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11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND NUMBERS
19 and DOES 1 through 50, inclusive,

20 Defendants.

21 Case No. 2:16-cv-00862-RGK (JCx)

22 **NOTICE OF AND *EX PARTE***
23 **APPLICATION FOR**
24 **TEMPORARY RESTRAINING**
25 **ORDER; MEMORANDUM OF**
26 **POINTS AND AUTHORITIES**

27 [Filed concurrently: Declaration of Sara
28 C. Colón; Application for Leave to File
Under Seal; [Proposed] Temporary
Restraining Order; [Proposed] Order to
Show Cause; and [Proposed] Order re
Application to File Under Seal]

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

2 **PLEASE TAKE NOTICE** that Plaintiff DOTCONNECTAFRICA TRUST
3 (“DCA”) will and does apply *ex parte* for a temporary restraining order, ordering
4 Defendant Internet Company for Assigned Names and Numbers (“ICANN”) to
5 refrain from issuing the .Africa generic top level domain (“gTLD”) until DCA’s
6 motion for a preliminary injunction is heard and ruled upon.

7 This application is made pursuant to Federal Rule of Civil Procedure 65 on
8 the grounds good cause exists for a temporary restraining order in that ICANN will
9 be imminently issuing the .Africa gTLD to another party. ICANN’s counsel has
10 refused to agree to DCA’s request to refrain from issuing the .Africa gTLD. ICANN
11 has failed to follow a binding arbitration order against it and has denied DCA the
12 fair and unbiased gTLD application process it is entitled to. Therefore, ICANN
13 should be prevented from issuing the .Africa gTLD until Plaintiff’s Motion for
14 Preliminary Injunction, filed yesterday, is resolved. The .Africa gTLD is a unique
15 asset and DCA will suffer irreparable harm if the .Africa gTLD is awarded to another
16 party.

17 In the alternative, DCA asks the Court to advance the hearing date on DCA’s
18 Motion for Preliminary Injunction to a date on or before March 18, 2016.

19 This application is based on this Notice, the memorandum of points and
20 authorities, the papers, records, and pleadings on file in this case, and on such oral
21 argument as the Court allows. Pursuant to Local Rule 7-19.1, counsel for DCA
22 informed ICANN of this application via email on March 1, 2016. Opposing counsel
23 did not respond to that email and presumably objects to this application. Counsel
24 for ICANN is as follows: Jeffrey A. Levee (jlevee@jonesday.com); Kate Wallace
25 (kwallace@jonesday.com); and Rachel Zernik (rzernik@jonesday.com); JONES
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27 3939.

1 Dated: March 2, 2016

BROWN NERI & SMITH LLP

2
3 By: /s/ Ethan J. Brown

4 Ethan J. Brown

5
6 *Attorneys for Plaintiff*
7 **DOTCONNECTAFRICA TRUST**

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TABLE OF CONTENTS

1 **I. INTRODUCTION** 1

2 **II. RELEVANT FACTS** 2

3 **A. ICANN** 2

4 **B. DCA and The Top-Level Domain Application** 3

5 **C. ZACR and AUC’s Top Level Domain Application** 4

6 **D. The Geographic Names Panel and InterConnect**

7 **Communications** 5

8 **E. The GAC** 6

9 **F. The Independent Review Process** 7

10 **G. ICANN Ignores the IRP’s Authority** 9

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

12 **Declaration** 9

13 **I. ICANN’s Issuance of the .Africa gTLD is Imminent** 9

14 **III. ARGUMENT** 10

15 **A. Good Cause exists for this *ex parte* application** 10

16 **B. DCA will prevail on the merits for declaratory relief and the**

17 **TRO will preserve the status quo.** 11

18 i. DCA meets the elements under the traditional

19 test. 12

20 1. DCA demonstrates a strong likelihood of success

21 on the merits of its ninth cause of action 12

22 2. DCA will suffer irreparable injury if the .Africa gTLD is

23 awarded to another party. 13

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

25 rules. 14

26 4. A TRO is in the public interest. 15

27 **C. TRO should issue under the alternative test.** 15

28 **D. ICANN’s waiver argument is void.** 15

 i. A waiver of fraudulent acts and intentional acts is void. 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ii. ICANN’s Prospective Release is unconscionable..... 17
 1. The Prospective Release is procedurally unconscionable... 18
 2. The Prospective Release is substantively unconscionable.19
iii. ICANN’s Prospective Release was procured by fraud..... 19

