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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

DOTCONNECTAFRICA TRUST Plaintiff, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS and DOES 1 through 50, inclusive, Defendants.	Case No. 2:16-cv-00862-RGK (JCx) **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** Date: April 4, 2016 Hearing: 9:00 a.m. Courtroom: 850 [Filed concurrently: Declarations of Sophia Bekele Eshete, Ethan J. Brown & Sara C. Colón; Application for Leave to File Under Seal; [Proposed] Order; and [Proposed] Order for Application for Leave to File Under Seal]

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

PLEASE TAKE NOTICE that on April 4, 2016 at 9:00 a.m. or as soon thereafter as the matter may be heard, before the Honorable R. Gary Klausner of the United States District Court for the Central District of California, Western Division, Courtroom 850, located at 255 E. Temple Street, Los Angeles, CA 90012-3332, Plaintiff DOTCONNECTAFRICA TRUST ("DCA") will and does move for a preliminary injunction ordering Defendant Internet Company for Assigned Names and Numbers ("ICANN") from issuing the .Africa generic top level domain ("gTLD") until this case has been resolved.

This Motion is made pursuant to Federal Rule of Civil Procedure 65 on the grounds that ICANN has failed to follow a binding arbitration order against it and has denied DCA the fair and unbiased gTLD application process it is entitled to. Therefore, ICANN should be prevented from issuing the .Africa gTLD until this case has been resolved. The .Africa gTLD is a unique asset and DCA will suffer irreparable harm if the .Africa gTLD is awarded to another party.

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

Dated: March 1, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown
Ethan J. Brown

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST

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I. INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") was delegated the task of issuing generic top level domains ("gTLD") such as ".com", ".org", or, in this case, ".Africa" by the U.S. Department of Commerce for the benefit of the community of users of the Internet. ICANN boasts of its transparency, fairness, and open process in order to comply with its government mandated purpose and to avoid any impression of impropriety. In this case, however, ICANN has subverted those ideals articulated in its Articles, Bylaws, and internal rules in taking sides in the granting of the .Africa gTLD – instead of maintaining the role it is required to play as a neutral arbiter.

This case concerns ICANN's process for granting the rights to a geographic gTLD, .Africa. There are two competing applications for .Africa, Plaintiff DotConnectAfrica Trust ("DCA") and Defendant ZA Central Registry ("ZACR"), purportedly sponsored by the African Union and for reasons known best to ICANN, favored at every opportunity by ICANN's Board and constituent bodies. Critically, ICANN's own internal independent review process ("IRP") has already done the hard work of reviewing ICANN's processes for granting .Africa and finding them in clear violation of ICANN's own Articles, Bylaws, and rules.

But, despite the IRP's extensive 63-page decision outlining ICANN's wrongful conduct and recommendations, ICANN simply "thumbed its nose" at the IRP, insisting that its decision is non-binding. After losing the IRP on all counts, ICANN placed DCA's long-pending application back to the beginning of the process, contrary to the IRP ruling, and loaded the dice ensuring the application would once again be denied – which it was on February 17, 2016, before the filing of this action.

Now, DCA faces irreparable harm. Having denied DCA's application, ICANN is free to grant .Africa to its favored applicant, ZACR, which it surely

intends to do at its upcoming March 5-10 Board meeting in Marrakech, Morocco. Indeed, DCA recently asked for assurance from ICANN's counsel that .Africa would not be granted at the meeting; the assurance was refused. ICANN already once hastily granted ZACR the rights in March 2014 before it was enjoined by the IRP panel during the pendency of the IRP review. History is repeating itself. Once .Africa is granted and rights to use it are granted to users, DCA's rights to this highly unique asset will be forever lost.

Given DCA's overwhelming victory before the IRP panel and ICANN's continued bad faith conduct refusing it fair treatment, DCA has a high likelihood of success on the merits. Indeed, ICANN's primary defense appears to be a self-serving prospective release and waiver of all rights to a judicial remedy, which ICANN forces all applicants to execute given its monopolistic power to grant the use of gTLDs. But, ICANN's "silver bullet" prospective release goes too far, purporting to absolve ICANN for even the grossest intentional misconduct and is thus void as a matter of law.

All the relevant factors favor the issuance of a preliminary injunction barring ICANN from issuing the rights to .Africa until this case is resolved, and DCA respectfully requests this Court grant that very relief.

