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8 DOTCONNECTAFRICA TRUST

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

10 **COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a Mauritius
13 charitable trust,

14 Plaintiff,

15 v.

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

20 Defendants.

Case No. BC607494

[Assigned to Hon. Howard L. Halm]

**NOTICE OF AND MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: December 22, 2016

Hearing: 8:30 a.m.

Dept.: 53

[Filed concurrently: Declarations of Sophia
Bekele Eshete, Ethan J. Brown and Sara C.
Colón]

RESERVATION ID: 161115174199

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

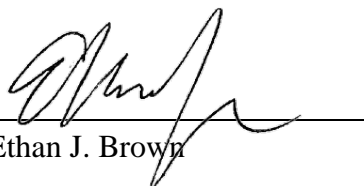
2 **PLEASE TAKE NOTICE** that on December 22, 2016 at 8:30 a.m. or as soon thereafter
3 as the matter may be heard, before the Honorable Howard L. Halm, of the Superior Court of
4 California, Stanley Mosk Courthouse, Department 53, located at 111 N. Hill Street, Los Angeles,
5 CA 90012-3332, Plaintiff DotConnectAfrica Trust (“DCA”) will and does move for a preliminary
6 injunction ordering Defendant Internet Company for Assigned Names and Numbers (“ICANN”)
7 from issuing the .Africa generic top level domain (“gTLD”) until this case has been resolved.
8 Indeed, an injunction has been entered twice – once by ICANN’s own independent review process
9 panel, and once by the Hon. R. Gary Klausner of the U.S. District Court – prohibiting ICANN
10 from engaging in the conduct DCA seeks to enjoin here.

11 This Motion is made pursuant to Code of Civil Procedure § 527 on the grounds that ICANN
12 has failed to follow a binding arbitration order against it and has denied DCA the fair and unbiased
13 gTLD application process it is entitled to. Therefore, ICANN should be prevented from issuing
14 the .Africa gTLD until this case has been resolved. DCA will suffer the destruction of its company
15 and be denied the fair determination of who is entitled to the .Africa domain - a determination that
16 ICANN agreed to follow when DCA applied for the domain. On the other hand, ICANN suffers
17 no harm, and DCA’s only competitor, Defendant ZA Central Registry NPC, suffers either the same
18 harm as DCA, or harm insufficient to justify denying a preliminary injunction.

19 This Motion is based on this Notice of Motion and Motion, the papers, records, and
20 pleadings on file in this case, and on such oral argument as the Court allows.

21
22 Dated: November 15, 2016

BROWN NERI SMITH & KHAN LLP

23
24 By: 
25 Ethan J. Brown

26 *Attorneys for Plaintiff*
27 DOTCONNECTAFRICA TRUST
28

TABLE OF CONTENTS

1 I. INTRODUCTION.....1
2 II. RELEVANT FACTS2
3 A. ICANN2
4 B. DCA and the Top-Level Domain Application2
5 C. ZACR and the AUC’s Top Level Domain Application3
6 D. The Geographic Names Panel and InterConnect Communications4
7 E. The GAC6
8 F. The Independent Review Process7
9 G. ICANN Ignores the IRP’s Authority7
10 H. ICANN’s Processing of DCA’s Application After the IRP Declaration8
11 I. DCA Trust v. ICANN, et al – 2:16-cv-00862-RGK9
12 III. ARGUMENT9
13 A. The Preliminary Injunction in Federal Court Remains Valid9
14 B. Alternatively, This Court Should Issue a Preliminary Injunction10
15 i. DCA demonstrates a strong likelihood of success on the merits10
16 ii. DCA’s harm significantly outweighs any harm to Defendants12
17 iii. ICANN suffers no injury by having to follow its own rules12
18 iv. ZACR Will Suffer Less Harm than DCA12
19 C. ICANN’s waiver argument is void13
20 i. A waiver of fraudulent acts and intentional acts is void13
21 ii. ICANN’s Prospective Release is unconscionable14
22 iii. ICANN’s Prospective Release was procured by fraud15
23 IV. CONCLUSION15
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Ayres v. Wiswall (1884) 112 U.S. 1879

Baker Pacific Corp. v. Suttles, 220 Cal.App.3d 1148.....13

Capri v. L.A. Fitness Int’l, LLC (2006) 136 Cal.App.4th 1075, 108413

Edward Hansen, Inc. v. Kearny P.O. Assoc. 166 N.J. Super. 161 (1979).....9

Hinesley v. Oakshade Town Center (2005) 135 Cal.App.4th 28915

Laguna Vill. v. Laborers’ Int’l Union of N. Am. (1983) 35 Cal.3d 174.....9

Orcilla v. Big Sur, Inc. (2016) 244 Cal.App.4th 98214

Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC
(2012) 55 Cal.4th 22314

Robbins v. Superior Court (1985) 38 Cal.3d 19910

SB Liberty, LLC v. Isla Verde Assn., Inc. (2013) 217 Cal.App.4th 2729

Tunkl v. Regents of California (1963) 60 Cal.2d 92n.4

White v. Davis (2003) 30 Cal.4th 528.....10, 12

Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal.App.4th 155910

STATUTES

Cal. Civ. Code § 1668.....13

Cal. Civ. Code § 1670.514

Cal. Code of Civ. P. § 5279

Cal. Code of Civ. P. §106010

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case concerns Defendant Internet Corporation for Assigned Names and Numbers’
4 (“ICANN”) processing of applications for the rights to the generic top level domain¹ (“gTLD”)
5 .Africa. There are two competing applications for .Africa, DotConnectAfrica Trust (“DCA”) and
6 Intervenor ZA Central Registry (“ZACR”), purportedly sponsored by the African Union, and
7 favored at every opportunity by ICANN. Critically, ICANN’s own internal independent review
8 process (“IRP”) found ICANN in clear violation of its own Articles, Bylaws, and rules.