IV. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

1
2 *Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc.*,
3 542 F.2d 779 (9th Cir. 1976) 15
4 *Alliance For The Wild Rockies v. Cottrell* 632 F.3d 1127 (9th Cir. 2011)..... 15
5 *Baker Pacific Corp. v. Suttles*, 220 Cal.App.3d 1148 (1990)..... 17
6 *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668 (9th Cir. 1988)..... 14
7 *Edgewater Place, Inc. v. Real Estate Collateral Mgmt. Co. (In Re Edgewater*
8 *Place, Inc.)*, 1999 U.S. Dist. LEXIS 23692, Case No. ED CV 98-281 RT (C.D.
9 Cal., May 19, 1999)..... 20
10 *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (9th Cir. 2002)..... 18
11 *Grillo v. California*, 2006 U.S. Dist. LEXIS 15255 (N.D. Cal. Feb. 13, 2006) . 16
12 *Imperial v. Castruita*, 418 F.Supp.2d 1174 (C.D. Cal. 2006)..... 11, 15
13 *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) 18,19
14 *Jewelers Mut. Ins. Co. v. Adt Sec. Servs.* (N.D.Cal. July 9, 2009),
15 No. C 08-02035 JW, 2009 U.S. Dist. LEXIS 58691 19
16 *Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*,
17 319 F.Supp.2d 1040 (C.D. Cal. 2003) 17, 18
18 *Ours Tech, Inc. v. Data Drive Thru, Inc.*, 645 F.Supp.2d 830 (2009)..... 12
19 *Reudy v. Clear Channel Outdoors, Inc.*,
20 693 F.Supp.2d 1091 (N.D. Cal. 2007)..... 16, 17
21 *Sampson v. Murray*, 415 U.S. 61 (1974)..... 14
22 *San Diego Hospice v. County of San Diego*, 31 Cal.App.4th 1048 (1995) 16
23 *Skrbina v. Flemin Cos.*, 45 Cal.App.4th 1353 (1996)..... 16
24 *Stern v. Cingular Wireless Corp.*, 453 F.Supp.2d 1138 (C.D. Cal. 2006).... 18, 19
25 *Towery v. Brewer*, 672 F.3d 650 (9th Cir. 2012) 11
26 *Tunkl v. Regents of California*, 60 Cal.2d 92 (1963) 17
27 *Washington Capitals Basketball Club, Inc. v. Barry*,
28 419 F.2d 472 (9th Cir. 1969) 12
Winet v. Price, 4 Cal.App.4th 1159 (1992)..... 16

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2
3
4
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11
12
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14
15
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18
19
20
21
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23
24
25
26
27
28

Statutes

28 U.S.C. §2201(a) 12
Cal. Civ. Code §1668..... 16
Cal. Civ. Code §1670.5(a) 17

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Internet Corporation for Assigned Names and Numbers
4 (“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
5 Commerce for the benefit of the community of users of the Internet. ICANN boasts
6 of its transparency and fairness in order to comply with its government mandated
7 purpose. However, ICANN has subverted those ideals, articulated in its Bylaws and
8 internal rules, in taking sides in the granting of the .Africa gTLD.
9

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

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

24 Now, DCA faces irreparable harm. Having denied DCA’s application,
25 ICANN is free to grant .Africa to its favored applicant, ZACR, which it surely
26 intends to do at its upcoming March 5-10 (this weekend) Board meeting in
27 Marrakech, Morocco. Indeed, DCA recently asked for assurance from ICANN’s
28 counsel that .Africa would not be granted at the meeting; the assurance was refused.

1 ICANN’s counsel indicated that DCA had at least two weeks after the board meeting
2 before .Africa would be granted, but would not agree to forego any delegation of
3 .Africa before the hearing on Plaintiff’s preliminary injunction motion. ICANN
4 already once hastily granted ZACR the rights in March 2014 before it was enjoined
5 by the IRP panel during the pendency of the IRP review. History is repeating itself.
6 Once .Africa is granted and rights to use it are granted to users, DCA’s rights to this
7 highly unique asset will be forever lost.

8 All the relevant factors favor the issuance of a temporary restraining order
9 (“TRO”) barring ICANN from issuing .Africa until this case is resolved, and DCA
10 respectfully requests this Court grant that very relief, or in the alternative, advance
11 the hearing date on DCA’s Motion for a Preliminary Injunction.