II. RELEVANT FACTS

A. ICANN

ICANN is a California non-profit established for the benefit of the Internet community and is tasked with carrying out its activities in conformity with relevant principles law and through open and transparent processes that enable competition and open-entry in Internet-related markets. (Declaration of Sophia Bekele ("Bekele Decl."), Ex. 1 at ¶4). ICANN is the only organization in the world that assigns rights to Generic Top-level Domains ("gTLDs"). It therefore yields monopolistic power and can and does force participants in the market for gTLDs to play by its onerous and sometimes self-serving rules.

The following core principles guide the decisions and actions of ICANN: (a) Preserve and enhance the operational stability of the Internet; (b) Employ open and transparent policy development mechanisms that promote well-informed decisions; (c) Make decisions by applying documented policies neutrally and objectively with integrity and fairness; and (d) Remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness. (Bekele Decl. ¶12, Ex. 4 at Art. 1 § 2). ICANN's own Bylaws state that it shall not apply its standards inequitably or single out any particular party for disparate treatment. (Bekele Decl. ¶12, Ex. 4 at Art. 2 § 3). ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. (Bekele Decl. ¶12, Ex. 4 at Art. 4 § 1).

B. DCA and the Top-Level Domain Application

DCA was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa. (Bekele Decl. ¶5, Ex. 1 ¶2). In March 2012, DCA applied to ICANN for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), an internet resource available for delegation under that program. (Bekele Decl. ¶5, Ex. 1 ¶3). In order to submit an application for a gTLD, all applicants were required to agree to the terms of the gTLD Applicant's Guidebook (the "Guidebook"). (*See* Bekele Decl. ¶¶7–11). In consideration of ICANN's promises to abide by its own Bylaws, the Guidebook, and in conformity with the laws of fair competition, Plaintiff paid ICANN a $185,000.00 mandatory application fee. (*See* Bekele Decl. ¶4).

ICANN required that applicants for the rights to a geographic gTLD such as .Africa obtain endorsements from 60% of the national governments in the region, and no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the the

region. (Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.2). As part of its bid to apply for the delegation rights of the .Africa gTLD, Plaintiff obtained the endorsements of the African Union Commission (hereinafter the "AUC") and the United Nations Economic Commission for Africa (UNECA) (Bekele Decl. ¶14, Ex. 6; ¶16, Ex. 8). Plaintiff was the first to obtain official endorsements/letters of support for the .Africa Internet domain name from these organizations.

In April 2010, nearly a year later, AUC wrote DCA and informed DCA that it had "reconsidered its approach in implementing the subject Internet Domain Name (.Africa) and no longer endorses individual initiatives in this matter[.]" However, the letter did not expressly withdraw its endorsement of DCA. (Bekele Decl. ¶15, Ex. 7). Section 2.2.1.4.3 of the Guidebook states that a governmental entity may only withdraw its endorsement if the conditions of its endorsement have not been satisfied: "…government may withdraw its support for an application at a later time…*if the registry operator has deviated from the conditions of original support or non-objection*." (emphasis added) (Bekele Decl. ¶7, Ex. 1 at § 2.2.1.4.3). There were no conditions on the AUC or UNECA endorsements to DCA. (*See* Bekele Decl. ¶14, Ex. 6; ¶16, Ex. 8).

C. <u>ZACR and AUC's Top Level Domain Application</u>

AUC presumably tried to withdraw its support of DCA because AUC itself attempted in 2011 to obtain the rights to .Africa by requesting that ICANN include .Africa in the List of Top-Level Reserved Names. (*See* Bekele Decl. ¶22, Ex. 14 at 1). This would mean that the .Africa gTLD and its equivalent in other languages would be unavailable for delegation under the New gTLD Program, which in turn would enable AUC to benefit from a special legislative protection that would allow AUC to delegate .Africa to itself. DCA protested that this would not be in compliance with the gTLD guidelines. ICANN denied AUC's request to reserve .Africa but assisted AUC in obtaining the .Africa delegation rights through ZACR as AUC's proxy. (*See* Bekele Decl. ¶22, Ex. 14 at 2). In violation of its duties to

act independently and transparently, ICANN, explained to AUC in a letter exactly how to combat a competing application using the Governmental Advisory Committee process. (*Id.*) In exchange for AUC's endorsement, ZACR agreed to allow AUC to "retain all rights relating to dotAfrica TLD." (Bekele Decl. ¶32, Ex. 20 at 616–17). The AUC also had other motives for favoring ZACR. The members of the AUC committee formed to choose who to endorse for the .Africa gTLD were individuals who were also members of other organizations affiliated with ZACR. (Bekele Decl. ¶31).