9 But, despite the IRP’s extensive 63-page Decision outlining ICANN’s wrongful conduct
10 and recommendations, ICANN simply “thumbed its nose” at the IRP, insisting that its decision is
11 non-binding. After losing the IRP on all counts, ICANN claimed to voluntarily follow the IRP
12 decision by placing DCA’s long-pending application back to stages of the process which were
13 already completed, contrary to the IRP ruling, and loaded the dice ensuring the application would
14 once again be denied – which it was on February 17, 2016, before the filing of this action.

15 Significantly, DCA requested that ICANN refrain from taking any further steps in
16 delegating the .Africa domain to ZACR while the IRP was pending. ICANN not only refused, but
17 also held an emergency meeting and entered into a registry agreement – the penultimate step to
18 delegation - two days ahead of schedule. The IRP panel issued an order enjoining ICANN from
19 taking further action. After ICANN improperly rejected DCA’s application the second time, DCA
20 filed suit in this Court. ICANN removed the action, and upon amending its complaint, DCA filed
21 an application for a temporary restraining order, which the Honorable R. Gary Klausner granted.
22 DCA subsequently moved for a preliminary injunction, which Judge Klausner also granted. Both
23 ICANN and ZACR moved for reconsideration. Judge Klausner denied the motion for
24 reconsideration.² Defendants appealed, but the appeal was mooted by the remand.

25 Now, in the event this court refuses to hold the federal court preliminary injunction
26 enforceable and valid, DCA again faces the irreparable harm that justified both the IRP Panel and

27 _____
28 ¹ Common gTLDs include “.com” and “.org”

² DCA acknowledges, as it did in its opposition papers to the Reconsideration Motion, that the District Court’s order granting the preliminary injunction erroneously referenced evidence that did not support its decision. However, even without that error, as argued by DCA and accepted by Judge Klausner, DCA was entitled to a preliminary injunction.

1 Judge Klausner in enjoining ICANN from acting further with respect to the .Africa domain. Given
2 DCA's overwhelming victory before the IRP panel and ICANN's continued bad faith conduct
3 refusing it fair treatment, DCA has a high likelihood of success on the merits. Indeed, ICANN's
4 primary defense is a self-serving prospective release and waiver of all rights to a judicial remedy.
5 But, ICANN's "silver bullet" prospective release goes too far, purporting to absolve ICANN for
6 even the grossest intentional misconduct and is thus void as a matter of law.

7 DCA sought and was granted an injunction against ICANN in two different judicial fora,
8 and the district court affirmed its decision after ICANN and ZACR sought reconsideration. DCA
9 respectfully requests this Court continue the injunction and enjoin ICANN from taking any further
10 steps with respect to delegating the .Africa gTLD.

11 **II. RELEVANT FACTS**

12 **A. ICANN**

13 ICANN is a California non-profit established by the U.S. government. ICANN is tasked
14 with carrying out its activities in conformity with relevant principles law and through enable
15 competition and open-entry in Internet-related markets. (Declaration of Sophia Bekele ("Bekele
16 Decl."), ¶ 10, Ex. 1 at ¶4). ICANN is the only organization in the world that assigns rights to
17 Generic Top-level Domains ("gTLDs"). It therefore yields monopolistic power and can and does
18 force participants in the market for gTLDs to play by its onerous and sometimes self-serving rules.
19 ICANN's own Bylaws state that it shall not apply its standards inequitably or single out any
20 particular party for disparate treatment. (Bekele Decl. ¶17, Ex. 4 at Art. 2 § 3). ICANN is
21 accountable to the Internet community for operating in a manner consistent with its Bylaws and
22 Articles of Incorporation as a whole. (*Id.*, Ex. 4 at Art. 4 § 1).

23 **B. DCA and the Top-Level Domain Application**

24 In March 2012, DCA applied to ICANN for the delegation of the .Africa top-level domain
25 name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New
26 gTLD Program"), an internet resource available for delegation under that program. (*Id.*, ¶ 10, Ex.
27 1, ¶3.) DCA was formed with the charitable purpose of advancing information technology
28 education in Africa and providing a continental Internet domain name to provide access to internet
services for the people of Africa. (*Id.*, ¶ 3.) Put otherwise, DCA's ultimate endeavor was to obtain

1 .Africa and further its charitable efforts through the revenue .Africa would generate. (*Id.*) DCA
2 only sought to act as the registry of .Africa and has not applied to act as a registry for any other
3 gTLD, unlike Intervenor ZACR. (*Id.*, ¶¶ 3 and 5.)

4 In order to apply for a gTLD, all applicants were required to submit to the terms of the
5 gTLD Applicant’s Guidebook (the “Guidebook”). (*Id.*, ¶¶ 13–16). In consideration of ICANN’s
6 promises to abide by its own Bylaws, the Guidebook, and in conformity with the laws of fair
7 competition, Plaintiff paid ICANN a \$185,000.00 mandatory application fee. (*Id.*, ¶4.)

