

1 Jeffrey A. LeVee (State Bar No. 125863)  
Erin L. Burke (State Bar No. 186660)  
2 Rachel T. Gezerseh (State Bar No. 251299)  
Amanda Pushinsky (State Bar No. 267950)  
3 JONES DAY  
555 South Flower Street  
4 Fiftieth Floor  
Los Angeles, CA 90071.2300  
5 Telephone: +1.213.489.3939  
Facsimile: +1.213.243.2539

6 Attorneys for Defendant  
7 INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11  
12 DOTCONNECTAFRICA TRUST,

13 Plaintiff,

14 v.

15 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, et  
16 al.,

17 Defendant.

**CASE NO. BC607494**

Assigned for all purposes to  
Hon. Howard L. Halm

**ICANN'S OPPOSITION TO DCA'S  
EX PARTE APPLICATION FOR A  
TEMPORARY RESTRAINING  
ORDER**

DATE: January 4, 2017  
TIME: 8:30 a.m.  
DEPT: 53

1       **I.       INTRODUCTION**

2           As of 10:00 p.m. on Tuesday, January 3, 2017, Plaintiff DotConnectAfrica ("DCA") still  
3 had not served its papers in support of its *ex parte* application for a temporary restraining order,  
4 despite the fact that DCA had known for a week that the Court had denied DCA's motion for  
5 preliminary injunction. As a result, ICANN prepares these papers based on DCA's three sentence  
6 notice delivered to ICANN at 9:49 a.m. earlier today. But based on that notice, it is evident that,  
7 for the very same reasons that the Court denied DCA's motion for preliminary injunction, DCA's  
8 *ex parte* application for a temporary restraining order (the "Application") likewise should be  
9 denied.

10           As an initial matter, DCA is unable to make the requisite showing of great or irreparable  
11 injury: if .Africa is delegated to ZACR, .Africa can always be re-delegated to DCA in the event  
12 DCA ultimately prevails in this litigation. As stated in ICANN's opposition to DCA's motion of  
13 preliminary injunction ("Opp."), ICANN has procedures for re-delegation that have been  
14 successfully utilized numerous times (as Mr. Akram Atallah of ICANN explained in his  
15 declaration in conjunction with the preliminary injunction). DCA provided no evidence  
16 whatsoever that .Africa could not be re-delegated to DCA in the event DCA ultimately prevailed,  
17 or that DCA would suffer any irreparable harm as a result of the delegation. Because DCA  
18 cannot meet this threshold requirement for *ex parte* relief, DCA's application should be denied.

19           Nor can DCA meet the basic requirements for injunctive relief.

20           *First*, DCA cannot show that the balance of harms weighs in its favor, for the same  
21 reasons it was unable to do so regarding its motion for preliminary injunction. As the Court's  
22 denial of DCA's motion affirms, the harm to the continent of Africa and to ZACR outweighs any  
23 alleged harm to DCA. *See* Declaration of Jeffrey A. LeVee ("LeVee Decl."), Exhibit A  
24 (December 22, 2016 Minute Order, denying DCA's motion for a preliminary injunction "based on  
25 the reasoning expressed in the oral and written arguments of defense counsel.")

26           *Second*, while DCA's Application is now based on two different causes of action,<sup>1</sup> DCA is

27           <sup>1</sup> DCA indicated in its 9:49 a.m. email earlier this morning that it intended to move for  
28 relief based on its second and fifth causes of action, but did not provide any further detail.  
Declaration of Jeffrey A. LeVee ("LeVee Decl"), Ex. B.

1 still unable to show likelihood of success on the merits of those causes of action. Specifically,  
2 DCA cannot provide any evidence supporting the intentional misrepresentation claims underlying  
3 its second cause of action, and DCA fails entirely to state a valid claim under the Unfair  
4 Competition Law comprising its fifth cause of action.

5 DCA's Application should be denied.

## 6 **II. LEGAL STANDARD**

7 In deciding whether to issue a preliminary injunction, a court must weigh two interrelated  
8 factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the  
9 relative interim harm to the parties from issuance or nonissuance of the injunction. *O'Connell v.*  
10 *Superior Court*, 141 Cal. App. 4th 1452, 1463 (2006).

