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8 DOTCONNECTAFRICA TRUST

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

10 **COUNTY OF LOS ANGELES – CENTRAL**

11
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]

**JOINT REPLY TO DEFENDANT’S AND
INTERVENOR’S OPPOSITION TO
PRELIMINARY INJUNCTION**

Date: February 2, 2016

Hearing: 8:29 a.m.

Dept.: 53

[Filed concurrently: Reply Declaration of
Sophia Bekele Eshete and Sara C. Colón;
Notice of Lodging]

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) through its
4 bylaws, articles of incorporation, and applicant guidebook repeatedly represented that the new
5 gTLD application process would be transparent, fair, and not subject any applicants to disparate
6 treatment. **ICANN’s own Independent Review Process (“IRP”) found ICANN purposefully**
7 **failed to give DCA the treatment that it promised when it violated its bylaws.** ICANN attempts
8 to distract from the fact that it continued to unfairly process DCA’s application after the IRP by
9 extensively misquoting Ms. Bekele’s deposition transcript and citing irrelevant facts. ICANN’s
10 disparate treatment of DCA’s application versus ZACR’s speaks for itself.

11 DCA had already passed the financial, administrative, and technical portions of the
12 application process when ICANN halted DCA’s application based on faulty GAC advice as the
13 IRP panel concluded. After the IRP, ICANN and its Geographic Names Panel (“GNP”) provider
14 InterConnect Communications (“ICC”) wrongfully failed DCA based on purportedly inadequate
15 endorsements. At the time, ICANN and ICC failed DCA based on a hyper-technical reading of a
16 single discretionary criteria. Now, knowing how weak that argument is, ICANN and Intervenor
17 ZA Central Registry (“ZACR”) argue that the African Union Commission (“AUC”) withdrew its
18 endorsement of DCA.¹ This withdrawal was not valid for the reasons explained below as ICANN
19 well knows as it processed DCA’s application for years after the purported withdraw. Even if the
20 withdrawal were valid, DCA also had an endorsement from the United Nations Economic
21 Commission for Africa (UNECA) a long-standing participant at ICANN’s GAC. ICANN agreed
22 that UNECA constituted a valid endorser. UNECA’s post IRP statement, made well after DCA’s
23 application should have been evaluated and passed and elicited by the AUC to try to discredit the
24 UNECA endorsement, that it was not a proper endorser is irrelevant because ICANN concluded
25 otherwise.

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28 ¹ ICANN was cc’d on the letter from the AUC and DCA raised the issue of the letter with ICANN in correspondence before it submitted its application. See January 3, 2017 Declaration of Sophia Bekele Eshete (“Jan. 3 Bekele Decl.”), ¶ 10, Ex. 6. ICANN’s self-serving insistence that it was unaware of the withdrawal until recently is utterly unfounded and further evidence that ICANN will say and do anything to justify its wrongful rejection of DCA’s application.

1 In opposing DCA’s motion for a preliminary injunction (“PI”), ICANN concedes that the
2 IRP held that ICANN violated its representations of fairness and even-handedness, but claims that
3 DCA was provided complete and full redress for that wrongful conduct.² ICANN’s argument that
4 DCA was not injured because it was placed back into geographic names review is baseless.
5 ICANN assigned the same reviewer to the file who had already stated biased and negative
6 comments about DCA openly (January 6, 2017 Declaration of Ethan J. Brown (“Jan. 6 Brown
7 Decl.”) Ex. B) and then denied the names review on a pre-textual issue with a **discretionary factor**
8 in evaluating endorsements. In stark contrast, ICANN assisted ZACR at every turn. ICANN
9 agreed to consider endorsements from the AUC and UNECA, only because ZACR – ICANN’s
10 favored applicant - would have otherwise indisputably failed the geographic names review. (Jan.
11 3 Bekele Decl. ¶ 26, Ex. 19.) In support of its application, ZACR misrepresented its endorsements
12 by submitting more than 30 letters from individual countries which actually claimed to support the
13 AUC’s “reserved names initiative;” **87.5% of ZACR’s “endorsements” did not even identify**
14 **ZACR or associated individuals by name**, evidencing that the endorsing governments did not
15 know of ZACR. (Reply Declaration of Sara C. Colón (“Colon Reply Decl.”) Ex 1.) Nevertheless,
16 ICANN’s GNP determined that ZACR satisfied the first criteria of evaluation, that the “letter
17 clearly express[es] the government’s or public authority’s support for or non-objection to the
18 *applicant’s* application.” (*Id.* Ex. 3.) The collusion between ICANN and the purportedly
19 independent GNP provider ICC appears contrary to the terms of reference for the GNP published
20 by ICANN.³

