David W. Kesselman (SBN 203838)
dkesselman@kbslaw.com
Amy T. Brantly (SBN 210893)
abrantly@kbslaw.com
KESSELMAN BRANTLY STOCKINGER LLP
1230 Rosecrans Ave., Suite 690
Manhattan Beach, CA 90266
Telephone: (310) 307-4555
Facsimile: (310) 307-4570

Attorneys for Defendant
ZA Central Registry, NPC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

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

Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)

Assigned for all purposes to the Honorable R. Gary Klausner

REPLY IN SUPPORT OF ZACR'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

[Request for Judicial Notice In Support of ZACR's Reply to Motion to Dismiss for Failure to State a Claim; and [Proposed] Order Filed Concurrently Herewith]

Date: May 31, 2016
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I. INTRODUCTION

Defendant ZA Central Registry, NPC's ("ZACR") motion to dismiss should be granted. In its opposition brief, plaintiff DotConnectAfrica Trust ("DCA") concedes that it has not pled a proper claim for fraud/conspiracy to commit fraud. DCA's remaining claims are similarly deficient, either because DCA does not allege facts sufficient to satisfy federal pleading standards, or because the allegations set forth in its First Amended Complaint ("FAC") do not meet the elements of the claims asserted.

II. ARGUMENT

A. DCA Fails to State a Claim for Fraud – Regardless of Label

Acknowledging that it has not properly pled a claim for fraud or conspiracy to commit fraud against ZACR, DCA attempts to switch theories and requests leave to amend to add a claim for aiding and abetting fraud. *See* Opp. Brief at 17 n.7. Even if the Court is now willing to consider DCA's new theory, DCA's allegations do not support the claim and it should be dismissed.

California courts hold that a party who "'aids and abets the commission of an intentional tort [can be held liable] if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person.'" *Casey v. U.S. Bank Nat. Assn.*, 127 Cal. App. 4th 1138, 1144 (2005) (citations omitted). However, a threshold requirement for any claim of aiding and abetting "is the actual commission of a tort." *Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574 (2005). Unless the underlying tort – in this case fraud – is properly alleged a defendant "cannot be held liable as a conspirator or as an aider and abettor." *Id*. at 575.

Here, as fully addressed in ZACR's opening brief, DCA fails to properly

allege an underlying claim of fraud. The allegations of fraud are vague and conclusory and fail to satisfy the particularity requirement of FRCP 9(b).[1] Accordingly, because DCA fails to properly allege an underlying claim of fraud, DCA's "new" theory of aider and abettor liability as against ZACR must be dismissed. *Higashi*, 131 Cal. App. 4th at 575.

Even setting aside DCA's failure to properly allege fraud, DCA's aiding and abetting claim fails because DCA does not properly allege that ZACR had knowledge of ICANN's supposed fraud. The case law is clear that actual knowledge is required for an aiding and abetting claim. *See Casey*, 127 Cal. App. 4th at 1144 (defendant must have "actual knowledge of the specific primary wrong the defendant substantially assisted"). Yet, DCA asks the Court to infer knowledge of ICANN's purported fraud from the conclusory allegation in paragraph 84 of the FAC that, "ICANN conspired with the AUC and its proxy company ZACR to defraud Plaintiff and Defendants did in fact commit fraud by assisting each other in improperly denying Plaintiff's application." Opp. Brief at 18; FAC ¶ 84. This type of conclusory allegation is improper. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 at 555 (2007).