12 **II. RELEVANT FACTS**

13 **A. ICANN**

14 ICANN is a California non-profit established for the benefit of the Internet
15 community and is tasked with carrying out its activities in conformity with relevant
16 principles law and through open and transparent processes that enable competition
17 and open-entry in Internet-related markets. (Declaration of Sophia Bekele¹ (“Bekele
18 Decl.”), Ex. 1 at ¶4). ICANN is the only organization in the world that assigns rights
19 to Generic Top-level Domains (“gTLDs”). It therefore yields monopolistic power
20 and can and does force participants in the market for gTLDs to play by its onerous
21 and sometimes self-serving rules.

22 The following core principles guide the decisions and actions of ICANN: (a)
23 Preserve and enhance the operational stability of the Internet; (b) Employ open and
24 transparent policy development mechanisms that promote well-informed decisions;

26 ¹ The Bekele Declaration was filed March 1, 2016 in support of Plaintiff’s
27 preliminary injunction papers and is attached as Exhibit C to the Declaration of Sara
28 C. Colón. For ease of reading it is referred to herein as the Bekele Declaration,
without reference to the Colón Declaration.

1 (c) Make decisions by applying documented policies neutrally and objectively with
2 integrity and fairness; and (d) Remain accountable to the Internet community
3 through mechanisms that enhance ICANN’s effectiveness. (Bekele Decl. ¶12, Ex.
4 4 at Art. 1 § 2). ICANN’s own Bylaws state that it shall not apply its standards
5 inequitably or single out any particular party for disparate treatment. (Bekele Decl.
6 ¶12, Ex. 4 at Art. 2 § 3). ICANN is accountable to the Internet community for
7 operating in a manner consistent with its Bylaws and Articles of Incorporation as a
8 whole. (Bekele Decl. ¶12, Ex. 4 at Art. 4 § 1).

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

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

22 ICANN required that applicants for the rights to a geographic gTLD such as
23 .Africa obtain endorsements from 60% of the national governments in the region,
24 and no more than one written statement of objection to the application from relevant
25 governments in the region and/or public authorities associated with the the region.
26 (Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.2). As part of its bid to apply for the delegation
27 rights of the .Africa gTLD, Plaintiff obtained the endorsements of the African Union
28 Commission (hereinafter the “AUC”) and the United Nations Economic

1 Commission for Africa (UNECA) (Bekele Decl. ¶14, Ex. 6; ¶16, Ex. 8). Plaintiff
2 was the first to obtain official endorsements/letters of support for the .Africa Internet
3 domain name from these organizations.

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

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

16 AUC presumably tried to withdraw its support of DCA because AUC itself
17 attempted in 2011 to obtain the rights to .Africa by requesting that ICANN include
18 .Africa in the List of Top-Level Reserved Names. (See Bekele Decl. ¶22, Ex. 14 at
19 1). This would mean that the .Africa gTLD and its equivalent in other languages
20 would be unavailable for delegation under the New gTLD Program, which in turn
21 would enable AUC to benefit from a special legislative protection that would allow
22 AUC to delegate .Africa to itself. DCA protested that this would not be in
23 compliance with the gTLD guidelines. ICANN denied AUC’s request to reserve
24 .Africa but assisted AUC in obtaining the .Africa delegation rights through ZACR
25 as AUC’s proxy. (See Bekele Decl. ¶22, Ex. 14 at 2). In violation of its duties to act
26 independently and transparently, ICANN, explained to AUC in a letter exactly how
27 to combat a competing application using the Governmental Advisory Committee
28 process. (*Id.*) In exchange for AUC’s endorsement, ZACR agreed to allow AUC to

1 “retain all rights relating to dotAfrica TLD.” (Bekele Decl. ¶32, Ex. 20 at 616–17).
2 The members of the AUC committee formed to choose who to endorse for the
3 .Africa gTLD were individuals who were also members of other organizations
4 affiliated with ZACR. (Bekele Decl. ¶31).

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

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

16 ICANN contracted with a private company InterConnect Communications
17 (“ICC”) to perform a review of geographic name applications as ICANN’s
18 Geographic Name Panel. (See Bekele Decl. ¶35, Ex. at 22). The ICC warned that
19 if ICANN did not accept endorsement letters from regional authorities like AUC and
20 UNECA, ZACR’s application would fail. (See Bekele Decl. ¶36, Ex. 23). ICANN
21 asserted during the IRP that it had taken both the AUC and UNECA endorsements
22 into account in evaluating DCA’s application. (Bekele Decl. ¶ 5, Ex. 1 ¶90).
23 However, had ICANN treated DCA’s and ZACR’s AUC endorsements equally, both
24 DCA and ZACR should have either passed or failed the endorsement requirement.
25 (See Bekele Decl. ¶36, Ex. 23.) Rather, ICANN conspired to accept ZACR’s
26 endorsements as sufficient while disregarding Plaintiff’s endorsements.