8 ICANN required that applicants for the rights to a geographic gTLD (such as .Africa)
9 obtain endorsements from 60% of the region’s national governments, and no more than one written
10 statement of objection to the application from relevant governments in the region and/or public
11 authorities associated with the region. (*Id.*, ¶ 12, Ex. 3 at § 2.2.1.4.2.) As part of its application
12 for the .Africa gTLD, Plaintiff obtained the endorsements of the African Union Commission
13 (hereinafter the “AUC”), United Nations Economic Commission for Africa (UNECA), among
14 others. (*Id.*, ¶ 19, Ex. 6; ¶ 21, Ex. 10.) Plaintiff was the first to obtain official endorsements/letters
15 of support for the .Africa Internet domain name from these organizations. In April 2010, nearly a
16 year later, the AUC wrote DCA and informed DCA that it had “reconsidered its approach in
17 implementing the subject Internet Domain Name (.Africa) and no longer endorses individual
18 initiatives in this matter[.]” This letter was also sent directly to ICANN.³

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

20 Presumably, the AUC tried to withdraw its support of DCA because in 2011, it attempted
21 to obtain the rights to .Africa for itself, requesting that ICANN include .Africa in the List of Top-
22 Level Reserved Names. (*See Id.*, ¶ 25, Ex. 12.) This would mean that the .Africa gTLD and its
23 equivalent in other languages would be unavailable for delegation under the new gTLD Program,
24 which would effectively allow the AUC to delegate .Africa to itself. DCA protested that this
25 violated the gTLD guidelines. ICANN denied the AUC’s request to reserve .Africa, but assisted
26 AUC in obtaining the .Africa delegation rights through a proxy - ZACR. (*Id.*) In exchange for the

27 _____
28 ³ Neither ICANN nor the third-party vendor (InterConnect Communications) responsible for conducting the
geographic names evaluation raised an issue with this purported withdrawal letter. ICANN only argued the letter
constituted a withdrawal after litigation commenced and expressly disclaimed this position in its deposition.
Declaration of Ethan J. Brown (“Brown Decl.”) ¶ 6, Ex. 4 [Willet Transcript], pp. 75:1-77:17.

1 AUC’s endorsement, ZACR agreed to allow the AUC to “retain all rights relating to the dotAfrica
2 TLD.” (*Id.*, ¶ 41, Ex. 26, ¶ 22 (7).) The members of the AUC committee formed to choose who
3 to endorse for the .Africa gTLD were also members of organizations affiliated with ZACR. (*Id.*,
4 ¶ 32.)

5 Furthermore, ZACR represented that it was applying for the .Africa gTLD on behalf of the
6 “African community.” (*See Id.*, ¶ 34, Ex. 20.) However, it failed to submit the required type of
7 application for organizations applying on behalf of a “community” which is a term of designation
8 and differentiation for gTLDs. (*See Id.*, ¶33, Ex. 19, ¶ 19.) Nevertheless, ICANN processed
9 ZACR’s “standard” application. ZACR also made multiple misrepresentations to ICANN to edge
10 DCA out including that it had endorsements sufficient to meet the 60% threshold under ICANN
11 rules. (*See Id.*, ¶ 33, Ex. 19; ¶ 35; ¶ 10, Ex. 1 at ¶80). In fact, only a small portion of ZACR’s
12 endorsements referenced ZACR by name, when most referred to the AUC’s failed reserved names
13 initiative. (*See Id.*)

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

15 ICANN contracted with a private company, InterConnect Communications (“ICC”), to act
16 as ICANN’s Geographic Names Panel and review geographic name applications. (*See Id.*, ¶ 36,
17 Ex. at 21.) In processing both DCA’s and ZACR’s applications, the ICC warned that if ICANN
18 did not accept endorsement letters from regional authorities like the AUC and UNECA ZACR’s
19 application would fail. (*See Id.*, ¶ 37, Ex. 22.) Subsequently during the IRP, ICANN asserted that
20 it had taken both the AUC and UNECA endorsements into account in evaluating DCA’s
21 application. (*Id.*, ¶ 10, Ex. 1, ¶ 90.)

22 According to the Guidebook ICANN considers the following factors in the geographic
23 names evaluation: (1) the endorsement must clearly express the government’s or public authority’s
24 support for or non-objection to the applicant’s application; (2) the endorsement must demonstrate
25 the government’s or public authority’s understanding of the string being requested; (3) the
26 endorsement must demonstrate the government’s or public authority’s understanding of the
27 string’s intended use; and (4) the endorsement *should* demonstrate the government’s or public
28 authority’s understanding that the string is being sought through the gTLD application process and
that the applicant is willing to accept the conditions under which the string will be available.

1 (emphasis added). (*Id.*, ¶ 12, Ex. 3, § 2.2.1.4.3.) As explained in more detail below, ICANN only
2 questioned DCA’s endorsements from the AUC and UNECA with respect to the fourth, non-
3 mandatory factor. If ICANN’s only grounds for denying DCA’s application is a discretionary
4 factor, ICANN presumably used this as a pretext to justify its planned disposition of the gTLD all
5 along.

6 Only after this litigation commenced, did ICANN argue that DCA’s application lacked
7 merit because its AUC endorsement had been withdrawn. Not only did the August 2010 letter
8 from the AUC fail to expressly withdraw the AUC’s endorsement of DCA, (*Id.*, ¶ 20, Ex. 7) but it
9 lacked the signature of Jean Ping – the AUC’s chairman who signed the original endorsement
10 letter. Even if the letter was considered with its blatant defects, Section 2.2.1.4.3 of the Guidebook
11 states that a “...government may withdraw its support for an application at a later time...*if the*
12 *registry operator has deviated from the conditions of original support or non-objection.*”
13 (emphasis added) (*Id.*, ¶ 20, Ex. 1 at § 2.2.1.4.3.) There were no conditions on the AUC or UNECA
14 endorsements to DCA. (*See Id.*, ¶ 19, Ex. 6; ¶21, Ex. 8.) This letter was sent to ICANN at the
15 same time it was sent to DCA, and ICANN continued to process DCA’s application nonetheless –
16 recognizing the validity of the endorsement. ICANN has also testified that it had not considered
17 the AUC endorsement letter withdrawn in evaluating DCA’s application; ICANN’s only objection,
18 was with respect to the fourth geographic names evaluation factor. (Brown Decl., Ex. 4 [Willet
19 Transcript], pp.75:1-77:17.)