Nor is DCA's claim saved by reference to paragraph 74 of the FAC. There, DCA simply asserts that ICANN made various "intentional misrepresentations on its website and in the Guidebook to Plaintiff…." Yet, there is no specific allegation to suggest that ZACR had any knowledge or involvement in the supposed misrepresentations that ICANN put on its website or in the Guidebook. Instead, DCA asserts that the Court should infer knowledge of fraud because "ZACR knew of the contents of the Guidebooks and ICANN's bylaws." Opp. Brief at 18. But knowledge of the contents of the Guidebook and bylaws cannot

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[1] *See, e.g. Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (fraud allegations must include "the who, what, when, where, and how" of the misconduct charged).

be read to suggest knowledge and involvement in a supposed fraudulent scheme. Accordingly, DCA's aiding and abetting claim is not plausible and should be dismissed. *See Allstate Ins. Co. v. Countrywide Fin. Corp.*, 824 F. Supp. 2d 1164, 1189 (C.D. Cal. 2011) (aiding and abetting claim dismissed).

Similarly, DCA's allegations do not support its claim that ZACR "substantially assisted" ICANN in the supposed fraudulent scheme. DCA cites to various allegations that ZACR: "wrongfully campaigned against DCA's application both to ICANN and the AUC" (FAC ¶ 28), "failed to submit the required type of application" for a community gTLD (*id*. ¶ 31), and "made multiple misrepresentations to ICANN in an effort to edge DCA out" (*id*. ¶ 32). *See* Opp. Brief at 18. None of these allegations, or any of the others cited, can be fairly read to suggest that ZACR "substantially assisted" ICANN in committing misrepresentations made in the Guidebook or the bylaws. The ICANN documents were years in the making and the relevant provision for 60% government support was included long before ZACR even applied for the .Africa gTLD. *See* Request for Judicial Notice ("RJN") filed concurrently herewith, Ex. 1 (first 60% requirement included in v.4). Whether labeled as conspiracy to commit fraud or aiding and abetting fraud – the Fourth Cause of Action should be dismissed. [2]

B. DCA Fails To State A Claim Under the UCL

As an initial matter, DCA fails to address ZACR's argument that it did not plead any unlawful, unfair, and fraudulent business acts or practices with a reasonable degree of particularity. *Lovesy v. Armed Forces Benefit Assn.*, CV-07-02745-SBA , 2008 U.S. Dist. LEXIS 93479, at *18-19 (N.D. Cal. Nov. 7, 2008). Even the *Patent Trust* case that DCA relies on makes clear that "all allegations under Section 17200 must 'state with reasonable particularity the facts supporting the statutory elements of the violation.'" *Patent Trust v. Microsft Corp.*, 525 F.

[2] DCA also fails to allege, nor can it, that ZACR had a separate duty to DCA as required under the second prong of the aiding and abetting test.

Supp. 2d 1200, 1217 (S.D. Cal. 2007) (citation omitted). The FAC completely fails to link facts to each separate prong of the UCL. For this reason alone, which is not contested by DCA, the UCL claim should be dismissed.

Furthermore, DCA's position that Rule 9(b) does not apply is wrong. The Ninth Circuit is clear that allegations of fraudulent conduct must still satisfy the heightened pleading standard of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F. 3d 1120, 1124-25 (9th Cir. 2009); *Vess*, 317 F.3d at 1103-1104. While DCA concedes that it failed to allege fraud or conspiracy to commit fraud against ZACR, it now seeks leave to allege a claim for aiding and abetting fraud. Thus, Rule 9(b) applies. Opp. Brief at 17 n. 7. DCA argues that its fraudulent business practice claim is based on allegations that "the public will be deceived with respect to the validity of ZACR's application as compared to DCA's." Opp. Brief at 19. Even if re-pled, this allegation would fail to state a claim because, post-Proposition 64, allegations that the public is likely to be deceived are insufficient to confer standing on a UCL plaintiff. *In re Tobacco II Cases*, 46 Cal. 4th 298, 326 (2009). A plaintiff must plead and prove their own "actual reliance" on the fraudulent conduct. *Id.* DCA has not alleged that it relied on any misrepresentations made by ZACR that resulted in harm to DCA. [3]

DCA's unlawful business practice claim similarly fails. DCA admits that it has not alleged a fraud or conspiracy to commit fraud claim against ZACR. And, as addressed more fully herein, DCA fails to allege claims for aiding and abetting fraud or intentional interference with contract. Therefore, those claims cannot serve as predicate acts to its unlawful business practice claim. *Berryman v. Merit Property Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1554 (2007).