27 **E. The GAC**

28 ICANN has a Governmental Advisory Committee (“GAC”) whose purpose,

1 according to ICANN's Bylaws, is to "consider and provide advice on the activities
2 of ICANN as they relate to concerns of governments." (See Bekele Decl. ¶12, Ex.
3 4 at Art. 11 § 2(1)(a)). By invitation, membership on the GAC is open to
4 "[e]conomies as recognized in the international fora, and multinational
5 governmental organizations." (See Bekele Decl. ¶12, Ex. 4 at Art. 11 § 2(1)(b)). The
6 AUC became a member of the GAC in 2012, apparently on the advice of ICANN.
7 (See Bekele Decl. ¶22, Ex. 14 at 1). Having encouraged the AUC's membership,
8 and having given the AUC instructions on how to use GAC proceedings to derail
9 DCA, ICANN then allowed AUC to use the GAC as a vehicle for the issuance of
10 advice against DCA's application by DCA's only competitor for .Africa, the AUC
11 through ZACR, effectively ensuring that the rights to .Africa would be delegated to
12 ZACR. (See Bekele Decl. ¶22, Ex. 14).

13 Specifically, ICANN allowed the GAC to issue a "consensus advice" that
14 DCA's application should not proceed due to issues with the regional endorsements.
15 (See Bekele Decl. ¶39, Ex. 26 at 3). Under ICANN's rules, the GAC can recommend
16 that ICANN cease reviewing an application if *all* of the GAC members agree that an
17 application should not proceed because an applicant is sensitive, violates national
18 law or is problematic. (See Bekele Decl. ¶5, Ex. 1 ¶88; ¶42, Ex. 29 at Art. 12,
19 Principle 47). However, not all of the members of the GAC agreed that DCA's
20 application should be stopped. Kenya's representative was not even present at the
21 GAC meeting when the advice was issued, but ICANN nonetheless allowed the
22 AUC (through Alice Munyua) to make a statement on Kenya's behalf denouncing
23 DCA's application, even though the current Kenya GAC advisor wrote to the GAC
24 chairperson to inform her that Ms. Munyua did not represent Kenya or its viewpoints
25 and that he objected to a GAC consensus advice on .Africa. (See Bekele Decl. ¶37,
26 Ex. 24; ¶38, Ex. 25).

27 Moreover, the GAC gave no indication that it considered the DCA's
28 application was problematic, violated law or was sensitive - the required standard.

1 (See Bekele Decl. ¶5, Ex. 1 ¶104 (“[ICANN’s witness] also stated that the GAC
2 made its decision without providing any rationale and primarily based on politics
3 and not on potential violations of national laws and sensitivities.”)) In June 2013,
4 the New gLTD Program Committee (“NGPC”) accepted the GAC’s advice despite
5 the aforementioned flaws in the GAC’s process. (See Bekele Decl. ¶ 5, Ex. 1 ¶ 106).
6 ICANN rejected DCA’s application on the basis of the GAC advice while ZACR’s
7 application continued. (See Bekele Decl. ¶5, Ex. 1 ¶¶ 80, 106; ¶40, Ex. 27). Although
8 ICANN could have reconsidered this decision under its rules, it refused to do so.
9 (See Bekele Decl. ¶5, Ex. 1 ¶6; ¶7, Ex. 3 at Art. 4 § 2.2).

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

22 **F. The Independent Review Process**

23 The Guidebook terms DCA agreed to upon submitting its gTLD application
24 contained a release and covenant not to sue (the “Prospective Release”): “Applicant
25 hereby releases ICANN...from any and all claims by applicant that arise out of, are
26 based upon, or are in any way related to, any action, or failure to act, by ICANN...in
27 connection with ICANN’s or an ICANN Affiliated Party’s review of this
28 application, investigation or verification, and any characterization or description of

1 applicant or the information in this application, any withdrawal of this application
2 or the decision by ICANN to recommend, or not to recommend, the approval of
3 applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN
4 COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE
5 BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY
6 WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER
7 JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST
8 ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE
9 APPLICATION." (See Bekele Decl. ¶7, Ex. 3 at Module 6, ¶6).