ZACR represented that it was applying for the .Africa gTLD on behalf of the "African community." (*See* Bekele Decl. ¶33, Ex. 21). However, it failed to submit the required type of application for organizations applying on behalf of a "community" which is a term of designation and differentiation for gTLDs. (*See* Bekele Decl. ¶32, Ex. 20 at 616). Nevertheless, ICANN processed ZACR's "standard" application. ZACR also made multiple misrepresentations to ICANN to edge DCA out including that it had the large number of qualifying endorsements from African governments sufficient to meet the 60% threshold under ICANN rules. (*See* Bekele Decl. ¶32, Ex. 20; ¶34; ¶5, Ex. 1 at ¶80). In fact, ZACR's purported governmental endorsements were not qualifying. (*See Id.*)

D. <u>The Geographic Names Panel and InterConnect Communications</u>

ICANN contracted with a private company InterConnect Communications ("ICC") to perform a review of geographic name applications as ICANN's Geographic Name Panel. (*See* Bekele Decl. ¶35, Ex. at 22). The ICC warned that if ICANN did not accept endorsement letters from regional authorities like the AUC and UNECA, ZACR's application would fail. (*See* Bekele Decl. ¶36, Ex. 23). ICANN asserted during the IRP that it had taken both the AUC and UNECA endorsements into account in evaluating DCA's application. (Bekele Decl. ¶ 5, Ex. 1 ¶90). However, had ICANN treated DCA's and ZACR's AUC endorsements equally, both DCA and ZACR should have either passed or failed the endorsement

requirement. (*See* Bekele Decl. ¶36, Ex. 23.) Rather, ICANN conspired to accept ZACR's endorsements as sufficient while disregarding Plaintiff's endorsements.

E. The GAC

ICANN has a Governmental Advisory Committee ("GAC") whose purpose, according to ICANN's Bylaws, is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments." (*See* Bekele Decl. ¶12, Ex. 4 at Art. 11 § 2(1)(a)). By invitation, membership on the GAC is open to "[e]conomies as recognized in the international fora, and multinational governmental organizations." (*See* Bekele Decl. ¶12, Ex. 4 at Art. 11 § 2(1)(b)). The AUC became a member of the GAC in 2012, apparently on the advice of ICANN. (*See* Bekele Decl. ¶22, Ex. 14 at 1). Having encouraged the AUC's membership, and having given the AUC instructions on how to use GAC proceedings to derail DCA, ICANN then allowed AUC to use the GAC as a vehicle for the issuance of advice against DCA's application by DCA's only competitor for .Africa, the AUC through ZACR, effectively ensuring that the rights to .Africa would be delegated to ZACR. (*See* Bekele Decl. ¶22, Ex. 14).

Specifically, ICANN allowed the GAC to issue a "consensus advice" that DCA's application should not proceed due to issues with the regional endorsements. (*See* Bekele Decl. ¶39, Ex. 26 at 3). Under ICANN's rules, the GAC can recommend that ICANN cease reviewing an application if *all* of the GAC members agree that an application should not proceed because an applicant is sensitive, violates national law or is problematic. (*See* Bekele Decl. ¶5, Ex. 1 ¶88; ¶42, Ex. 29 at Art. 12, Principle 47). However, not all of the members of the GAC agreed that DCA's application should be stopped. Kenya's representative was not even present at the GAC meeting when the advice was issued, but ICANN nonetheless allowed the AUC (through Alice Munyua) to make a statement on Kenya's behalf denouncing DCA's application, even though the current Kenya GAC advisor wrote to the GAC chairperson to inform her that Ms. Munyua did not

represent Kenya or its viewpoints and that he objected to a GAC consensus advice on .Africa. (*See* Bekele Decl. ¶37, Ex. 24; ¶38, Ex. 25].