Next, DCA fails to explain how ZACR has engaged in an unfair business practice. A plaintiff who alleges that it has been injured by a direct competitor's

[3] For this same reason, DCA's new assertion that the U.S. Government has been harmed by ZACR's conduct does not support its claim. Opp. Brief at 19.

unfair act must plead "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . ." *Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 186-87 (1999). DCA never addresses this core proposition in its brief.

Finally, DCA's UCL claim is deficient because DCA seeks to recover "full disgorgement of all profits obtained by Defendants" even though UCL remedies are limited to restitution or injunctive relief. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148 (2003). The cases cited by DCA, *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 335-336 (2011) and *Luxul Tech., Inc. v. Nectarlux, LLC*, 78 F. Supp. 3d 1156, 1174 (N.D. Cal. 2015), did not alter the limitations on the scope of UCL remedies recognized in *Korea Supply*. *Kwikset* merely held that the UCL permits a plaintiff to seek an injunction even in the absence of any basis for restitution. *Luxul* cites *Kwikset* for the same proposition. Here, DCA does not allege restitution and fails to specifically seek injunctive relief against ZACR under the UCL as required by Fed. R. Civ. P. Rule 8(a)(3). Opening Brief at 8 n.1. Because DCA fails to seek a viable remedy under the UCL, its claim must be dismissed. [4]

C. DCA Fails to State A Claim for Interference With Contract

DCA's assertions in its brief make clear that it is really complaining about its purported loss of a prospective opportunity – its failure to be awarded the rights to .Africa. DCA's claim, albeit deficient, is thus one for intentional interference with prospective economic advantage. In an attempt to avoid pleading the required independent wrongful act, and to similarly avoid a fair competition defense, DCA struggles to fit a square peg in a round hole and meet the elements

[4] Contrary to DCA's implication, there is no basis for recovering "damages" in a UCL case. Opp. Brief at 19. *See Korea Supply*, 29 Cal. 4th at 1144, 1148.

of an intentional interference with contract claim.[5] This it cannot do.

1. The Complaint Fails to Allege Facts Showing that ZACR Intentionally Acted to Cause a Breach of Contract

DCA makes several allegations that focus on ZACR's campaigning for its own application and against DCA's application. Opp. Brief at 10-13. This conduct is not of the type that the tort was created to address.[6] The tort protects a third party's interference with the economic benefits of an existing contract. *Della Penna v. Toyota Motor Sales, U.S.A.*, 11 Cal. 4th 376, 392 (1995). It does not protect a party from competition in a prospective economic relationship. *Summit*, 7 F.3d at 1442. Moreover, DCA fails to allege that ZACR knew that its campaigning or promoting of its own application would cause ICANN to allegedly breach a term in the Guidebook. *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1148 (2004) (plaintiff must show the defendant's knowledge that the interference was certain or substantially certain to occur as a result of his actions). DCA's

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[5] To state a claim for intentional interference with prospective economic advantage, a plaintiff must show more than that the defendant competed with the plaintiff for the business. *Summit Machine Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1442 (9th Cir. 1993). The elements of intentional interference with prospective economic advantage are: (1) an economic relationship between the plaintiff and a third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship which are wrongful by some measure other than the fact of interference itself; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. *Korea Supply*, 29 Cal. 4th at 1153.