11 Injunctive relief on an expedited *ex parte* basis, as DCA seeks here, can only be granted if  
12 the applicant establishes a risk of great or irreparable injury before the matter can be heard on  
13 notice. Cal. Code Civ. Proc. §§ 526(a),527(c).

## 14 **III. ARGUMENT**

### 15 **A. DCA Cannot Show Great or Irreparable Injury Because Delegation** 16 **Is Reversible.**

17 DCA cannot establish that great or irreparable injury will result if the TRO is not issued  
18 because .Africa can be re-delegated to DCA in the event DCA prevails in this litigation.

19 In its motion for preliminary injunction and during oral argument, DCA argued that it  
20 would be irreparably harmed if .Africa were delegated to ZACR while this litigation was pending,  
21 claiming – without any evidence – that “re-delegation is a complicated, if not nearly impossible  
22 task as a practical matter.” (DCA Mot. at 9:8-9.) In opposition, ICANN presented evidence that  
23 .Africa could be re-delegated in the event DCA won, and that re-delegation was a common  
24 procedure that had occurred numerous times. *See* Declaration of Akram Atallah ¶ 13. Once  
25 ICANN delegates the .AFRICA gTLD to ZACR, a transfer or assignment of the gTLD in the  
26 future would still be possible, feasible and consistent with ICANN’s previous conduct. *Id.*  
27 Although DCA's counsel made representations during oral argument regarding difficulties  
28 associated with re-delegation, DCA has presented no actual evidence that such difficulties would

1 in fact be encountered, much less rise to the level necessary to demonstrate irreparable harm.

2 **B. The Balance of Harms Does Not Support Injunctive Relief.**

3 The fact that .Africa can be re-delegated to DCA at a later date also means that DCA  
4 cannot establish that the interim harm DCA may suffer if the injunction is denied exceeds the  
5 harm if the injunction is granted. Further (and as discussed in ZACR's opposition to this *ex parte*  
6 Application), in denying DCA's motion for preliminary injunction, the Court has already ruled  
7 that the harm to ZACR and the people of Africa posed by injunctive relief outweighs any harm  
8 DCA might suffer if .Africa were delegated. ZACR submitted detailed evidence addressing the  
9 heavy financial investment that ZACR has made in the .Africa gTLD and the substantial sums of  
10 money that ZACR has lost since signing the registry agreement with ICANN in 2014. This harm  
11 extends to the African people who are foreclosed from reaping the benefits of the .Africa gTLD  
12 due to the delay caused by the effects of DCA's lawsuit. In contrast, DCA has offered no real  
13 evidence of harm.

14 **C. DCA Is Unlikely To Succeed On The Merits Of Its Claims.**

15 DCA is unable to meet the second factor necessary for issuance of injunctive relief,  
16 because it is unlikely to succeed on either its second or fifth causes of action.

17 **1. There Is No Evidence Supporting DCA's Second Cause of Action.**

18 DCA's second cause of action alleges that ICANN made intentional misrepresentations  
19 regarding the review of DCA's application for .Africa and ICANN's participation in the IRP  
20 process. Specifically, DCA alleges that, despite representations to the contrary, ICANN had no  
21 intention to follow its own rules and procedures; that it never intended to treat ZACR and DCA's  
22 applications for .Africa equally; that it never intended to participate in the IRP process in good  
23 faith; and that it "simply chose applicants based on its own wishes and in exchange for political  
24 favors." First Amended Complaint, ¶¶ 74-76.

25 Most notable about DCA's second cause of action is that DCA does not state who at  
26 ICANN made any of these representations to DCA. Further, if the representations were made  
27 solely by virtue of the language of the Applicant Guidebook, the representations are demonstrably  
28 accurate, not in any way misleading. For this reason alone, the second cause of action is legally

1 defective.