20 Had ICANN treated DCA’s and ZACR’s AUC endorsements equally, both DCA and
21 ZACR should have either passed or failed the endorsement requirement. (*See Id.*, ¶ 37, Ex. 22.)
22 Rather, ICANN conspired to accept ZACR’s endorsements as sufficient while disregarding
23 Plaintiff’s endorsements.

24 **E. The GAC**

25 ICANN has a Governmental Advisory Committee (“GAC”) whose purpose, according to
26 ICANN’s Bylaws, is to “consider and provide advice on the activities of ICANN as they relate to
27 concerns of governments.” (*Id.*, ¶17, Ex. 4, at Art. 11 § 2(1)(a).) The AUC became a member of
28 the GAC in 2012, shortly after ICANN’s advice. (*Id.*, ¶ 25, Ex. 12, at 1.) ICANN then allowed
the AUC to use the advice ICANN gave them, and employ the GAC as a vehicle to issue advice

1 against DCA’s application by its only competitor for .Africa. This effectively allowed the AUC
2 to ensure that the rights to .Africa would be delegated to itself – through its proxy ZACR. (*Id.*)

3 Specifically, ICANN allowed the GAC to issue a “consensus advice” that DCA’s
4 application should not proceed due to issues with the regional endorsements. (*Id.*, ¶ 40, Ex. 25 at
5 3.) Under ICANN’s rules, the GAC can recommend that ICANN cease reviewing an application
6 if *all* of the GAC members agree that an application should not proceed because an applicant is
7 sensitive, violates national law or is problematic. (*Id.*, ¶ 10, Ex. 1 ¶¶88; ¶ 43, Ex. 28 at Art. 12,
8 Principle 47.) But, Kenya’s representative did not agree to issue advice. Kenya’s representative
9 was not even present at the GAC meeting when the advice was issued. Instead, ICANN allowed
10 Kenya’s *former* GAC advisor, Alice Munyua – a representative for the AUC and a member of
11 ZACR’s steering committee - to make a statement on Kenya’s behalf denouncing DCA’s
12 application. Kenya’s current GAC advisor previously informed the GAC chairperson that Ms.
13 Munyua did not represent Kenya or its viewpoints and that he objected to a GAC consensus advice
14 on .Africa. (*Id.*, ¶ 38, Ex. 23; ¶ 39, Ex. 24].

15 Moreover, the GAC gave no indication that DCA’s application was problematic, violated
16 law or was sensitive - the required standard. (*Id.*, ¶ 10, Ex. 1, ¶104 (“[ICANN’s witness] also
17 stated that the GAC made its decision without providing any rationale and primarily based on
18 politics and not on potential violations of national laws and sensitivities.”)) ICANN rejected
19 DCA’s application based on the GAC advice while ZACR’s application continued. (*Id.*, ¶ 10, Ex.
20 1 ¶¶ 80, 106; ¶ 41, Ex. 26.) Although ICANN could have reconsidered this decision under its
21 rules, it refused to do so when DCA requested so. (*Id.*, ¶ 10, Ex. 1, ¶ 6; ¶ 12, Ex. 3, Art. 4 § 2.2.)

22 Meanwhile, ZACR passed the initial evaluation and entered the contracting phase with
23 ICANN. (*Id.*, ¶ 10, Ex. 1 ¶ 13; ¶ 41, Ex. 26.) ZACR did not have sufficient country specific
24 endorsements to meet the ICANN requirements for geographic gTLDs. (*Id.*, ¶ 37, Ex. 22.) ZACR
25 filed purported “endorsement letters” that endorsed the AUC’s “Reserved Names” initiative, along
26 with declarations made by the AUC regarding its intention to reserve .Africa for its own use along
27 with its appointment letter from the AUC as evidence of such support. (*Id.*, ¶ 33, Ex. 19.) Only
28 five of the purported endorsement letters submitted by ZACR from African governments
referenced ZACR by name. (*Id.*, ¶ 35.) ICANN later ghostwrote an endorsement for ZACR to

1 submit to the AUC for its signature— yet another example of ICANN’s disparate treatment of DCA.
2 (Declaration of Sara C. Colón (“Colón Decl.”), ¶ 4, Ex. 3.)

3 **F. The Independent Review Process**

4 The Guidebook terms DCA agreed to upon submitting its gTLD application contained a
5 release and covenant not to sue (the “Prospective Release”). (*Id.*, ¶ 12, Ex. 3, at Module 6, ¶ 6.)
6 ICANN purports to provide applicants with an independent review process (“IRP”) as an
7 alternative, to challenge ICANN’s actions with respect to a gTLD application. (*Id.*, ¶ 12, Ex. 3 §§
8 3.2.3; 6.) The IRP is effectively an arbitration, operated by the International Centre for Dispute
9 Resolution of the American Arbitration Association, comprised of an independent panel of
10 arbitrators. (*Id.*, ¶ 12, Ex. 3 § 3.2.3.) In October 2013, DCA successfully sought an IRP to review
11 ICANN’s processing of its application, including ICANN’s handling of the GAC opinion. (*Id.*, ¶
12 10, Ex. 1 at ¶ 9.)