[6] Further, to the extent DCA relies upon allegations of "lobbying" to influence the AUC (opp. brief at 13), such conduct is immunized under the *Noerr-Pennington* doctrine. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-141 (1961) (lobbying and publicity campaign immune even if the result is harm to competitor); *Amarel v. Connell*, 102 F.3d 1494, 1520 (9th Cir. 1996) (*Noerr* doctrine applies to efforts to influence foreign officials); *Theme Promotions, Inc. v. News-Am. Mktg. FSI*, 546 F.3d 991, 1007-08 (9th Cir. 2008) (*Noerr* doctrine applies beyond antitrust to state law tort claim).

failure to allege facts showing that ZACR acted to cause ICANN to breach the terms of the Guidebook is fatal to its claim.[7]

2. ICANN Did Not Breach The Terms of the Guidebook

DCA concedes that "ICANN may appropriately use its discretion in rejecting gTLD applications for legitimate reasons." Opp. Brief at 15. ICANN rejected DCA's application for failure to show support from at least 60% of the African governments. FAC ¶ 61; RJN, Ex. 1 (v.9) at 2.2.1.4.2. DCA relied on alleged endorsements issued years ***before*** the final version of the Guidebook was in place. FAC ¶ 24; RJN Ex. 1. DCA acknowledges that the AUC repudiated its support for DCA in April 2010. FAC ¶ 24. Accordingly, DCA had no basis to believe that the AUC endorsement complied with the Guidebook requirements. DCA also acknowledges that, following the IRP Process, ICANN placed DCA's application where it belonged – the geographic names phase. Opp. Brief at 7. Because DCA's early endorsements did not meet the criteria set forth in the Guidebook, ICANN appropriately rejected DCA's application for a legitimate reason. Nothing in the IRP Final Declaration contradicts this fact.[8]

3. DCA Cannot Allege That ZACR Proximately Caused Its Alleged Damages

DCA claims that it has properly alleged that ZACR's actions proximately caused ICANN to breach the Guidebook because "DCA would have had more than a 'hope' of being delegated .Africa." Opp. Brief at 16. Moreover, DCA claims that had ICANN dismissed ZACR's application, then DCA would have

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[7] The *Image Online Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968-DDP (JCx), 2013 U.S. Dist. LEXIS 16896 at *28 (C.D. Cal. Feb. 7, 2013), is directly applicable because there, as here, no facts were alleged identifying the actual disruption of the contract causing the claim to fail.

[8] The findings in the IRP Final Declaration addressed the GAC consensus advice. FAC, Ex. A at ¶¶ 92 - 117. Contrary to DCA's implication, the Panel made no finding that DCA met the Geographic Names Panel requirements. *Id.*

moved to the delegation phase of the application process. Opp. Brief at 16. These assertions only reinforce that DCA is really alleging the loss of a prospective opportunity, specifically the delegation of the gTLD .Africa. It is not claiming damages for interference with the Guidebook – which would amount to $185,000 and which DCA could have sought from ICANN in the form of a refund at any time. RJN Ex. 1 (v.9) at 1.5.1.

But even if re-pled under a theory of interference with prospective economic advantage, DCA's claim would nevertheless fail because it cannot overcome the simple fact that it did not have the required 60% support of the governments in Africa. This was a clear requirement in the Guidebook. RJN Ex. 1 (v.9) at 2.2.1.4.2. Whether ZACR was signed to the registry agreement or not, DCA would not have been awarded the rights to .Africa. Where, as here, a plaintiff can plead no more than a hope for an economic relationship and a desire for economic benefit it cannot prove proximate cause. *Blank v. Kirwan*, 39 Cal. 3d 311, 330-331 (1985).[9]

D. DCA Fails to State a Claim For Declaratory Relief

DCA asserts that it is entitled to a declaration from the Court that: (1) the registry agreement between ZACR and ICANN be declared null and void; and (2) that ZACR's application for the gTLD .Africa does not meet ICANN's standards. FAC ¶ 132. DCA, which is not a party to either agreement, lacks standing to challenge these agreements.[10] *See* Opening Brief at 11-12.

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[9] DCA asserts that *Blank* is inapplicable because that case dealt with a prospective economic advantage claim. Because DCA asserts injury for a prospective opportunity, the reasoning of the *Blank* case is directly applicable. Moreover, proximate cause is an element of both the interference with contract and interference with prospective advantage torts.