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

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

24 **G. ICANN Ignores the IRP's Authority**

25 Despite the initiation of the IRP, ICANN continued to review ZACR's
26 application – *even going so far as to sign a contract for the operation of Africa with*
27 *ZACR.* (Bekele Decl. ¶5, Ex. 1 ¶¶12– 20; ¶9, Ex. 9. The IRP panel, during
28 emergency proceedings, found that this was improper and enjoined further issuance

1 of .Africa to ZACR. (*See id.*). The IRP panel issued a final and thorough 63-page
2 declaration in the matter on July 9, 2015. The panel found, *inter alia*, that:

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

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

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

15 ICANN did not act in accordance with the IRP’s Final Declaration. (*See*
16 Bekele Decl. ¶5, Ex. 1 ¶23). Instead of allowing DCA’s application to proceed
17 through the remainder of the application process, ICANN restarted DCA’s
18 application and re-reviewed its endorsements. (Bekele Decl. ¶¶ 23–24, Ex. 15).
19 ICANN intended to deny DCA’s application. For example, in September 2015
20 ICANN issued DCA clarifying questions regarding its endorsements and then
21 indicated that DCA’s responses were inadequate. Hoping to gain insight into what
22 exactly was allegedly wrong with its application, DCA agreed to an extended
23 evaluation. (Bekele Decl. ¶29). But, ICANN merely asked the exact same questions
24 without further guidance or clarification, clearly a pretext to deny DCA’s
25 application. (*Id.*). After all, ICANN had already entered into a registry agreement
26 with ZACR, as ICANN’s general counsel had made public *after* the IRP Declaration
27 issuance. In short, the process ICANN put Plaintiff through was a sham with a
28 predetermined ending – ICANN’s denial of Plaintiff’s application so that ICANN

1 could steer the gTLD to ZACR.

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

3 In February 2016, ICANN rejected DCA's application after the extended
4 evaluation. (Bekele Decl. ¶28, Ex. 18). It is believed that ICANN is on the verge
5 of awarding .Africa to ZACR. On March 5, 2016, ICANN is holding a board
6 meeting in Morocco, Africa where it is expected to officially give the .Africa rights
7 to ZACR. (Bekele Decl. ¶41, Ex. 28). In fact, when DCA sought assurance from
8 ICANN's counsel that .Africa would not be granted at the meeting, the assurance
9 was refused. (Declaration of Sara C. Colón ("Colón Decl.") at ¶2, Ex. A; ¶3, Ex. B
10 [Ethan J. Brown] at ¶2; ¶5, Ex. D). Now, DCA stands to face another wrongful and
11 unfair delegation of the .Africa gTLD.

12 **III. ARGUMENT**

13 **A. Good Cause exists for this *ex parte* application**

14 The fact that ICANN has refused to agree to wait a month to hear plaintiff's
15 motion for a preliminary injunction, demonstrates the imminent threat of ICANN
16 issuing the .Africa gTLD, causing DCA irreparable harm and constituting good
17 cause for this application. "In order to justify *ex parte* relief, a moving party must
18 show (1) irreparable prejudice if the underlying [relief] is heard according to
19 regularly noticed motion procedures; and (2) that the moving party is without fault
20 in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result
21 of excusable neglect." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F.Supp.
22 488, 493 (C.D. Cal. 1995).

23 Here, as demonstrated below, DCA will be irreparably harmed if ICANN is
24 allowed to issue the .Africa gTLD to ZACR. ICANN indicated that this would
25 take at least two weeks - a period of time before the hearing of plaintiff's motion
26 for a preliminary injunction - but refused to stay the issuance of .Africa in the
27 interim. ("Colón Decl.") at ¶2, Ex. A; ¶3, Ex. B [Brown Decl.] at ¶2; ¶5, Ex. D).
28 DCA's application for the .Africa gTLD was improperly processed and DCA will

1 be irreparably harmed if the .Africa gTLD is issued before their application is
2 processed properly (Bekele Decl. at ¶3). The .Africa gTLD is an irreplaceable
3 asset, and DCA has no control, or part in fault, in creating this emergency – it is
4 ICANN that created it by failing to process DCA’s application as the IRP panel
5 ordered and refusing to agree to a stay until the preliminary injunction is resolved.
6 (Bekele Decl. at ¶3; ¶5, Ex.1 at ¶¶109, 133).

7 **B. DCA will prevail on the merits for declaratory relief and the TRO**
8 **will preserve the status quo.**

9 The Court has the power to issue a TRO pursuant to Federal Rule of Civil
10 Procedure 65. “The standard for issuing a TRO is identical to the standard for
11 issuing a preliminary injunction.” (*NML Capital, Ltd. v. Spaceport Sys. Int’l, L.P.*,
12 788 F.Supp.2d 1111, 1117 (C.D.Cal. 2011).) “District courts in the Ninth Circuit
13 use two tests when analyzing a request for a temporary or preliminary injunction:
14 the ‘traditional-’ and ‘alternative-’ criteria tests.” *Imperial v. Castruita*, 418
15 F.Supp.2d 1174, 1177-78 (C.D. Cal. 2006).