13 **G. ICANN Ignores the IRP’s Authority**

14 Despite the initiation of the IRP, ICANN continued to review ZACR’s application – *even*
15 *going so far as to sign a contract for the operation of .Africa with ZACR.* (*Id.*, ¶ 10, Ex. 1, ¶¶ 12–
16 20.) The IRP panel, during emergency proceedings, found this improper and enjoined further
17 issuance of .Africa to ZACR. (*Id.*) The IRP panel issued a final and thorough 63-page declaration
18 in the matter on July 9, 2015. The panel found, *inter alia*, that: (1) the IRP arbitration was binding.
19 (*Id.*, ¶ 5, Ex. 1 ¶ 23); (2) ICANN’s actions and inactions with respect to DCA’s application were
20 inconsistent with ICANN’s bylaws and articles of incorporation. (*Id.*, ¶ 10, Ex. 1, ¶ 109); and (3)
21 ICANN should “continue to refrain from delegating the .Africa gTLD and permit DCA Trust’s
22 application to proceed through the remainder of the new gTLD application process.” (*Id.*, ¶ 10, Ex.
23 1, ¶ 133.)

24 Although the panel noted that other actions and inactions of ICANN also likely violated
25 ICANN’s Bylaws and Articles of Incorporation, the Panel refrained from taking any further action
26 after the initial findings of misconduct. (*Id.*, ¶ 10, Ex. 1, ¶ 116.)

27 **H. ICANN’s Processing of DCA’s Application After the IRP Declaration**

28 ICANN did not act in accordance with the IRP’s Final Declaration. (*Id.*, ¶ 10, Ex. 1 ¶23.)

1 Instead of allowing DCA’s application to proceed through the *remainder* of the application
2 process, ICANN forced DCA to be reevaluated in the geographic names evaluation phase. (*Id.*, ¶¶
3 26–27, Ex. 14.) However, ICANN had already decided to accept endorsements from regional
4 authorities such as AUC and UNECA, and the only objection it raised to DCA’s endorsements,
5 was based on a non-mandatory factor set forth in the Guidebook – “[the endorsement] ***should***
6 demonstrate the government’s or public authority’s understanding that the string is being sought
7 through the gTLD application process and that the applicant is willing to accept the conditions
8 under which the string will be available. (*Id.*, ¶ 12, Ex. 3, § 2.2.1.4.3 (emphasis added).) ICANN
9 then issued DCA clarifying questions regarding this factor. (*Id.*, ¶¶ 24 and 26, Exs. 15 and 17.)
10 ICANN never challenged DCA’s endorsements as invalid or insufficient in the 12 months between
11 submission of the application and the GAC advice.

12 In September 2015, after the IRP decision, ICANN issued DCA clarifying questions
13 regarding its endorsements, and then indicated that DCA’s responses were inadequate with respect
14 to the non-mandatory factor. Hoping to gain insight into what was allegedly wrong with its
15 application, DCA agreed to an extended evaluation. (*Id.*, ¶ 30.) But, ICANN merely asked the
16 exact same questions without further guidance or clarification, or explanation as to why this
17 discretionary consideration mattered, clearly a pretext to deny DCA’s application. (*Id.*, ¶¶ 24 and
18 26, Exs. 15 and 17.) After all, ICANN had already entered into a registry agreement with ZACR.
19 In short, the process ICANN put Plaintiff through was a sham with a predetermined ending –
20 ICANN’s denial of Plaintiff’s application so that ICANN could steer the gTLD to ZACR.

21 **I. DCA Trust v. ICANN, et al – 2:16-cv-00862-RGK**

22 In January 2016, DCA filed suit against ICANN after learning that ICANN would reject
23 DCA’s application. Shortly after, ICANN removed the case to the Central District of California
24 and it was assigned to the Hon. R. Gary Klausner. DCA knew that ICANN was holding its
25 triannual meeting in early March and requested that ICANN refrain from taking any further action
26 on .Africa until a preliminary injunction was heard. (Brown Decl., ¶ 2; Colón Decl., ¶ 2, Ex. 1.)
27 ICANN refused. (Brown Decl., ¶ 2.) Based on ICANN’s refusal, DCA moved for and was granted
28 a TRO and subsequently the PI, enjoining ICANN from delegating the rights to .Africa until the
case was resolved. (*Id.*, ¶¶ 3 and 4, Exs. 1 and 2.)

1 Now after the IRP panel, and the district court have entered and affirmed injunctions
2 against ICANN delegating the .Africa gTLD, ICANN wants yet another bite at the apple. For the
3 reasons stated below, DCA respectfully requests that this Court adopt the federal court's order
4 issuing the preliminary injunction or issue a preliminary injunction directly.

5 **III. ARGUMENT**

6 **A. The Preliminary Injunction in Federal Court Remains Valid**

7 The issue of whether DCA is entitled to a preliminary injunction was fully briefed and
8 decided by Judge Klausner. ICANN and ZACR should not get a third bite at the apple. "It will
9 be for the State court, when the case gets back there, to determine what shall be done with pleadings
10 filed...during ... the suit in [federal court]." *Ayres v. Wiswall* (1884) 112 U.S. 187, 190-191;
11 *Laguna Vill. v. Laborers' Int'l Union of N. Am.* (1983) 35 Cal.3d 174; *see also Edward Hansen,*
12 *Inc. v. Kearny P.O. Assoc.* 166 N.J. Super. 161 (1979) ["Adoption of federal pleadings filed in this
13 case would avoid the needless waste of time, effort, and expense."] Adopting the federal court's
14 preliminary injunction serves judicial economy and results in no prejudice because all parties were
15 apprised of the proceedings in federal court. *See Laguna Vill, supra*, 35 Cal.3d at 181.

16 Here, the preliminary injunction was fully briefed and adjudicated twice (once upon
17 reconsideration). It is judicially inefficient to revisit positions and arguments already made in
18 federal court. The only party to be prejudiced here is DCA. Finally, the preliminary injunction
19 was already decided on the merits and the federal court order should stand. Accordingly, DCA
20 respectfully requests this Court adopt the federal court's preliminary injunction.