[10] DCA provides no legal basis to suggest that the IRP proceeding can be given res judicata effect. Moreover, and contrary to DCA's unsupported assertion, the law is clear that *res judicata* cannot apply where, as here, ZACR was not involved in the IRP proceeding. *Leon v. IDX Sys. Corp.*, 464 F.3d 951,

First, DCA's reliance on *Newcal Industries v. Ikon Office Solutions*, 513 F. 3d 1038 (9th Cir. 2008), is misplaced. In *Newcal*, the plaintiff sought a declaration that IKON's "lock-in" contracts with customers were void and unenforceable. *Id*. at 1056. IKON had threatened the plaintiff with litigation if the plaintiff sought to compete for business and interfere with existing and potential customers. *Id*. It was only on that basis that the Ninth Circuit determined the plaintiff "had a stake in the controversy even though it was not a party to the relevant contracts." *Id*. Unlike *Newcal*, here DCA has not alleged that ZACR has threatened litigation.

Second, DCA's efforts to distinguish the cases cited in ZACR's opening brief are unavailing. For example, *Douglas v. Don King Productions, Inc*., 736 F. Supp. 223 (D. Nev. 1990), provides a clear illustration of why declaratory relief is improper where, as here, a plaintiff only alleges speculative harm. In *Douglas*, third party Mirage-Casino Hotel had an agreement with plaintiff Buster Douglas that the Mirage would be entitled to promote Douglas's next boxing match if Douglas's contracts with Defendant Don King Productions ("DKP") were invalidated. *Id*. at 224. The Mirage joined an action filed by Douglas and sought a declaration from the Court that the contracts between Douglas and DKP were invalid. *Id*. Notwithstanding the contract between the Mirage and Douglas, the court found that the Mirage's interests were too speculative to give it standing to seek declaratory judgment on the validity of the Douglas/DKP contracts, stating that "the only parties with a legally recognizable personal stake in this matter are the parties to the contract…." *Id*. at 223-224.

Here, DCA's purported injury is even more speculative than the injury claimed by the Mirage in *Douglas*. The contract between DCA and ICANN does

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962 (9th Cir. 2006). DCA expressly requested that ZACR be barred from participating in the IRP. FAC Ex. A (IRP at ¶¶ 40-43). DCA cannot now invoke that proceeding as a sword against ZACR.

not give DCA the right to a registry agreement with ICANN in the event that the registry agreement between ICANN and ZACR is invalidated. Despite its protests, DCA was simply an applicant for the .Africa registry, and its claimed "actual injury" of losing a contract to ZACR does not give it a legally recognizable stake in its competitor's contract. Even if the ICANN-ZACR registry agreement were invalidated, DCA still would not meet the requirement for 60% support of African governments. *See* RJN Ex. 1 (v.9) at 2.2.1.4.2. Accordingly, because there is no basis for concluding that DCA would be selected in place of ZACR, DCA's claim remains entirely speculative. Thus, the additional standing cases cited by ZACR support dismissal of DCA's claim. *See Evans v. Sirius Comput. Sols., Inc*., No. 3:12-cv-46-AA, 2012 U.S. Dist. LEXIS 61552, at *4-6 (D.Or. May 1, 2012) (declaratory relief inapplicable where third party only had future or speculative rights); *Mardin Equp. Co. v. St. Paul Fire & Marine Ins*., Co., CV-05-2729-PHX-DGC, 2006 U.S. Dist. LEXIS 60213, at *16-18 (D.Ariz. Aug. 22, 2006) (declaratory relief improper where insured plaintiff had no present adverse interest). The Tenth Cause of Action should be dismissed.

III. CONCLUSION

For the foregoing reasons, ZACR respectfully requests that this Court grant its motion to dismiss.

DATED: May 17, 2016

Respectfully submitted,

KESSELMAN BRANTLY STOCKINGER LLP

By: /s/ David W. Kesselman
David W. Kesselman
Amy T. Brantly

Attorneys for Defendant ZA Central Registry, NPC