16 Under the former test, the plaintiff must show “(1) a strong likelihood of
17 success on the merits, (2) the possibility of irreparable injury to plaintiff if
18 preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff,
19 and (4) advancement of the public interest (in certain cases).” *Id.* Under the
20 alternative, or “serious questions” test, a TRO “is appropriate when a plaintiff
21 demonstrates that “serious questions going to the merits were raised and the balance
22 of hardships tips sharply in the plaintiff’s favor.” *Towery v. Brewer*, 672 F.3d 650,
23 657 (9th Cir. 2012). This approach requires that the elements of the test be balanced,
24 so that a stronger showing of one element may offset a weaker showing of another.”
25 *Id.* Under either test, DCA is likely to succeed on the merits and is likely to suffer
26 irreparable harm, balancing the scales heavily in its favor. Given the public nature
27 of ICANN and the internet as a whole, issuing gTLDs in a fair, transparent process
28 is in the public’s interest. A TRO should issue.

1 DCA has already demonstrated that it is entitled to the relief it seeks (as
2 evidenced by the IRP decision) and satisfies the elements for a TRO under either
3 standard. DCA only moves for a TRO under its ninth cause of action against ICANN
4 for declaratory relief. A TRO “maintains the *status quo ante litem* pending a
5 determination of the action on the merits. The status quo is the last uncontested
6 status preceding the commencement of the controversy.” *Washington Capitals*
7 *Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969). ICANN has not
8 issued the rights to the .Africa gTLD. Until DCA is afforded the relief determined
9 by ICANN’s own IRP Declaration, the .Africa gTLD should not issue. For the
10 reasons demonstrated below, and determined by ICANN’s IRP, DCA has already
11 largely succeeded on the merits of its claim before the IRP.

12 i. DCA meets the elements under the traditional test.

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

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

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

9 Moreover, DCA will be able to show that it met ICANN's geographic
 10 endorsement standards, or at the very least that its endorsements were no less
 11 adequate than ZACR's², ICANN's favored applicant. (*See* Bekele Decl. ¶14, Ex. 6;
 12 ¶16, Ex. 8; ¶36, Ex. 23). At the time the IRP proceeding commenced, DCA's
 13 endorsers (AUC and UNECA) had been approved as endorsers by ICANN. (*See*
 14 Bekele Decl. ¶5, Ex. 1 at ¶45). Both of those entities are representative of nearly all
 15 the nations in Africa, far more than 60% (*See* Bekele Decl. ¶30, Ex. 19 at 601).
 16 Although ICANN has asserted that the AUC and UNECA withdrew their
 17 endorsements from DCA, a withdrawal is only permitted after an applicant applies
 18 if an applicant has failed to meet one of the conditions of its endorsement. (*See*
 19 Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.3) There were no conditions on either the AUC
 20 or UNECA endorsements; any attempted withdrawal of those endorsements is
 21 improper. (*See* Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.3; ¶14, Ex. 6; ¶16, Ex. 8).
 22 Accordingly, DCA demonstrates a strong likelihood of success on the merits.

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

25 Plaintiff will suffer irreparable injury because the .Africa gTLD is a unique
 26 asset for which Plaintiff cannot be compensated through monetary damages. "The
 27 key word in this consideration is *irreparable*." *Sampson v. Murray*, 415 U.S. 61, 90-

28 _____
² *Infra*, Section II.E.

1 91 (1974). The rights to .Africa cannot be issued again. There is but one holder to
 2 the delegation rights to .Africa, and if ZACR is granted those rights after DCA has
 3 been improperly denied the fair and transparent gTLD application process ICANN
 4 was required to provide, DCA will not be able to obtain those rights elsewhere. (*See*
 5 *Bekele Decl.* ¶2). If ICANN issues the .Africa gTLD delegation rights to ZACR or
 6 any other party, DCA will be irreparably harmed.

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

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

21 ICANN cannot demonstrate any harm, because no harm occurs if the .Africa
 22 gTLD issuance is delayed.³ “[T]he district court should balance the relative
 23 hardships to the parties that would result from granting or denying injunctive relief.
 24 If the balance tips decidedly toward plaintiffs, and if plaintiffs have raised serious
 25 enough questions to require litigation, the injunction **should** issue.” *Aguirre v. Chula*

26
 27 ³ Since ZACR presently possesses no right to .Africa it will not be materially harmed
 28 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.