21 **B. Alternatively, This Court Should Issue a Preliminary Injunction**

22 Pursuant to Cal. Code of Civ. Proc. § 527 "a preliminary injunction may be granted at any
23 time before judgment upon...affidavits if...the affidavits...show satisfactorily that sufficient
24 grounds exist therefor." In deciding a motion for a preliminary injunction a trial court weighs:
25 "(1) the likelihood that the plaintiff will prevail on the merits at trial, and (2) the relative interim
26 harm to the parties from the issuance or nonissuance of the injunction." *SB Liberty, LLC v. Isla*
27 *Verde Assn., Inc.* (2013) 217 Cal.App.4th 272, 280. Thus, "[t]he trial court's determination must
28 be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's
showing on one, the less must be shown on the other to support an injunction." *Id.* "If the denial

1 of an injunction would result in great harm to the plaintiff, and the defendants would suffer little
2 harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction.”
3 *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 [citations omitted].

4 The presence or absence of each factor is usually a matter of degree, and if the party seeking
5 an injunction can make a sufficiently strong showing of likelihood of success on the merits, the
6 trial court has discretion to issue the injunction notwithstanding that party’s inability to show that
7 the balance of harms tips in his favor. *White v. Davis* (2003) 30 Cal.4th 528, 561. DCA is entitled
8 to a preliminary injunction because it is likely to succeed on the merits of its ninth cause of action
9 and DCA will suffer greater harm than ZACR and ICANN if a preliminary injunction is not issued.

10 i. DCA demonstrates a strong likelihood of success on the merits.

11 DCA moves for a preliminary injunction under its ninth cause of action against ICANN for
12 declaratory relief, which seeks a declaration from the Court that it is entitled to proceed through
13 the remainder of the .Africa gTLD application process as expressed by the IRP findings. As an
14 initial matter, DCA’s claim for declaratory relief is proper. “To qualify for declaratory relief,
15 Wilson would have to demonstrate its action presented two essential elements: “(1) a proper
16 subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating
17 to [Wilson's] rights or obligations[.]” *Wilson & Wilson v. City Council of Redwood City* (2011)
18 191 Cal.App.4th 1559, 1582; CCP § 1060. An actual controversy exists between DCA and
19 ICANN because ICANN is denying DCA the relief afforded to DCA by the IRP decision. The
20 IRP panel ruled that DCA should be allowed to “proceed through the *remainder* of the new gTLD
21 process (emphasis added).” However, ICANN forced DCA to re-complete the geographic names
22 review when it should have been passed to the delegation stage. (Bekele Decl. ¶ 27, Ex. 14.)

23 Moreover, DCA will be able to show that it met ICANN’s geographic endorsement
24 standards, or at the very least that its endorsements were no less adequate than ZACR’s, ICANN’s
25 favored applicant. (*Id.*, ¶ 19, Ex. 6; ¶ 21, Ex. 8; ¶ 37, Ex. 22.) At the time the IRP proceeding
26 commenced, DCA’s endorsers (AUC and UNECA) had been approved as endorsers by ICANN.
27 (*Id.*, ¶ 10, Ex. 1, at ¶ 45.) Both of those entities are representative of nearly all the nations in
28 Africa, far more than 60% (*Id.*, ¶ 31, Ex. 18.)

1 In its clarifying questions to DCA, ICANN suggested that DCA was only missing a non-
2 mandatory factor in its endorsement: a showing that the endorser “understand[] that the string is
3 being sought through the gTLD application process and that the applicant is willing to accept the
4 conditions under which the string will be available.” In any event, DCA’s endorsement did satisfy
5 this non-mandatory factor because both letters expressly state that DCA is applying for the .Africa
6 gTLD through ICANN. Since ICANN is the only organization that issues gTLDs, it is obvious
7 that any applicant would have to not only meet the requirements and conditions for obtaining the
8 gTLD, but also adhere to those regulations after the gTLD is awarded. This is also expressly stated
9 in the Guidebook which states “[a]pplicant understands and agrees that it will acquire rights in
10 connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and
11 that applicant’s rights in connection with such gTLD will be limited to those expressly stated in
12 the registry agreement.” (*Id.*, ¶ 12, Ex. 3, Module 6-6, ¶ 10.) It is therefore redundant for an
13 endorser to acknowledge ICANN’s regulations, limitations, and terms, when the endorser is aware
14 that the applicant is applying for the gTLD through ICANN. ICANN never complained that DCA
15 was missing any of the three mandatory factors. (*Id.*, ¶ 12, Ex. 3, §2.2.1.4.3.)

16 Only after ICANN rejected DCA’s application and after this litigation commenced did
17 ICANN argue that the AUC and UNECA had withdrawn their endorsements from DCA. But a
18 withdrawal is only permitted if an applicant has failed to meet one of the conditions of its
19 endorsement. (*Id.*) There were no conditions on either the AUC or UNECA endorsements;
20 therefore any attempted withdrawal of those endorsements is improper. (*Id.*, ¶ 12, Ex. 3 at §
21 2.2.1.4.3; ¶ 19, Ex. 6; ¶ 21, Ex. 8.) ICANN processed DCA’s application based on those
22 endorsements, and cannot now claim that they are invalid. Accordingly, DCA demonstrates a
23 strong likelihood of success on the merits regarding its claim for declaratory relief that it is entitled
24 to the gTLD application process the IRP ordered.

25 ii. DCA’s harm significantly outweighs any harm to Defendants.

