

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

7 Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
8 NAMES AND NUMBERS

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**
11

12 DOTCONNECTAFRICA TRUST,
13
Plaintiff,
14
v.
15 INTERNET CORPORATION FOR
16 ASSIGNED NAMES AND NUMBERS, *et*
al.,
17
Defendants.
18

CASE NO. BC607494
Assigned to Hon. Howard L. Halm

**ICANN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

DATE: February 2, 2017
TIME: 8:30 a.m.
DEPT: 53

[Filed concurrently herewith: Declarations
of J. LeVee, K. Espinola, A. Atallah, C.
Willett and M. McFadden; Evidentiary
Objections to Declaration and Supp.
Declaration of S. Bekele Eshete]

TABLE OF CONTENTS

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

	Page
INTRODUCTION	1
STATEMENT OF FACTS	2
A. ICANN And The New gTLD Program	2
B. Initial Evaluations Of The .AFRICA Applications.....	4
C. DCA’s Challenge To ICANN’s Acceptance Of The GAC’s Advice	6
D. Post-IRP Processing Of DCA’s Application	6
E. Court Proceedings and Prior Motions for Preliminary Injunction	7
LEGAL STANDARD	8
ARGUMENT	8
I. DCA's motion provides no new evidence of harm	8
II. DCA cannot show likelihood of success on the merits.....	9
A. DCA Cannot Succeed On Its Second Cause Of Action.....	9
1. There Is No Evidence That ICANN Or ICC Favored ZACR's Application.....	9
2. There Is No Evidence ZACR's Application Was Improper	11
3. ICANN's Acceptance Of The GAC Advice Already Has Been Adjudicated In DCA's Favor	12
4. DCA Admits That ICANN Followed The IRP Declaration	13
5. DCA's Alleged Harm Was Not The Result Of Any Action by ICANN	13
B. DCA Cannot Succeed On Its Fifth Cause Of Action.....	13
C. DCA's Claims Are Barred By The Covenant.....	14
CONCLUSION	15

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4
5 *Choice-in-Educ. League v. L.A. Unified Sch. Dist.*,
6 17 Cal. App. 4th 415 (1993).....8

7 *Daugherty v. Am. Honda Motor Co., Inc.*
8 144 Cal. App. 4th 824 (2006).....13

9 *Fleishman v. Superior Court*,
10 102 Cal. App. 4th 350 (2002).....8

11 *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*,
12 209 Cal. App. 4th 1118 (2012).....14

13 *Frittelli, Inc. v. 350 North Canon Drive, LP*,
14 202 Cal. App. 4th 35 (2011).....14

15 *Ruby Glen, LLC v. Internet Corp. for Assigned Names &*
16 *Nos.*, No. CV 16-5505 PA, 2016 U.S. Dist. LEXIS 163710 (C.D. Cal. Nov. 28,
17 2016)14

18 *Werner v. Knoll*,
19 89 Cal. App. 2d 474 (1948).....14

20 **STATUTES**

21 Business and Professions Code § 17200.....13

22 Civil Code § 166814, 15

1 INTRODUCTION

2 In 2010, two years before DCA filed its application for .AFRICA with ICANN, DCA
3 knew that it did not have the support of 60% of the African governments as required by the New
4 gTLD Applicant Guidebook ("Guidebook"). In 2012, DCA applied for .AFRICA anyway,
5 relying on a "support" letter from the African Union Commission ("AUC") that DCA knew had
6 been withdrawn and had not been reinstated despite DCA's repeated requests, a direct violation of
7 the Guidebook terms and conditions. DCA has now spent the better part of four years trying to
8 sidestep its lack of support from the Continent of Africa with litigation and finger-pointing,
9 flinging baseless allegations of bias and conspiracy in the hope that this will somehow obscure
10 the fact that DCA's application not only lacked the support it needed from the African
11 governments, but that DCA lied about it.

12 On December 22, 2016, this Court denied DCA's motion for a preliminary injunction
13 based on "the reasoning expressed in the oral and written arguments of defense counsel." *See*
14 *LeVee Decl., Ex. I* (December 22, 2016 Minute Order ("Order")). The Court confirmed the broad
15 basis for this Order at the January 4, 2017 hearing on DCA's *ex parte* TRO application, when the
16 Court stated that its ruling was indeed based on all defense arguments, just as the Court had
17 written in its Order. *LeVee Decl.* ¶ 13. These arguments included that DCA did not establish
18 irreparable harm or succeed in showing that the balance of harms favors DCA; that DCA has no
19 likelihood of success on the merits as to its ninth cause of action; and that the covenant not to sue
20 ("Covenant") contained in the Applicant Guidebook barred DCA's claim. *Id.* DCA now makes a
21 second attempt, based on different causes of action, but relying on the exact same underlying
22 accusations. *Nothing* in DCA's TRO application or its Supplemental Motion for Preliminary
23 Injunction ("Motion") alters the basis for this Court's December 22, 2016 ruling.¹ DCA's Motion
24 should be denied.