1 *Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976)
2 [emphasis added]. As demonstrated above, the lack of harm to ICANN and
3 permanent, irreparable, and irreversible injury - coupled with the likelihood of
4 success - warrants the granting of Plaintiff's request for a TRO.

5 4. A TRO is in the public interest.

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

18 **C. A TRO should issue under the alternative test.**

19 DCA has already established probable success on the merits and the inevitable
20 irreparable injury necessary as elements under either test. Under the latter test, the
21 plaintiff must show either "a combination of probable success on the merits and the
22 possibility of irreparable injury or that serious questions are raised and the balance
23 of hardships tips sharply in his favor." *Imperial v. Castruita*, 418 F.Supp.2d 1174,
24 1177-78 (C.D. Cal. 2006) [internal citations omitted]. As stated above, DCA seeks
25 declaratory relief with respect to the claim that it is entitled to proceed through the
26 remainder of the .Africa gTLD application process as expressed by the IRP findings.
27 ICANN's IRP already ordered the relief DCA seeks here therefore DCA is likely to
28 succeed on the merits. In addition to meeting the likelihood of success, the unique

1 character of the .Africa gTLD guarantees irreparable injury will occur if ICANN is
 2 allowed to issue the gTLD without first complying with the IRP Declaration and
 3 processing DCA's application at a point beyond the initial evaluation. DCA's
 4 application is rendered meaningless if the .Africa gTLD is issued. Accordingly,
 5 under either test, the scale balance in favor of DCA and a TRO should issue.

6 **D. ICANN's waiver argument is void.**

7 DCA believes ICANN will assert as its primary defense to this Motion that
 8 the Guidebook's Prospective Release prohibits this Court from ruling on this case.
 9 The Prospective Release quoted in Section II.F, *supra*, however, is not enforceable
 10 because it violates California Code of Civil Procedure §1668, is unconscionable, and
 11 was procured by fraud. ICANN can cite to no authority for the proposition that the
 12 Prospective Release is enforceable.⁴

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

14 ICANN's Prospective Release is void in that it waives and releases any redress
 15 in a court of law, including fraudulent and intentional actions. "All contracts which
 16 have for their object, directly or indirectly, to exempt anyone from responsibility for
 17 his own fraud, or willful injury to the person or property of another, or violation of
 18 law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code
 19 §1668; *See also Reudy v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1116
 20 (N.D. Cal. 2007) ["a party [cannot] contract away liability for his fraudulent or
 21
 22
 23

24 ⁴ In its motion to dismiss, currently on file with this Court, ICANN provides
 25 inapposite case law to support its position. The California case law ICANN uses in
 26 support of its argument involve settlement agreement mutual releases – not one-
 27 sided prospective releases. *See San Diego Hospice v. County of San Diego*, 31
 28 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).

1 intentional acts or for his negligent violations of statutory law, regardless of whether
2 the public interest is affected” (internal citations and quotations omitted).]⁵

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

16 ii. ICANN’s Prospective Release is unconscionable.

17 The Prospective Release is also unenforceable because it is unconscionable.
18 “If the court ... finds the contract or any clause of the contract ...unconscionable ...
19 the court may refuse to enforce the contract, or it may enforce the remainder of the
20 contract without the unconscionable clause, or it may so limit the application of any
21 unconscionable clause as to avoid any unconscionable result.” Cal. Civ. Code
22 §1670.5(a); *See also Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*, 319 F.Supp.2d
23 1040, 1054 (C.D. Cal. 2003). “[T]he test for unconscionability is whether the
24 clauses involved are so one-sided as to be unconscionable under the circumstances

25
26 ⁵ Although often cited for the claim that public policy must be implicated for a
27 release to be void, *Tunkl v. Regents of California*, 60 Cal.2d 92 (1963) does not
28 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.

1 existing at the time of the making of the contract. [...] [C]ourts look to whether the
2 allocation of the burdens and benefits are so one-sided as to shock the conscience or
3 whether there is an ‘absence of meaningful choice on the part of one of the parties
4 together with the contract terms which are unreasonably favorable to the other
5 party.’” *Nat’l Rural Telcoms. Coop. v. DIRECTV, Inc.*, supra.