Moreover, the GAC gave no indication that it considered the DCA's application was problematic, violated law or was sensitive - the required standard. (See Bekele Decl. ¶5, Ex. 1 ¶104 ("[ICANN's witness] also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.")) In June 2013, the New gLTD Program Committee ("NGPC") accepted the GAC's advice despite the aforementioned flaws in the GAC's process. (*See* Bekele Decl. ¶ 5, Ex. 1 ¶ 106). ICANN rejected DCA's application on the basis of the GAC advice while ZACR's application continued. (*See* Bekele Decl. ¶5, Ex. 1 ¶¶ 80, 106; ¶40, Ex. 27). Although ICANN could have reconsidered this decision under its rules, it refused to do so. (*See* Bekele Decl. ¶5, Ex. 1 ¶6; ¶7, Ex. 3 at Art. 4 § 2.2).

Meanwhile, ZACR passed the initial evaluation and entered into the contracting phase with ICANN. (*See* Bekele Decl. ¶5, Ex. 1 ¶13; ¶40, Ex. 27). ZACR did not have sufficient country specific endorsements to meet the ICANN requirements for geographic gTLDs. (*See* Bekele Decl. ¶36, Ex. 23). ZACR filed purported support letters endorsing the AUC's "Reserved Names" initiative, along with declarations made by the AUC regarding its intention to reserve .Africa for its own use along with its appointment letter from the AUC as evidence of such support. (*See* Bekele Decl. ¶32, Ex. 20). Only five of the purported endorsement letters submitted by ZACR from African governments actually referenced ZACR by name. (*See* Bekele Decl. ¶34). Presumably, given the clear limitations of these purported endorsements, ZACR passed on the basis of the same regional endorsements that ICANN and GAC had used to derail Plaintiff's application.

F. <u>The Independent Review Process</u>

The Guidebook terms DCA agreed to upon submitting its gTLD application contained a release and covenant not to sue (the "Prospective Release"):

"Applicant hereby releases ICANN…from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN...in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, and any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFIILIATED PARTIES WITH RESPECT TO THE APPLICATION." (*See* Bekele Decl. ¶7, Ex. 3 at Module 6, ¶6).

ICANN instead purports to provide applicants with an independent review process ("IRP"), as a means to challenge ICANN's actions with respect to a gTLD application: (*See* Bekele Decl. ¶7, Ex. 3 §§ 3.2.3; 6). The IRP is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators. (*See* Bekele Decl. ¶7, Ex. 3 § 3.2.3).

In October 2013, DCA successfully sought an IRP to review ICANN's processing of its application, including ICANN's handling of the GAC opinion. (*See* Bekele Decl. ¶5, Ex. 1 at ¶9). DCA's panel was comprised of the Honorable William J. Cahill (Ret.)(who replaced the Honorable Richard C. Neal (Ret.) after his passing), Babak Barin, and Professor Catherine Kessedjian. (*See* Bekele Decl. ¶5, Ex. 1 at 1). Judge Cahill is a JAMS arbitrator and former judge in San Francisco County Superior Court. Mr. Barin and Ms. Kessedjian are both experienced professors of international law as well as experienced arbitrators.

G. ICANN Ignores the IRP's Authority

Despite the initiation of the IRP, ICANN continued to review ZACR's application – *even going so far as to sign a contract for the operation of .Africa with ZACR*. (Bekele Decl. ¶5, Ex. 1 ¶¶12– 20; ¶9, Ex. 9. The IRP panel, during emergency proceedings, found that this was improper and enjoined further issuance of .Africa to ZACR. (*See id.*). The IRP panel issued a final and thorough 63-page declaration in the matter on July 9, 2015. The panel found, *inter alia,* that:

a. The IRP arbitration was binding, despite ICANN's protests to the contrary. (Bekele Decl. ¶5, Ex. 1 ¶23).
b. ICANN's actions and inactions with respect to DCA's application were inconsistent with ICANN's bylaws and articles of incorporation. (Bekele Decl. ¶5, Ex. 1 ¶109).
c. ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (Bekele Decl. ¶5, Ex. 1 ¶133).

This was the first time in its new gTLD history that ICANN was *not* the prevailing party in an IRP.

H. ICANN's Processing of DCA's Application After the IRP Declaration

ICANN did not act in accordance with the IRP's Final Declaration. (*See* Bekele Decl. ¶5, Ex. 1 ¶23). Instead of allowing DCA's application to proceed through the remainder of the application process, ICANN restarted DCA's application and re-reviewed its endorsements. (Bekele Decl. ¶¶ 23–24, Ex. 15). ICANN intended to deny DCA's application. For example, in September 2015 ICANN issued DCA clarifying questions regarding its endorsements and then indicated that DCA's responses were inadequate. Hoping to gain insight into what exactly was allegedly wrong with its application, DCA agreed to an extended evaluation. (Bekele Decl. ¶29). But, ICANN merely asked the exact same

questions without further guidance or clarification, clearly a pretext to deny DCA's application. (*Id.*). After all, ICANN had already entered into a registry agreement with ZACR, as ICANN's general counsel had made public *after* the IRP Declaration issuance. In short, the process ICANN put Plaintiff through was a sham with a predetermined ending – ICANN's denial of Plaintiff's application so that ICANN could steer the gTLD to ZACR.