21 When ICANN issued its first set of clarifying questions to DCA, it merely stated that the
22 endorsements were insufficient, because they lacked the fourth, discretionary criteria for
23 endorsement letters. DCA responded by stating that it believed the endorsement letters were
24 sufficient for all criteria. ICC disagreed, but when DCA agreed to an extended evaluation, ICC
25 staffer, Mark McFadden, suggested to ICANN that ICANN provide an explanation as to why
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27 ² DCA objected to ICANN’s sending DCA back to the same conflicted GNP Panel, who per the Guidebook, must
28 remain independent. By placing DCA back to the same Panel, DCA could not receive a fair processing. Reply
Declaration of Sophia Bekele (“Reply Bekele Decl.”) ¶ 10, Ex. E; Jan. 3 Bekele Decl. Ex. 3, § 2.4.3.

³ <https://archive.icann.org/en/topics/new-gtlds/eoi-geonames-02apr09-en.pdf>; <http://www.domainpulse.com/2009/04/03/icann-extends-deadline-for-independent-evaluator-applications/>

1 DCA’s endorsements were insufficient as to the fourth criteria. (Colón Reply Decl. Ex. 1.)
2 Although ICC was to be an evaluation panel independent from ICANN (and not subject to any
3 influence from ICANN), when ICANN rejected this, Mr. McFadden issued the same clarifying
4 questions a second time – a pretext to justify its planned rejection of DCA’s application. (Jan 3.
5 Bekele Decl. Ex. 13.) In stunning contrast to it intentionally stonewalling DCA, ICANN
6 ghostwrote the endorsement letter ZACR used to pass evaluation and signed an improper registry
7 agreement with ZACR. In short, ICANN manipulated the .Africa gTLD application process to
8 ensure ZACR’s success and DCA’s failure. ICANN cannot claim that DCA has been provided
9 redress for its improper and disparate conduct when the whole process, even after DCA’s IRP
10 victory, has been a rigged process designed to ensure DCA’s ultimate failure.

11 Defendants’ arguments as to DCA’s harm are red herrings. ZACR argues that Plaintiff
12 DCA cannot be harmed because DCA Registry is a shell company. DCA Registry is a separate
13 legal entity wholly-owned by DCA (who has partnered with the well-experienced international
14 registry CentralNic), responsible for the operation of the .Africa gTLD if awarded to DCA. (Reply
15 Bekele Decl. ¶ 3.) DCA Registry will not operate if .Africa were delegated to ZACR, and DCA
16 would also suffer. (*Id.*) Finally, both ZACR and ICANN claim that DCA cannot demonstrate
17 “irreparable harm”. While this is the federal court standard, *it is not the standard here*. DCA
18 demonstrates substantial harm, even irreparable harm, in the destruction of its business and the
19 loss of the ability to control the unique sunrise period which includes, the “landrush” period for
20 non-trademark premium domain name sales. The only harm demonstrated by ZACR is speculative
21 monetary harm. If monetary harm is no grounds for granting a PI, it logically cannot be grounds
22 for denying it.

23 DCA respectfully requests the Court grant its motion for a preliminary injunction.

24 **II. RELEVANT FACTS**

25 **A. DCA’s endorsements from the AUC and UNECA remain valid**

26 ICANN had suggested to potential applicants, that they begin the process of obtaining
27 endorsements well in advance of applying. (Jan. 3 Bekele Decl., ¶ 5 Ex. 3, p. 2-20.) Thus, DCA
28 obtained endorsements from both the AUC and UNECA, among others, years before applying.
(*Id.* at Exhs. 6 and 8.)

