conduct violates both the express terms of the parties' agreement as
12 well as the implied covenant of good faith and fair dealing, it violates the duty owed to
13 Plaintiff, it is contrary to public policy as set forth in California's Civil Code, and it
14 constitutes independent violations of multiple prongs of the UCL. Similarly, Plaintiff
15 has demonstrated more than a possibility that it will suffer irreparable harm if the TRO
16 is not issued. Thus, under this alternative approach, the TRO should issue.

17 **2. A TRO Should Issue under the "Sliding Scale" Approach**

18 As the Ninth Circuit has recognized, "[t]he district court should balance the
19 relative hardship to the parties that would result from granting or denying a preliminary
20 injunction. If the balance tips decidedly towards plaintiffs, and if plaintiffs have raised
21 questions serious enough to require litigation, the injunction should issue." *Aguirre v.*
22 *Chula Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976).

23 The balancing of the relative hardships tip substantially in favor of the relief
24 requested. As discussed above, .WEB is a unique asset. Only one person can act as the
25 .WEB registry. Once the auction of last resort commences, the disclosure of bidding
26 strategies and valuations cannot be unlearned. Moreover, given the timing of
27

1 adjudicating the merits of this case, unwinding the auction will have adverse impacts
2 upon both the winning registry and the public, which militate against such action.

3 In contrast, a brief postponement of the last resort auction to allow for a thorough,
4 transparent, and reasonable investigation into the disqualifying admissions by NDC will
5 not create any hardship on ICANN. ICANN contractually agreed to conduct the very
6 investigation sought by Plaintiff. Indeed, ICANN's representation that it would conduct
7 such an investigation was a material inducement by Plaintiff into entering into the
8 parties' agreement. Thus, requiring ICANN to honor its stated commitment does not
9 create a hardship.

10 Nor does a brief postponement itself create a hardship. This process has been
11 pending for four years. ICANN took three years from the date of approving the
12 contention set members to set the auction of last resort. Requiring a brief postponement
13 of the auction will have no adverse impact on ICANN. This is especially true given the
14 fact that ICANN does not have a vested interest in the outcome of the .WEB bid process
15 unless and until the conclusion of the auction of last resort. Thus, delaying the last
16 resort auction to determine NDC's eligibility in light of its disqualifying admissions
17 cannot harm ICANN, particularly if NDC is disqualified and the remaining contention
18 set members pursue the private process.

19 In addition to the hardships balancing entirely in the favor of an injunction,
20 Plaintiff has raised, at the very least, serious questions regarding ICANN's compliance
21 with its obligations of administering the .WEB contention set with neutrality and
22 transparency, whether it met its obligation to continually investigate the qualification
23 of all contention set members, particularly when confronted with disqualifying
24 admissions by NDC, and whether it has failed to do so because of its own conflict of
25 interest.

26 Thus, under this alternative approach, the TRO should issue.

1 **V. THE COURT SHOULD ORDER EXPEDITED DISCOVERY**

2 This Court has authority, upon good cause shown, to order expedited discovery.
3 *Semitoool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002); *see*
4 *also Interserve, Inc. v. Fusion Garage PTE, Ltd.*, No. C 09-05812, 2010 WL 143665,
5 at *2 (N.D. Cal. Jan. 7, 2010) (courts in the Ninth Circuit “use the ‘good cause’ standard
6 to determine whether discovery should be allowed to proceed prior to a Rule 26(f)
7 conference.”). “Good cause may be found where the need for expedited discovery, in
8 consideration of the administration of justice, outweighs the prejudice to the responding
9 party.” *Interserve*, at *2 (quoting *Semitoool, Inc. v. Tokyo Electron America, Inc.*, 208
10 F.R.D. 273, 276 (N.D. Cal. 2002).