26 DCA stands to suffer more harm if a preliminary injunction is not issued than ZACR or
27 ICANN will suffer if the preliminary injunction is adopted or re-issued. DCA’s mission is to
28 provide a continental Internet domain name to provide access to internet services to the people of
Africa by acting as the registry for the .Africa gTLD. (*Id.*, ¶¶ 3, 6, and 7.) To carry out its purpose,

1 DCA received funding from various investors. (*Id.*, ¶ 6.) If ICANN is free to grant ZACR the
2 .Africa domain before a resolution of this case on the merits, DCA’s funding will cease, and DCA
3 as a business entity will be destroyed. (*Id.*) DCA’s funding is conditional upon its ability to obtain
4 the .Africa gTLD. Unlike ZACR, who acts as a registry for other various domains, .Africa is the
5 only gTLD, or domain on any level, that DCA seeks. (*Id.*, ¶ 5.)

6 Additionally, although technically possible, it is highly unlikely and impractical that the
7 .Africa gTLD would be re-delegated if DCA prevails in its lawsuit. (*Id.*, ¶ 8.) ICANN has
8 established procedures for re-delegating a gTLD to a new registry, but this typically occurs when
9 a registry agreement expires. (Colón Decl., ¶ 3, Ex. 2 (Masilela Declaration).) Further, ICANN’s
10 procedures for re-delegating gTLDs was subject to approval by the Department of Commerce. (*Id.*,
11 at p.102.) Recently, the U.S. Government’s ties with ICANN ceased. Therefore, the current
12 procedure for gTLD re-delegation is uncertain.

13 iii. ICANN suffers no injury by having to follow its own rules.

14 ICANN cannot demonstrate any harm, because no harm occurs to ICANN if the .Africa
15 gTLD is not issued. ICANN has little to no interest, other than ensuring that the domain is
16 regulated properly, after .Africa eventually goes live. ICANN receives insignificant revenues from
17 the registration of domains within the gTLD, but ICANN will obtain those fees when the .Africa
18 gTLD goes live regardless.

19 iv. ZACR Will Suffer Less Harm than DCA.

20 ZACR – ICANN’s favored applicant – will suffer little harm with respect to being delayed
21 from operating the .Africa domain. This Court should not permit ZACR to prematurely operate
22 the domain, if it is determined that ZACR is not entitled to it based on the collusive and inequitable
23 conduct, engaged in by ZACR, ICANN, and the AUC as described above. It is anticipated that
24 ZACR will claim to have losses of nearly \$20 million if a preliminary injunction is issued as it did
25 in the federal court. (*See* Colón Decl., Ex. 2.) However, ZACR’s anticipated costs are conclusory
26 and speculative, without any sufficient evidence demonstrating how those costs are incurred or
27 why they could not be mitigated. They also appear to be based largely on time that has already
28 passed. Further, ZACR operates other domains whereas DCA’s business is built around serving
as the registry for .Africa.

1 At this point, significant discovery has taken place and the delay in issuing .Africa will be
2 negligible at best. This case was originally set for trial at the end of February 2017. The case can
3 be promptly re-set for trial as much discovery has already taken place. Any harm to ZACR is
4 minimal. The lack of harm to ZACR and ICANN as compared to the irreversible injury that would
5 be suffered by DCA, coupled with DCA’s likelihood of success on its ninth cause of action,
6 warrants the granting of DCA’s request for a preliminary injunction. *See White*, 30 Cal.4th at 561.

7 **C. ICANN’s waiver argument is void.**

8 DCA believes ICANN will assert that the Guidebook’s Prospective Release prohibits this
9 entire proceeding. The Prospective Release quoted in Section II.F, *supra*, however, is
10 unenforceable because it violates Cal. Civil Code §1668, is unconscionable, and was procured by
11 fraud. ICANN can cite to no authority for the proposition that the Prospective Release is
12 enforceable. The District Court agreed with DCA and found that ICANN’s Prospective Release
13 violated Cal. Civ. Code §1668 and was void “as a matter of law.” (Brown Decl., ¶ 4, Ex. 2.)

14 i. **A waiver of fraudulent acts and intentional acts is void.**

15 ICANN’s Prospective Release is void in that it waives and releases any redress in a court
16 of law, including fraudulent and intentional actions. “All contracts which have for their object,
17 directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to
18 the person or property of another, or violation of law, whether willful or negligent, are against the
19 policy of the law.” Cal. Civ. Code §1668; *See also Capri v. L.A. Fitness Int’l, LLC* (2006) 136
20 Cal.App.4th 1078, 1084 [“[U]nder Section 1668, ‘a party [cannot] contract away liability for his
21 fraudulent or intentional acts...’ regardless of whether the public interest is affected.”]⁴

22 ICANN’s Prospective Release encompasses every claim that arises from its actions –
23 necessarily including, fraud and intentional violations of law. *See Baker Pacific Corp. v. Suttles*,
24 220 Cal.App.3d 1148, 1153 [holding a covenant not to sue that released “any and all claims of
25 every nature” void for excluding fraud, intentional acts, and negligent violations of statutory law.].
26 ICANN’s Prospective Release purports to waive fraud and intentional violations of law, and thus,
27

28 ⁴ Although often cited for the claim that public policy must be implicated for a release to be void, *Tunkl v. Regents of California* ((1963) 60 Cal.2d 92) does not support that proposition. *See Capri v. L.A. Fitness, Int’l, LLC, supra*. Even under the standard expressed in *Tunkl v., supra*, DCA can establish that ICANN’s Prospective Release is void.