1 In 2010, nearly a year after granting its endorsement, the AUC wrote to DCA, stating that
2 it “has reconsidered its approach in implementing the subject Internet Domain Name (DotAfrica)
3 and no longer endorses individual initiatives in this matter related to continental resource.” (*Id.*
4 Ex. 7.) DCA never understood this letter to constitute a valid withdrawal. (Reply Bekele Decl.
5 Ex. C) ICANN never raised this argument until this litigation, although it was copied on the letter
6 and DCA referenced the letter extensively in correspondence to ICANN throughout the entire
7 process. (*Id.*) DCA had no reason to believe ICANN had not received the letter, as ICANN now
8 questionably claims. (Declaration of Christine Willet ¶ 8.)⁴

9 ICANN now claims that DCA understood the April 16, 2010 purported withdrawal letter
10 to be valid, because it stated in a letter the next day “we fully support the open process and we are
11 quite confident based on our due diligence...to be one of the leading contenders.” LeVee
12 Declaration, Ex. L. However, *Ms. Bekele never acknowledged that the purported withdrawal was*
13 *valid*, but clearly stated in her reply letter to the AUC “...we fully support **the ICANN open**
14 **process and we are quite confident to be a leading contender**. (Bekele Reply Decl. ¶ 5, Ex. B.)
15 Any reference DCA made to “reinstating” the AUC’s letter was an attempt to comply with
16 ICANN’s new demands, not an acknowledgment that the endorsement had been withdrawn
17 pursuant to the rules in the Guidebook. The Guidebook clearly states that an endorsement cannot
18 be withdrawn unless the conditions to the endorsement were not fulfilled. (Jan 3 Bekele Decl.,
19 Ex. 3, § 2.2.1.4.3.) There were no conditions to the AUC’s endorsement of DCA.

20 ICANN further claims that DCA later acknowledged that the AUC withdrew its support
21 and cites to a January 26, 2011 letter. (ICANN Opp. at 4:21-24.) But in the same letter, DCA
22 states: “[W]e still believe that our original endorsement that was given by the AU Chairperson
23 remains valid. As a direct consequence, we no longer give credence to the letter that was
24 purportedly issued in the name of the Deputy Chairperson[.]” (LeVee Declaration, Ex. M.)

25 Finally, ICANN claims that because DCA requested that “ICANN...give DCA no less than
26 18 additional months” to obtain individual endorsements, that it “obviously acknowledged that it

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28 ⁴ ICANN and ZACR misleadingly suggest that DCA conceded it was not permitted to “skip” the geographic names
review. DCA only agreed that no parties could “skip” the geographic names review. Immediately prior to that
statement, Ms. Bekele testified that DCA had sufficient endorsements to pass the geographic names review and
therefore did not “skip” the review. (LeVee Decl, Ex. H at 180.)

1 lacked the required support at the time of the IRP.” (ICANN Opp. at 6:9-10.) But this was not
2 DCA’s entire request. At the IRP, DCA requested that “DCA...be granted a period of no less than
3 18 months to obtain Government support as set in the Applicant Guidebook and interpreted by the
4 Geo-Panel...or **accept that the requirement is satisfied as a result of the endorsement...by**
5 **UNECA.**” (Jan. 3 Bekele Decl. Ex. 1 (¶46).) The request was in the event that the endorsements
6 from the AUC and UNECA were invalidated by the IRP. (LeVee Decl. Ex. H at 205:14-20;
7 208:13-23.) Ms. Bekele thoroughly explained this request in the deposition transcript excerpts that
8 were submitted by ICANN.⁵ (*Id.*)

9 Ultimately, ICANN failed DCA’s application not because of the withdrawals it now
10 belatedly asserts to justify its wrongful actions but because it found the letters did not satisfy the
11 following discretionary criteria: “that the application should demonstrate the endorsers
12 understanding that the applicant is applying for the gTLD through ICANN and will accept the
13 gTLD pursuant to any conditions ICANN imposes.”⁶ ICANN and ZACR claim this was
14 mandatory, but fail to explain why ICANN used the word “should” when it could have used
15 “must,” as it did for all three of the other immediately preceding criteria. In any event both letters
16 satisfied the fourth criteria because they indicated that “your organization is applying
17 for....’ .africa’ from the Internet Corporation for Assigned Names and Numbers,” expressly stating
18 that DCA was applying through ICANN, and implying that the award of the gTLD would be
19 subject to ICANN’s rules and regulations.

20 **B. ZACR’s Fraudulent Application**

21 In submitting its application, ZACR submitted endorsement letters from 30 +
22 separate countries, and the AUC. Significantly, only 5 out of 30 + individual country endorsement
23 letters submitted, *referenced or identified ZACR by name!* (Reply Colón Decl. Ex 2.) In drafting
24 an initial round of clarifying questions, ICC noted to ICANN that although those endorsement
25 letters were insufficient as to criteria 3 and 4, they fulfilled the first criteria, which requires that
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27 ⁵ ICANN has cited Ms. Bekele’s testimony many times for propositions that it does not stand for. *See* ICANN Opp.
28 at 4:24-25; 6:7-8; n. 6; n. 7; 7:4; 11:17; 13:5 and 15:12-13.