6 A contract is unenforceable where it contains “both a procedural and
7 substantive element of unconscionability. These two elements, however, need not
8 both be present to the same degree.” *Ferguson v. Countrywide Credit Indus.*, 298
9 F.3d 778, 783 (9th Cir. 2002) [internal citations omitted]. “[C]ourts use a sliding
10 scale, ‘such that the greater the degree of unfair surprise or unequal bargaining
11 power, the less the degrees of substantive unconscionability required to annul the
12 contract and vice versa.’” *Stern v. Cingular Wireless Corp.* 453 F.Supp.2d 1138,
13 1146 (C.D. Cal. 2006) at 1146. ICANN’s contract is both procedurally and
14 substantively unconscionable.

15 1. The Prospective Release is procedurally unconscionable.

16 All bargaining power was in the hands of ICANN and there was no
17 negotiation. “A contract is procedurally unconscionable if at the time the contract
18 was formed there was ‘oppression’ or ‘surprise.’ Oppression exists if an inequality
19 of bargaining power between the parties results in the absence of real negotiation
20 and meaningful choice. Surprise ‘involves the extent to which the supposedly
21 agreed-upon terms are hidden in a prolix printed form drafted by the party seeking
22 to enforce them.’” *Stern*, supra at 1145; *See also Ingle v. Circuit City Stores, Inc.*
23 (“*Ingle*”), 328 F.3d 1165, 1172 (9th Cir. 2003) [“When a party who enjoys greater
24 bargaining power than another party presents the weaker party with a contract
25 without a meaningful opportunity to negotiate, ‘oppression and, therefore,
26 procedural unconscionability, are present.’”]

27 DCA had no bargaining power because ICANN holds a monopoly on gTLDs.
28 ICANN is the *only* gTLD provider in the world; .Africa could not be obtained from

1 anyone else. (Bekele Decl. ¶3). In order to apply, DCA was forced to agree to the
2 Guidebook that contained the Prospective Release. (Bekele Decl. ¶8). DCA was
3 not invited to negotiate any provision of the Guidebook nor did DCA contribute the
4 language in the Prospective Release. (Bekele Decl. ¶9). The Guidebook does not
5 encourage the parties to consult with an attorney, nor did DCA do so. (Bekele Decl.
6 ¶7, Ex. 3; ¶11). Accordingly, the Prospective Release is procedurally
7 unconscionable.

8 2. The Prospective Release is substantively unconscionable.

9 The Prospective Release is also substantively unconscionable. “A contract is
10 substantively unconscionable if the contract or a provision thereof is overly harsh or
11 one-sided.” *Stern, supra*. A contract is substantively unconscionable where its
12 “terms are so one-sided as to shock the conscience.” *Ingle, supra* at 1172. The
13 Prospective Release is a textbook example of a one-sided agreement. It requires that
14 DCA give up its right to sue ICANN for **any and all** acts relating to the application
15 but does not require ICANN to give up any right to sue DCA. ICANN is not
16 prevented from suing DCA for any violation of law, negligence, fraud or otherwise.
17 The Prospective Release absolves ICANN of all wrongdoing – and provides no
18 benefit to applicants. Because the Prospective Release is both procedurally and
19 substantively unconscionable, it is unenforceable.

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

21 ICANN’s Prospective Release was procured by fraud and cannot be relied
22 upon to ICANN’s benefit. “Fraud in the inducement is a subset of the tort of fraud
23 whereby ‘the promisor knows what he is signing but his consent is induced by fraud,
24 mutual assent is present and a contract is formed, which by reason of the fraud is
25 voidable.’” *Jewelers Mut. Ins. Co. v. Adt Sec. Servs.* (N.D. Cal. July 9, 2009, No. C
26 08-02035 JW) 2009 U.S. Dist. LEXIS 58691, at *7-8. [internal citations omitted].
27 “Where the plaintiff proves fraudulent inducement (which requires a showing of
28 justifiable reliance), none of [the fraudulently induced agreement’s] provisions have

1 any legal or binding effect.” *Edgewater Place, Inc. v. Real Estate Collateral Mgmt.*
2 *Co. (In Re Edgewater Place, Inc.)*, 1999 U.S. Dist. LEXIS 23692, Case No. ED CV
3 98-281 RT at *12 (C.D. Cal., May 19, 1999).

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

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

16 **IV. CONCLUSION**

17 For the foregoing reasons, DCA is entitled to the issuance of a TRO and
18 respectfully requests that this Court grant such relief. In the alternative, DCA
19 respectfully requests this Court advance the hearing date on DCA’s Motion for a
20 Preliminary Injunction to a date on or before March 18, 2016.

21
22 Dated: March 2, 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 2, 2016, I caused the foregoing **NOTICE OF AND EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER; 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 2, 2016

/s/ Ethan J. Brown