I. ICANN's Issuance of the .Africa gTLD is Imminent

In February 2016, ICANN rejected DCA's application after the extended evaluation. (Bekele Decl. ¶28, Ex. 18). It is believed that ICANN is on the verge of awarding .Africa to ZACR. On March 5, 2016, ICANN is holding a board meeting in Morocco, Africa where it is expected to officially give the .Africa rights to ZACR. (Bekele Decl. ¶41, Ex. 28). In fact, when DCA sought assurance from ICANN's counsel that .Africa would not be granted at the meeting, the assurance was refused. (Declaration of Ethan J. Brown ¶2). Now, despite its pending complaint against ICANN, DCA stands to face another wrongful and unfair delegation of the .Africa gTLD.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 65 provides that: (1) The court may issue a preliminary injunction only on notice to the adverse party and (2) before or after beginning a hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Fed. R. Civ. P. 65. "The basis for injunctive relief [] in the federal courts has always been irreparably injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). "District courts in the Ninth Circuit use two tests when analyzing a request for a temporary or preliminary injunction: the 'traditional-' and 'alternative-' criteria tests." *Imperial v. Castruita*, 418 F.Supp.2d 1174, 1177-78 (C.D. Cal. 2006).

Under the former test, the plaintiff must show "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Id*. Under the alternative, or "serious questions" test, "a preliminary injunction is appropriate when a plaintiff demonstrates that "serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). This approach requires that the elements of the preliminary injunction test be balanced, so that a stronger showing of one element may offset and a weaker showing of another." *Id.* Under either test, DCA is likely to succeed on the merits and is likely to suffer irreparable harm, balancing the scales heavily in its favor. Given the public nature of ICANN and the internet as a whole, issuing gTLDs in a fair, transparent process is in the public's interest. A preliminary injunction should issue.

IV. ARGUMENT

A. DCA will prevail on the merits for declaratory relief and the injunction will preserve the status quo.

DCA has already demonstrated that it is entitled to the relief it seeks (as evidenced by the IRP decision) and satisfies the elements for a preliminary injunction under either standard. DCA only moves for a preliminary injunction under its ninth cause of action against ICANN for declaratory relief. "The function of a preliminary injunction is to maintain the *status quo ante litem* pending a determination of the action on the merits. The status quo is the last uncontested status preceding the commencement of the controversy." *Washington Capitals Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969). ICANN has not issued the rights to the .Africa gTLD. Until DCA is afforded the relief determined by ICANN's own IRP Declaration, the .Africa gTLD should not issue. For the

reasons demonstrated below, and determined by ICANN's IRP, DCA has already largely succeeded on the merits of its claim before the IRP.

i. DCA meets the elements under the traditional test for a preliminary injunction.

1. DCA demonstrates a strong likelihood of success on the merits of its ninth cause of action.

DCA's ninth cause of action seeks a declaration from the Court that it is entitled to proceed through the remainder of the .Africa gTLD application process as expressed by the IRP findings. As an initial matter, DCA's claim for declaratory relief is proper. The federal Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction…any court of the United States…may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. §2201(a). In determining whether a plaintiff's claim properly invokes the [Declaratory Judgment] Act, courts consider "whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Ours Tech, Inc. v. Data Drive Thru, Inc.,* 645 F.Supp.2d 830, 834 (internal cites omitted).

An actual dispute exists between DCA and ICANN because ICANN is denying DCA the proper application processing according to the IRP. The IRP ruled that ICANN failed to follow its articles of incorporation, by-laws, and other guidelines for processing DCA's application. The IRP also ruled that DCA should be allowed to "proceed through the ***remainder*** of the new gTLD process (emphasis added)." ICANN refused to follow the IRP ruling, and placed DCA back to the start of the application. (*See* Bekele Decl. ¶24, Ex. 15). DCA complained that this was not proper. The controversy is not conjectural, but actual.