⁶ ICANN also fails to show why the AUC would not understand ICANN’s process and rules when it had endorsed
ZACR for the same gTLD. This fourth criteria was intended to apply to applicants obtaining endorsements from
“individual” country governments.

1 the “letter must clearly express the government’s or public authority’s support for or non-objection
2 to **the applicant’s** application. (*Id.* Ex. 3; Jan. 3 Bekele Decl. Ex. 3, § 2.2.1.4.2.3 (emphasis
3 added).)

4 Because ZACR’s endorsements letters did not even identify ZACR by name there is no
5 legitimate way ICANN could conclude the letters demonstrate that the government or public
6 authority support ZACR. Instead, as the IRP finding evidenced, the 30 + endorsement letters
7 indicated that they endorsed the AUC’s reserved names initiative. (Reply Colón Decl. Ex. 2.) That
8 initiative was rejected by ICANN on March 8, 2012. (Jan. 3 Bekele Decl. Ex. 10.) It is indisputable
9 that ZACR knew its endorsements were not appropriate and **still appropriated such letters as its**
10 **own letters of endorsements, for the purposes of its application, and still submitted them,**
11 despite its public claim for many years that it has the support of African Governments. Yet the
12 ICC and ICANN collaborated in making the public believe that ZACR’s endorsements – which
13 endorsed a separate initiative – were sufficient. (Reply Colón Decl. Ex. 3.) Only when the actual
14 letters came out in the IRP process was the truth revealed. ICANN also overlooked the fact that
15 ZACR purportedly applied on behalf of the community when its application did not qualify as
16 such. The ZACR application was not community-based; nor did it identify the target community
17 based on its answers to the evaluation questions submitted along with its application. (Jan. 3
18 Bekele Decl., ¶ 22, Ex. 16.) Moreover, that ZACR’s application was selected by the AUC during
19 its request for proposals (“RFP”) does not make ZACR’s application any more legitimate than
20 DCA’s – the RFP was a process completely outside the framework of ICANN’s gTLD application
21 process, called for a “community” applicant rather than a standard applicant, and ZACR was an
22 AUC puppet from the outset.

23 Finally, although ZACR clearly stated that it was applying on behalf of the AUC, and the
24 AUC has now admitted it was ZACR’s “partner,” ICANN again overlooked its rules and declined
25 to run a background check or review of qualifications on the AUC, an actual applicant. (Jan. 3
26 Bekele Decl. ¶ 5, Ex. 3, § 1.1.2.1.) Only ZACR was required to undergo review, and even there
27 ICANN gave ZACR multiple opportunities to re-submit portions of its application that were not
28 adequate upon initial submission such as its endorsement letter from the AUC and its Contingency
Operations Instrument, which ZACR directly negotiated with ICANN after the fact.

1 **C. DCA is harmed by ICANN intentionally breaking its promises**

2 DCA campaigned for years, spending significant sums of money and expending countless
3 hours, only to be given intentionally disparate and unfair treatment in the processing of its .Africa
4 gTLD application. The harm is not limited to ICANN’s failure and IRP’s finding of ICANN’s
5 failure to follow its rules. The failure of ICANN to follow its rules will result in the inequitable
6 grant of the .Africa gTLD to ZACR, who for the reasons stated within this brief and DCA’s
7 previous briefs, should not be awarded the gTLD.