1 is void. It is irrelevant that DCA only moves for a preliminary injunction on its ninth cause of
2 action for declaratory relief, because DCA also brings claims for intentional misrepresentation,
3 fraud, violation of Cal. Bus. & Prof. Code § 17200, among others. By attempting to exempt itself
4 from any and all claims, ICANN’s waiver indisputably is void.⁵

5 ii. ICANN’s Prospective Release is unconscionable.

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

16 The Prospective Release is procedurally unconscionable. In order to apply, DCA was
17 forced to agree to the Guidebook that contained the Prospective Release. (Bekele Decl. ¶¶ 13-16.)
18 The Guidebook does not encourage the parties to consult with an attorney before signing, nor did
19 DCA do so. (Bekele Decl. ¶7, Ex. 3; ¶ 11.) ICANN’s own GAC told ICANN that the Prospective
20 Release was too broad, but ICANN refused to change the language. ICANN cannot allege that
21 DCA had an opportunity to negotiate, because it didn’t even accept the GAC’s comment.
22 Accordingly, the Prospective Release is procedurally unconscionable.

23 The Prospective Release is also substantively unconscionable. “As our Supreme Court has
24 explained, the unconscionability doctrine ‘ensures that contracts...do not impose terms that have
25 been variously described as ‘overly harsh,’ ‘unduly oppressive,’ ‘so one-sided as to ‘shock the
26 conscience,’ or ‘unfairly one-sided.’” *Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 998.
27 The Prospective Release is a textbook example of a one-sided agreement. It requires that DCA

28 _____
⁵ ICANN cannot argue that the Prospective Release is not an exemption of liability but merely a limitation of liability because it refuses to recognize any binding effect of the IRP.

1 give up its right to sue ICANN for *any and all* acts relating to the application but does not require
2 ICANN to give up any right to sue DCA. ICANN is not prevented from suing DCA for any
3 violation of law, negligence, fraud or otherwise. The Prospective Release absolves ICANN of all
4 wrongdoing – but provides no benefit to applicants. Because the contract is both procedurally and
5 substantively unconscionable, the agreement is unenforceable.

6 iii. ICANN’s Prospective Release was procured by fraud.

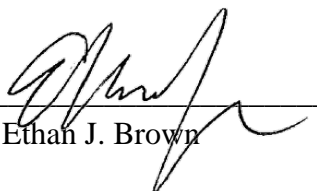
7 ICANN’s Prospective Release was procured by fraud and cannot be relied upon to
8 ICANN’s benefit. “Fraud in the inducement is a subset of the tort of fraud whereby ‘the promisor
9 knows what he is signing but his consent is induced by fraud, mutual assent is present and a
10 contract is formed, which by reason of the fraud is voidable.’” *Hinesley v. Oakshade Town Center*
11 (2005) 135 Cal.App.4th 289, 294-295. DCA agreed to the Guidebook and paid a \$185,000 fee
12 because it was falsely led to believe that the IRP process provided redress in lieu of court review.
13 (Bekele Decl. ¶ 12, Ex. 3 at Module 6, ¶ 6.) After the IRP ruled against it, ICANN failed to follow
14 the IRP ruling, and disclaimed any binding nature, making the above statement false. (See *Id.*)
15 ICANN procured the provision by fraud, and it would be inequitable and to DCA’s detriment to
16 find the Prospective Release binding. Accordingly, under any of the grounds stated above,
17 ICANN’s Prospective Release is void and unenforceable.

18 **IV. CONCLUSION**

19 For the foregoing reasons, DCA is entitled to the issuance of a preliminary injunction or
20 an order from this Court adopting the federal court’s preliminary injunction, and respectfully
21 requests that this Court grant such.

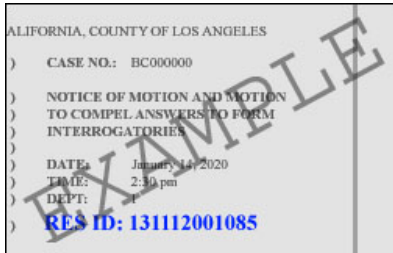
22
23 Dated: November 15, 2016

BROWN NERI SMITH & KHAN LLP

24
25 By: 
26 Ethan J. Brown

27 *Attorneys for Plaintiff*
28 DOTCONNECTAFRICA TRUST

THIS IS YOUR CRS RECEIPT

INSTRUCTIONS
Please print this receipt and attach it to the corresponding motion/document as the last page. Indicate the Reservation ID on the motion/document face page (see example). The document will not be accepted without this receipt page and the Reservation ID.
 An example of a court document from the County of Los Angeles. The document includes case details such as 'CASE NO.: BC000000', 'NOTICE OF MOTION AND MOTION TO COMPEL ANSWERS TO FORM INTERROGATORIES', 'DATE: January 14, 2020', 'TIME: 2:30 pm', and 'DEPT:'. The 'RES ID: 131112001085' is highlighted in blue. A large 'EXAMPLE' watermark is overlaid on the document.

RESERVATION INFORMATION

Reservation ID: 161115174199
Transaction Date: November 15, 2016
Case Number: BC607494
Case Title: DOTCONNECTAFRICA TRUST VS INTERNET CORPORATION FOR ASSIGNED
Party: DOTCONNECTAFRICA TRUST (Plaintiff/Petitioner)
Courthouse: Stanley Mosk Courthouse
Department: 53
Reservation Type: Motion for Preliminary Injunction
Date: 12/22/2016
Time: 08:30 am

FEE INFORMATION (Fees are non-refundable)

First Paper Fee: Party asserts first paper was previously paid.

Description	Fee
Motion for Preliminary Injunction	\$60.00
Total Fees:	Receipt Number: 1161115K2102 \$60.00

PAYMENT INFORMATION

Name on Credit Card: Ethan Brown
Credit Card Number: XXXX-XXXX-XXXX-4118

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