Moreover, DCA will be able to show that it met ICANN's geographic endorsement standards, or at the very least that its endorsements were no less adequate than ZACR's[1], ICANN's favored applicant. (*See* Bekele Decl. ¶14, Ex. 6; ¶16, Ex. 8; ¶36, Ex. 23). At the time the IRP proceeding commenced, DCA's endorsers (AUC and UNECA) had been approved as endorsers by ICANN. (*See* Bekele Decl. ¶5, Ex. 1 at ¶45). Both of those entities are representative of nearly all the nations in Africa, far more than 60% (*See* Bekele Decl. ¶30, Ex. 19 at 601). Although ICANN has asserted that the AUC and UNECA withdrew their endorsements from DCA, a withdrawal is only permitted after an applicant applies if an applicant has failed to meet one of the conditions of its endorsement. (*See* Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.3) There were no conditions on either the AUC or UNECA endorsements; therefore any attempted withdrawal of those endorsements is improper. (*See* Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.3; ¶14, Ex. 6; ¶16, Ex. 8).

Accordingly, DCA demonstrates a strong likelihood of success on the merits with regard to its claim for declaratory relief that it is entitled to the gTLD application process it was promised.

2. DCA will suffer irreparable injury if the .Africa gTLD is awarded to another party.

Plaintiff will suffer irreparable injury because the .Africa gTLD is a unique asset for which Plaintiff cannot be compensated through monetary damages. "The key word in this consideration is *irreparable*." *Sampson v. Murray*, 415 U.S. 61, 90-91 (1974). The rights to .Africa cannot be issued again. There is but one holder to the delegation rights to .Africa, and if ZACR is granted those rights after DCA has been improperly denied the fair and transparent gTLD application process ICANN was required to provide, DCA will not be able to obtain those

[1] *Infra,* Section II.E.

rights elsewhere. (*See* Bekele Decl. ¶2). If ICANN issues the .Africa gTLD delegation rights to ZACR or any other party, DCA will be irreparably harmed.

Furthermore, the irreparable harm that DCA will suffer tips the balance in favor of a preliminary injunction, regardless of whether the court finds less weight in DCA's likelihood of success. "In some cases, we have stated that a plaintiff may meet its burden by demonstrating a combination of probable success on the merits and a possibility of irreparable injury. At other times, we have stated that where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise "serious questions" on the merits." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiff has demonstrated both a likelihood of success on the merits (based upon the IRP decision granting Plaintiff the relief it seeks here) and inevitable irreparable injury if ICANN is not enjoined from issuing the .Africa gTLD.

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

ICANN cannot demonstrate any harm, because no harm occurs if the .Africa gTLD is not issued.[2] "[T]he district court should balance the relative hardships to the parties that would result from granting or denying a preliminary injunction. If the balance tips decidedly toward plaintiffs, and if plaintiffs have raised serious enough questions to require litigation, the injunction **should** issue." *Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976) [emphasis added]. As demonstrated above, the lack of harm to ICANN and

[2] Since ZACR presently possesses no right to .Africa it will not be materially harmed either. It has also contributed to this delay by its own collusion with AUC and ICANN to derail DCA's application and cannot complain of further delay.

permanent, irreparable, and irreversible injury - coupled with the likelihood of success - warrants the granting of Plaintiff's request for a preliminary injunction.

4. A preliminary injunction is in the public interest.

"The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief. *Alliance For The Wild Rockies v. Cottrell,* 632 F.3d 1127, 1138 (9th Cir. 2011). The fair and transparent application process that ICANN touts is indisputably in the public interest; in addition to the fact that ICANN regulates the largest public domain in the world (the internet). No public interest would be injured here, but rather it would be preserved and fostered. DCA only seeks to obtain a fair and transparent application processing – the processing it contracted for, was denied as determined by ICANN's IRP, and is entitled to as also determined by ICANN's IRP. Ensuring that the proper party holds the rights to the .Africa gTLD is more important than forcing a process where the gTLD will end up in the hands of an improper party.

B. A preliminary injunction should issue under the alternative test.

DCA has already established probable success on the merits and the inevitable irreparable injury necessary as elements under either test. Under the latter test, the plaintiff must show either "a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *Imperial v. Castruita*, 418 F.Supp.2d 1174, 1177-78 (C.D. Cal. 2006) [internal citations omitted].