8 **III. ARGUMENT**

9 **A. DCA Is Likely to Succeed on its Second Cause of Action**

10 ICANN’s IRP found that ICANN failed to follow its rules and bylaws, and thus failed to
11 treat DCA’s and ZACR’s applications fairly and equally. To prove its claim for intentional
12 misrepresentation, DCA must show (1) misrepresentation; (2) knowledge of falsity; (3) intent to
13 defraud; (4) justifiable reliance; and (5) damages. *Lazar v. Superior Court* (1996) 12 Cal.4th 631,
14 638; Cal. Civ. Code §1709. ICANN does not clearly identify which elements it feels DCA cannot
15 meet, however, it does assert that it made no misrepresentations and that any harm to DCA was
16 redressed after the IRP. DCA has shown that ICANN misrepresented: (1) that it would “make
17 decisions by applying documented policies neutrally and objectively, with integrity and fairness;
18 (2) that it would “operate the maximum extent feasible in an open and transparent manner and
19 consistent with procedures designed to ensure fairness; (3) that it would “be accountable to the
20 Internet community for operating in a manner that is consistent with these Bylaws, and with due
21 regard to the core values set forth in Article 1 of [its] Bylaws; (4) that it would carry[] out its
22 activities in conformity with relevant principles of international law and the application of
23 international conventions and local law...”; and (5) that the IRP provided actual redress to
24 applicants. (Jan. 3 Bekele Decl. ¶ 3, Ex. 1, ¶ 94-98.)

25 The IRP expressly found that ICANN did not act in accordance with its Bylaws and
26 Articles of Incorporation because it treated DCA unfairly. (Jan. 3 Bekele Decl. Ex. 1, ¶¶ 109,
27 113.) ICANN and ZACR claim that DCA suffered no further harm because ICANN provided DCA
28 with all necessary redress after the IRP. (ICANN Opp. at II(a)(3) and (4); ZACR Opp. at 10:25-

1 11:6.) But ICANN did not provide all necessary redress and continued to treat DCA unfairly and
2 in violation of ICANN’s own rules. (Colón Reply Decl. Ex. 1.) After DCA responded to the first
3 set of clarifying questions, ICC staffer Mark McFadden suggested that ICANN provide DCA with
4 additional language explaining why DCA’s endorsements were insufficient for the fourth,
5 discretionary criteria. (*Id.*) Nevertheless, ICANN instructed McFadden and the ICC to issue the
6 same exact clarifying questions although McFadden and the ICC should have been acting
7 independently. ICANN wanted to fail DCA’s application so that it could honor the registry
8 agreement it had already improperly signed with ZACR.

9 DCA’s endorsements for .Africa were sufficient and ICANN’s GNP arbitrarily rejected
10 DCA’s application to favor ZACR under a discretionary criteria for baseless reasons. ICANN
11 never questioned whether the AUC or UNECA withdrew their support, but only questioned criteria
12 four of the endorsement requirements, and DCA’s endorsements met that requirement as well. As
13 to DCA’s endorsement from UNECA, this endorsement was never withdrawn. Rather, after the
14 fact, in response to a request from the AUC, UNECA’s legal office – not the office of the Executive
15 Secretary that had issued the endorsement -- wrote to the AUC and stated that it did not consider
16 itself a valid endorser. (Jan. 3 Bekele Decl. Ex. 9.) But the ICC had already made the
17 determination that UNECA counted as an endorser. (*Id.* Ex. 19.) Contrary to the Guidebook,
18 ICANN tolled the review of DCA’s application following the GAC advice. (Jan. 3 Bekele Decl.,
19 Ex. 3, § 3.1): This impacted DCA’s public legitimacy and removed any possibility of constructive
20 engagement with the AUC of the type required to amend the endorsement letter.

21 ICANN improperly concludes that any harm DCA suffered was remedied by the IRP. As
22 just explained, ICANN continued to process DCA’s application unfairly even after the IRP.
23 Moreover, the IRP did not address the monetary harm DCA suffered in relying on ICANN’s
24 misrepresentations, including the \$185,000 it spent on application fees and the expenditures since
25 then in order to obtain the gTLD.

26 DCA will succeed on the merits of its claim for intentional misrepresentation.

27 **B. DCA demonstrates a likelihood of success on its fifth cause of action**

28 ICANN makes no argument against DCA’s fifth cause of action other than “[f]or the same
reasons that DCA lacks any likelihood of success on the second cause of action, so too does DCA

1 lack any likelihood of success on the fifth cause of action.” (ICANN Opp. at 13:21-14:1). But
2 DCA was treated unfairly, deceptively, and fraudulently.⁷ DCA applied for, and its application
3 was rejected for no specific reason at all, *i.e.* arbitrarily. (Jan. 3 Bekele Decl. Ex. 1 (¶104).) DCA
4 was lead to believe that it would receive fair, equal, transparent, and indiscriminate processing of
5 its application, which it did not. The IRP determined that ICANN failed to follow its rules in
6 processing DCA’s application and this behavior continued after the IRP as well as explained in
7 Section III.A, *supra.*.