2 Further, after months of discovery, including extensive document production and the  
3 depositions of DCA's and ICANN's persons most qualified, there is no evidence that ICANN  
4 failed to review or process DCA's application properly, no evidence that ICANN refused to  
5 participate in (and adhere to) the results of the IRP process (which DCA won and ICANN abided  
6 by), and no evidence that ICANN failed to follow its Bylaws, Articles of Incorporation, or the  
7 rules outlined in the New gTLD Applicant Guidebook. And, to the extent DCA is relying on  
8 evidence from the IRP hearing regarding ICANN's treatment of the GAC advice (the second  
9 cause of action is unclear on this), DCA prevailed at the IRP, and ICANN's Board then declined  
10 to follow the GAC advice and allowed DCA's application to proceed. As a result, DCA has  
11 suffered no injury whatsoever from the facts related to the GAC advice, and if this is the basis of  
12 DCA's second cause of action, the claim should be summarily dismissed.<sup>2</sup>

13 Likewise, paragraphs 74(b) and 74(c) of the second cause of action allege that ICANN  
14 "represented that it had in place an Accountability Mechanism including an Independent Review  
15 Panel (IRP) process" and that ICANN would participate in good faith in that process, and the  
16 evidence already presented to the Court establishes that ICANN did just that. What is the  
17 "misrepresentation" supporting the second cause of action? There is none.

18 Further, it is undisputed that, at the time the GAC issued advice that DCA's application  
19 should be denied, the ICC (not ICANN) was conducting the geographic names review, and that  
20 DCA had not yet passed. Opp. at 14. (ICANN had already passed DCA's application in all other  
21 areas.) The geographic names review, therefore, was not complete when DCA's application was  
22 first halted. Following the issuance of the IRP Declaration, ICANN returned DCA's application  
23 to the geographic names review process, which DCA now admits was consistent with the IRP  
24 Declaration (directly contrary to the allegations of the second cause of action). Opp. at 13. The

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25  
26 <sup>2</sup> For example, DCA alleges in paragraph 75(a) of the second cause of action, that ICANN  
27 did not adhere to its Bylaws in conjunction with the issuance of the so-called GAC consensus  
28 advice to block DCA's application, but DCA then sought Independent Review (the accountability  
mechanism set forth in ICANN's Bylaws), DCA prevailed in that Independent Review, and  
ICANN's Board thereafter determined that it would adhere to the results of the Independent  
Review and not follow the GAC advice.

1 ICC then determined that DCA's letters of support failed to meet the requirements outlined in the  
2 Applicant Guidebook, and issued two sets of Clarifying Questions seeking updated, compliant  
3 letters. *Id.* at 14. Because DCA was unable to provide updated letters of support – due to the fact  
4 that DCA did not in 2012 (when it submitted its application to ICANN) and never subsequently  
5 had the required support of the countries of Africa – DCA's application failed for geographic  
6 review requirement. *Id.* at 13-14.<sup>3</sup> The declaration of Mark McFadden of the ICC makes clear  
7 that the ICC treated the applications of ZACR and DCA exactly the same, even to the point of  
8 rejecting the initial letters of support that both had received from the AUC.

9 Because there is no evidence to support DCA's intentional misrepresentation allegations,  
10 DCA is unlikely to succeed on the merits of this claim.<sup>4</sup>

11 **2. DCA Is Unlikely To Succeed On The Merits Of Its Fifth Cause**  
12 **Of Action.**

13 DCA is also unlikely to succeed on the merits of its unfair competition claim, which  
14 appears at paragraphs 96-99 of the FAC. The allegations of the fifth cause of action are entirely  
15 superficial, and there is no way to determine what conduct DCA is referencing when DCA alleges  
16 that ICANN has violated Business and Professions Code Section 17200 (the “UCL”). Although  
17 DCA makes allegations under all three prongs of Section 17200, alleging that ICANN’s conduct  
18 “constitutes unlawful, unfair, or fraudulent business acts or practices” (FAC ¶ 97) does not  
19 describe any conduct in the FAC sufficient to satisfy these prongs.

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20 <sup>3</sup> ZACR, whose initial letters of support also failed to meet Guidebook requirements, was  
21 presented with nearly identical Clarifying Questions in 2013 seeking updated letters; because  
22 ZACR did, in fact, have the required support, ZACR was able to provide an updated letter from  
23 the AUC. *Id.* at 5-6.