As stated above, DCA seeks declaratory relief with respect to the claim that it is entitled to proceed through the remainder of the .Africa gTLD application process as expressed by the IRP findings. ICANN's IRP accepted DCA's argument and ordered ICANN to do what DCA seeks here. This is an actual controversy, with sufficient immediacy, proper for Court action.

In addition to meeting the likelihood of success, the unique character of the .Africa gTLD guarantees irreparable injury will occur if ICANN is allowed to issue the gTLD without first complying with the IRP Declaration and processing DCA's application at a point beyond the initial evaluation. DCA's application is rendered meaningless if the .Africa gTLD is issued.

Accordingly, under either test, the scale balance in favor of DCA and a preliminary injunction should issue.

C. ICANN's waiver argument is void.

DCA believes ICANN will assert as its primary defense to this Motion that the Guidebook's Prospective Release prohibits this Court from ruling on this case. The Prospective Release quoted in Section II.F, *supra*, however, is not enforceable because it violates California Code of Civil Procedure §1668, is unconscionable, and was procured by fraud. ICANN can cite to no authority for the proposition that the Prospective Release is enforceable.[3]

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

ICANN's Prospective Release is void in that it waives and releases any redress in a court of law, including fraudulent and intentional actions. "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code §1668; *See also Reudy v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116 (N.D. Cal. 2007) ["a party [cannot] contract away

[3] In its motion to dismiss, currently on file with this Court, ICANN provides inapposite case law to support its position. The California case law ICANN uses in support of its argument involve settlement agreement mutual releases – not one-sided prospective releases. See *San Diego Hospice v. County of San Diego*, 31 Cal.App.4th 1048, 1050 (1995); *Winet v. Price*, 4 Cal.App.4th 1159 (1992); *Skrbina v. Flemin Cos.*, 45 Cal.App.4th 1353 (1996); *Grillo v. California*, 2006 U.S. Dist. LEXIS 15255 (N.D. Cal. Feb. 13, 2006).

liability for his fraudulent or intentional acts or for his negligent violations of statutory law, regardless of whether the public interest is affected" (internal citations and quotations omitted).][4]

ICANN's Prospective Release encompasses every claim that arises from its actions – necessarily including, fraud and intentional violations of law: "Applicant hereby releases ICANN and the ICANN affiliated Parties ... from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN...in connection with ICANN's...review of this application, investigation or verification, any characterization or description of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application." *See Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d 1148, 1153 (1990) [holding a covenant not to sue that released "for, from and against any and all liability whatsoever" of "any and all claims of every nature" void for excluding fraud, intentional acts, and negligent violations of statutory law.]; Bekele Decl. ¶7 Ex. 3 at Module 6, ¶6. ICANN's Prospective Release purports to waive fraud and intentional violations of law, and thus, is void.

ii. ICANN's Prospective Release is unconscionable.

The Prospective Release is also unenforceable because it is unconscionable. "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Cal. Civ. Code §1670.5(a); *See also Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 319 F.Supp.2d 1040, 1054 (C.D.

[4] Although often cited for the claim that public policy must be implicated for a release to be void, *Tunkl v. Regents of California*, 60 Cal.2d 92 (1963) does not support that proposition. *See Reudy v. Clear Channel Outdoors, supra.* Even under the standard expressed in *Tunkl v. Regents of California*, *supra*, DCA can establish that ICANN's prospective release is void.

Cal. 2003). "[T]he test for unconscionability is whether the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. […] To determine unconscionability, courts look to whether the allocation of the burdens and benefits are so one-sided as to shock the conscience or whether there is an 'absence of meaningful choice on the part of one of the parties together with the contract terms which are unreasonably favorable to the other party.'" *Nat'l Rural Telcoms. Coop. v. DIRECTV, Inc.*, supra.

"In order to render a contract unenforceable under the doctrine of unconscionability, there must be both a procedural and substantive element of unconscionability. These two elements, however, need not both be present to the same degree." *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 783 (9th Cir. 2002) [internal citations omitted]. "[C]ourts use a sliding scale, 'such that the greater the degree of unfair surprise or unequal bargaining power, the less the degrees of substantive unconscionability required to annul the contract and vice versa.'" *Stern v. Cingular Wireless Corp.* ("Stern") 453 F.Supp.2d 1138, 1146 (C.D. Cal. 2006) at 1146. ICANN's contract is both procedurally and substantively unconscionable.