11 Plaintiff seeks narrowly tailored discovery of ICANN and third parties NDC and
12 NSR as to the disputed issue in this case—namely, (a) changes to NDC’s ownership
13 and management structure, including Mr. Bezsonoff’s role at NDC and/or NSR (*see*
14 Nevett Decl. at ¶ 6, Exh. A); (b) ICANN’s investigation of it, and (c) the impact that
15 the recent changes have on NDC’s eligibility to participate in the .WEB string
16 contention. More specifically, Plaintiff requests the Court order the scheduling of
17 depositions to be permitted on three (3) business days’ notice with deponent be required
18 to produce as follows:

- 19 · From ICANN: all documents in its possession and/or under its corporate
20 control related to its investigation into NDC’s admissions to changes in its
21 management, control, or ownership;
22 · From NDC: all documents in its possession and/or under its control related
23 to regarding the status or admitted changes to its management, control, or
24 ownership, including any changes in by Mr. Bezsonoff’s status with NDC;
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- 1 · From NSR: all documents in its possession and/or under its control related
2 to its employee, Mr. Bezsonoff and his status with NDC and any interest
3 held by NSR in NDC or NDC's .WEB gTLD application;

4 Expedited discovery will help to resolve this matter in an expedited fashion,
5 because it will facilitate the full and transparent investigation that ICANN should have
6 conducted to ensure the legitimacy of the gTLD delegation process, and resolve the
7 issue of NDC's eligibility to participate in the .WEB contention set string contention.
8 ICANN, NDC and NSR will suffer no prejudice as a result of these discovery requests.
9 ICANN should have already disclosed the information related to its investigation
10 pursuant to its duty to oversee the gTLD delegation process and ensure its fairness and
11 transparency. Similarly, NDC already agreed to make public all of the relevant
12 information requested on its gTLD application. In so doing, NDC took on the
13 affirmative obligation to publicly disclose any changes to its ownership or management
14 structure.

15 NSR is in possession of information that goes to the heart of the dispute between
16 Plaintiff and ICANN – what relationship Mr. Bezsonoff has with NSR, who is not an
17 approved contention set member, and whether that relationship resulted in a required
18 disclosure on NDC's behalf. *See* Nevett Decl. at ¶ 6, Exh. A. NSR also is uniquely
19 positioned to provide evidence that will test the veracity of the conflicting statements
20 asserted by NDC. Requiring NSR to participate in limited discovery narrowly tailored
21 to the core issues in this case does not constitute the type of prejudice that would bar
22 Plaintiff's expedited discovery request.

23 Therefore, the need for expedited discovery, in consideration of the
24 administration of justice, outweighs any potential prejudice to ICANN, NDC or NSR.

25 **VI. CONCLUSION**

1 For the foregoing reasons, Plaintiff Ruby Glen, LLC respectfully asks this Court
2 to:

3 (a) Grant its *ex parte* application for a temporary restraining order prohibiting
4 Defendant ICANN, along with those acting in concert with any of said defendants, from
5 proceeding with the .WEB auction of last resort, currently scheduled for July 27, 2016;

6 (b) Grant its request for expedited discovery; and

7 (c) Set a hearing and briefing schedule for Plaintiff's Motion for Preliminary
8 Injunction.

9
10 Dated: July 22, 2016 _____

By: /s/ Paula Zecchini

11 Paula L. Zecchini (SBN 238731)

12 Aaron M. McKown (SBN 208781)

13 Jeffrey M. Monhait (*pro hac vice* to be submitted)

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16 Seattle, WA 98104

17 Telephone: 206.340.1000

18 Toll Free Phone: 1.800.423.1950

19 Facsimile: 206.621.8783

20 *Attorneys for Ruby Glen, LLC*

CERTIFICATE OF SERVICE

1 I, [redacted], hereby declare under penalty of perjury as follows:
2

3 I am a [redacted] at the law firm of Cozen O'Connor, with offices at 999
4 Third Avenue, Suite 1900, Seattle, Washington 98104. On July [redacted], 2016, I caused the
5 foregoing **NOTICE OF AND EX PARTE APPLICATION FOR A TEMPORARY**
6 **RESTRAINING ORDER; MEMORANDUM OF POINTS AND**
7 **AUTHORITIES** to be [redacted]
8

9 Executed on July [redacted], 2016
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