24 <sup>4</sup> This Court has essentially heard and ruled against DCA on this issue already. Although  
25 DCA's motion for preliminary injunction was based on its ninth cause of action, as counsel for  
26 DCA stated during oral argument, DCA's argument for a preliminary injunction was based on the  
27 same factual allegations as its second cause of action – including its intentional misrepresentation  
28 allegations. *See* LeVeve Decl., Ex. C (12/22/16 Hearing Tr. on Plaintiff's Motion for Preliminary  
Injunction at 37:4-38:11) (arguing that the ninth cause of action "subsumed" the factual  
allegations in the complaint, including the intentional misrepresentation allegations). DCA’s  
counsel went on to state that, if its motion were denied, DCA would simply move for a TRO  
under a different cause of action, so if the Court "were fundamentally persuaded" that DCA  
presented a sufficient case that DCA's application was "denied on a pretextual basis" – if  
ICANN's review of DCA's application was, as the second cause of action alleges, not done fairly  
and in accordance with its rules and bylaws – the Court should grant the preliminary injunction  
motion. *Id.* at 40:19-3. Presented with this option, the Court nonetheless denied DCA's motion.

1 Under its “unlawful” prong, “the UCL borrows violations of other laws ... and makes  
2 those unlawful practices actionable under the UCL.” *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th  
3 1494, 1505. Thus, a violation of another law is a predicate for stating a cause of action under the  
4 UCL's unlawful prong. DCA does not allege anywhere in the FAC that ICANN has violated a  
5 particular law, meaning that DCA fails to state a claim under this prong.

6 Similarly, under the UCL, “[a]n act or practice is unfair if the consumer injury is  
7 substantial, is not outweighed by any countervailing benefits to consumers or to competition, and  
8 is not an injury the consumers themselves could reasonably have avoided.” *Daugherty v.*  
9 *American Honda Motor Co., Inc.* (2006) Cal.App.4th 824, 839. Here again, DCA has not  
10 included any allegations in the FAC to state a claim under this prong.

11 Regarding the “fraudulent” prong of the UCL, DCA does not state in the fifth cause of  
12 action what conduct of ICANN constitutes fraudulent conduct. Although DCA alleges fraud in  
13 its fourth cause of action for “Fraud and Conspiracy to Commit Fraud” (FAC ¶¶ 83-95), DCA  
14 has not moved for extraordinary relief on the fourth cause of action, and the alleged conduct does  
15 not support an unfair competition claim under California case law in all events. The UCL  
16 imposes an actual reliance requirement on a plaintiff prosecuting a private enforcement action  
17 under the UCL's fraud prong; in other words, the plaintiff must allege he or she was motivated to  
18 act or refrain from action based on the truth or falsity of a defendant's statement, not merely on  
19 the fact it was made. *Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 614.  
20 Nowhere in the FAC does DCA make these types of allegations with respect to ICANN’s alleged  
21 fraud.<sup>5</sup>

#### 22 **IV. CONCLUSION**

23 For the above stated reasons, DCA’s Application should be denied.  
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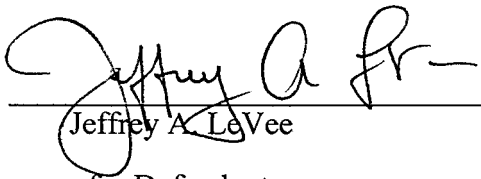
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26 <sup>5</sup> To the extent that DCA is alleging that ICANN’s conduct was “fraudulent” in the second  
27 cause of action for intentional misrepresentation, DCA has no likelihood of success on that cause  
28 of action, as discussed above. Therefore, adding an unfair competition claim to the request for a  
temporary restraining order fails to add any value other than the trying to avoid the effects of the  
Covenant not to sue, which the Court already has held to bar DCA’s claim for declaratory relief.

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Dated: January 3, 2016

JONES DAY

By:   
Jeffrey A. LeVee

Attorneys for Defendant  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

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