1. <u>The Prospective Release is procedurally unconscionable.</u>

All bargaining power was in the hands of ICANN and there was no negotiation. "A contract is procedurally unconscionable if at the time the contract was formed there was 'oppression' or 'surprise.' Oppression exists if an inequality of bargaining power between the parties results in the absence of real negotiation and meaningful choice. Surprise 'involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them.'" *Stern*, *supra* at 1145; *See also Ingle v. Circuit City Stores, Inc.* ("*Ingle*"), 328 F.3d 1165, 1172 (9th Cir. 2003) ["When a party who enjoys greater bargaining power than another party presents the weaker party with a contract

without a meaningful opportunity to negotiate, 'oppression and, therefore, procedural unconscionability, are present.'"]

DCA had no bargaining power because ICANN holds a monopoly on gTLDs. ICANN is the *only* gTLD provider in the world; .Africa could not be obtained from anyone else. (Bekele Decl. ¶3). In order to apply, DCA was forced to agree to the Guidebook that contained the Prospective Release. (Bekele Decl. ¶8). DCA was not invited to negotiate any provision of the Guidebook nor did DCA contribute the language in the Prospective Release. (Bekele Decl. ¶9). The Guidebook does not encourage the parties to consult with an attorney, nor did DCA do so. (Bekele Decl. ¶7, Ex. 3; ¶11). Accordingly, the Prospective Release is procedurally unconscionable.

2. The Prospective Release is substantively unconscionable.

The Prospective Release is also substantively unconscionable. "A contract is substantively unconscionable if the contract or a provision thereof is overly harsh or one-sided." *Stern, supra*. "Substantive unconscionability centers on the "terms of the agreement and whether those terms are so one-sided as to shock the conscience." *Ingle, supra* at 1172. The Prospective Release is a textbook example of a one-sided agreement. It requires that DCA give up its right to sue ICANN for ***any and all*** acts relating to the application but does not require ICANN to give up any right to sue DCA. ICANN is not prevented from suing DCA for any violation of law, negligence, fraud or otherwise. The Prospective Release absolves ICANN of all wrongdoing – and provides no benefit to applicants. Because the contract is both procedurally and substantively unconscionable, the agreement is unenforceable.

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

ICANN's Prospective Release was procured by fraud and cannot be relied upon to ICANN's benefit. "Fraud in the inducement is a subset of the tort of fraud whereby 'the promisor knows what he is signing but his consent is induced by

fraud, mutual assent is present and a contract is formed, which by reason of the fraud is voidable.'" *Jewelers Mut. Ins. Co. v. Adt Sec. Servs.* (N.D. Cal. July 9, 2009, No. C 08-02035 JW) 2009 U.S. Dist. LEXIS 58691, at *7-8. [internal citations omitted]. "Where the plaintiff proves fraudulent inducement (which requires a showing of justifiable reliance), none of [the fraudulently induced agreement's] provisions have any legal or binding effect." *Edgewater Place, Inc. v. Real Estate Collateral Mgmt. Co. (In Re Edgewater Place, Inc.)*, 1999 U.S. Dist. LEXIS 23692, Case No. ED CV 98-281 RT at *12 (C.D. Cal., May 19, 1999).

ICANN required DCA to agree to the terms of its guidebook and pay $185,000 in order to apply for the .Africa gTLD. DCA agreed only because it was falsely led to believe that the IRP process provided for real redress through the IRP in lieu of court review. (See Bekele Decl. ¶7, Ex. 3 at Module 6, ¶6). After the IRP ruled against it, ICANN failed to follow the directives in the IRP ruling, making the above statement false. (See Bekele Decl. ¶7, Ex. 3 at Module 6, ¶6). DCA was provided no redress and would not have agreed to the Guidebook terms or paid the $185,000 fee, if it knew that ICANN would not follow the IRP decision. ICANN procured the provision by fraud, and it would be inequitable and to DCA's detriment to find the Prospective Release binding.

Accordingly, under any of the grounds stated above, ICANN's Prospective Release is void and unenforceable.

V. CONCLUSION

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

Dated: March 1, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown
Ethan J. Brown
Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST

CERTIFICATE OF SERVICE

I, Ethan J. Brown, hereby declare under penalty of perjury as follows:

I am a partner at the law firm of Brown, Neri & Smith LLP, with offices at 11766 Wilshire Blvd., Los Angeles, California 90025. On March 1, 2016, I caused the foregoing **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on March 1, 2016

/s/ Ethan J. Brown