8 Accordingly, DCA will succeed on its fifth cause of action.

9 **C. The harm standard is a balance of relative harms and DCA’s outweighs all others.**

10 If the PI is denied, DCA will have to terminate operations as its funding will cease and
11 such harm outweighs the harm of any other interested parties. (*Id.* ¶ 40.) The second factor for the
12 court to consider is “the interim harm to the respective parties if an injunction is granted or denied.”
13 *Pittsburg Unified School District v. S.J. Amoroso Construction Co., Inc.* (2014) 232 Cal.App.4th
14 808, 813-814.⁸ Even though DCA is not required to demonstrate “irreparable harm” as ZACR and
15 ICANN suggest, the destruction of DCA’s business is irreparable harm. Contrary to what ZACR
16 asserts, DCA is operational. DCA is a Mauritius Trust. (Reply Bekele Decl. ¶ 3.) The “non-
17 operational” entity that ZACR refers to, is actually DCA Registry, a wholly-owned subsidiary of
18 DCA that will manage the .Africa gTLD if awarded to DCA. (*Id.*)

19 ZACR claims that monetary harm cannot support the granting of an injunction because it
20 is not irreparable (ZACR Opp. at 13:23-25), but ZACR itself only demonstrates (insufficient)
21 monetary harm if the PI is granted. However, its damages for “expenditures” and lost opportunities
22 are speculative as presented. (*See* ZACR Opp. at 14:3-18.)

23 ZACR argues that the harm to the public justifies denying the PI, but provides only vague
24 self-serving claims in a declaration from the AUC, essentially an applicant itself for .Africa, and
25 speculative claims about a non-operational charity. *See* (Declaration of Moctar Yedaly, ¶ 18.)
26

27 _____
28 ⁷ ICANN claims that “DCA does not assert a claim under the unlawful or fraudulent prongs, but only the ‘unfair’
prong. (ICANN Opp. at 14:21-22). To the contrary, DCA’s Operative Complaint states “Defendant’s
conduct...constitutes unlawful, unfair, or fraudulent business acts or practices....” FAC ¶ 97.

⁸ As indicated in the Court’s December 22, 2016 tentative ruling, this is not the standard. (Jan. 3 Brown Decl. Ex 3.)

1 Thus, ZACR incorrectly states that DCA is non-operational and cannot demonstrate any harm,
2 while at the same time claiming that its non-operational charity will suffer if the PI is granted.
3 ZACR also concludes that there are “real opportunities being lost,” but cannot articulate those lost
4 opportunities. Significantly, ZACR fails to address what the IRP and the Hon. R. Gary Klausner
5 both agreed on: that the “public’s interests in having the award of the .Africa gTLD” outweighs
6 all the harm advanced otherwise. (Jan 3. Brown Decl. Ex. 2.)

7 The .Africa gTLD is a unique asset. Although technically possible, it will be very difficult
8 to re-delegate and unwind the contracts that have been formed if the gTLD is prematurely
9 delegated. This includes the contracts that are part of the “sunrise period” and premium names
10 included in the parallel “landrush” period. DCA will lose all of those opportunities if the gTLD is
11 delegated before this case resolves.

12 Accordingly, for the foregoing reasons, DCA is likely to succeed on the merits of its claims,
13 and the interim harm to the respective parties favors DCA.

14 **D. ICANN’s Prospective Release is Unenforceable**

15 ICANN relies principally on *Ruby Glen, LLC v. ICANN* (No. CV 16-5505 PA (ASx), 2016
16 U.S. Dist. LEXIS 163710) to support its argument that the Prospective Release is enforceable. As
17 explained in DCA’s opening brief, the plaintiff in *Ruby Glen* did not allege claims for fraud; *Ruby*
18 *Glen* is also a federal district court case which this Court need not follow.

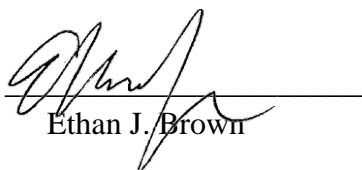
19 Accordingly, the Prospective Release is Unenforceable.

20 **IV. CONCLUSION**

21 For the foregoing reasons, DCA respectfully requests that this Court grant its Motion.

22
23 Dated: January 26, 2017

BROWN NERI SMITH & KHAN LLP

24
25 By: 
26 Ethan J. Brown

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28 DOTCONNECTAFRICA TRUST