25
26
27 ¹ In its Motion, DCA inexplicably (and repeatedly) cites the Court's December 22, 2016 *tentative*
28 ruling. DCA ignores that, following oral argument, the Court withdrew that ruling and replaced it
in its entirety.

1 **STATEMENT OF FACTS**

2 **A. ICANN And The New gTLD Program.**

3 ICANN is a California not-for-profit public benefit corporation that oversees the technical
4 coordination of the Internet’s domain name system (“DNS”). Atallah Decl. ¶ 2. The DNS’s
5 essential function is to convert numeric IP addresses into easily-remembered domain names such
6 as “uscourts.gov” and “ICANN.org.” *Id.* ¶ 3. The portion of a domain name to the right of the
7 last dot (in these examples, “.gov” and “.org”) is known as a gTLD. *Id.* In 2012, ICANN
8 accepted applications in conjunction with the “New gTLD Program,” in which it invited
9 interested parties to apply to be designated the operator of their chosen gTLD. *Id.* ¶ 4. The
10 operator would manage the assignment of names within the gTLD and maintain its database of
11 names and IP addresses. *Id.* ¶¶ 2-3; Willett Decl. ¶¶ 4-5.

12 The Guidebook prescribes the requirements for new gTLD applications. *Id.* ¶ 2. The
13 Guidebook was developed in a years-long, bottom-up process in which numerous versions were
14 published for public comment beginning in late 2008. Espinola Decl. ¶ 2. DCA participated in
15 this process: its CEO, Sophia Bekele, was actively involved in the ICANN community beginning
16 in 2005 and helped to “formulat[e] the rules and requirements” for the New gTLD Program,
17 including submitting public comments on drafts of the Guidebook. LeVee Decl., Ex. G (Bekele
18 IRP Decl. ¶ 13); *id.*, Ex. H (Bekele Dep. 17:3-20, 23:2-24:2). Module 2 of the Guidebook sets
19 forth the requirements and procedures for applying for a gTLD that represents the name of a
20 geographic region (such as .AFRICA). The Guidebook requires that an applicant for a
21 geographic name provide documentation of support or non-objection from at least 60% of the
22 governments in that region, and contains four specific requirements for the content of those
23 letters:

24 The documentation of support or non-objection should include a signed letter
25 from the relevant government or public authority ... The letter must clearly
26 express the government’s or public authority’s support for or non-objection to the
27 applicant’s application and demonstrate the government’s or public authority’s
28 understanding of the string being requested and its intended use. The letter should
also demonstrate the government’s or public authority’s understanding that the
string is being sought through the gTLD application process and that the applicant
is willing to accept the conditions under which the string will be available, i.e.,

1 entry into a registry agreement with ICANN requiring compliance with consensus
2 policies and payment of fees.

3 Declaration of Sophia Bekele Eshete in Support of DCA's Ex Parte Application for TRO
4 ("Bekele Decl."), Ex. 3 § 2.2.1.4.2, 3. A sample letter is included at the back of Module 2 for
5 applicants to use in assembling their applications. *Id.* (Attachment to Module 2). The Guidebook
6 further provides that a Geographic Names Panel will confirm that each applicant has provided the
7 required documentation, and that "the communication is legitimate and contains the required
8 content." *Id.* § 2.2.1.4.4; McFadden Decl. ¶ 3.

9 Module 6 of the Guidebook sets forth the terms and conditions that all applicants,
10 including DCA, accepted by submitting a gTLD application. LeVee Decl., Ex. H (Bekele Dep.
11 17:18-20, 24:3-7); Bekele Decl., Ex. 3 § 6. Section 1 of Module 6 provides:

12 Applicant warrants that the statements and representations contained in the
13 application (**including any documents submitted** and oral statements made and
14 confirmed in writing in connection with the application) are **true and accurate**
15 **and complete in all material respects**, and that ICANN may rely on those
16 statements and representations fully in evaluating this application. Applicant
17 acknowledges that **any material misstatement or misrepresentation (or**
18 **omission of material information) may cause ICANN and the evaluators to**
19 **reject the application** without a refund of any fees paid by Applicant.

20 Bekele Decl, Ex. 3 § 6.1 (emphasis added). Also included in Module 6 is the Covenant, which
21 bars lawsuits against ICANN arising out of its evaluation of new gTLD applications:

22 Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all
23 claims by applicant that arise out of, are based upon, or are in any way related to, any
24 action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with
25 ICANN's or an ICANN Affiliated Party's review of this application, investigation or
26 verification, any characterization or description of applicant or the information in this
27 application, any withdrawal of this application or the decision by ICANN to
28 recommend, or not to recommend, the approval of applicant's gTLD application.
29 **APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER**
30 **JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT**
31 **TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE**
32 **OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS**
33 **OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED**
34 **PARTIES WITH RESPECT TO THE APPLICATION. . . .**

35 Bekele Decl., Ex. 3 § 6.6. Although the Covenant bars lawsuits against ICANN, ICANN's
36 Bylaws provide accountability mechanisms to ensure that ICANN operates in accordance with its

1 Articles of Incorporation ("Articles") and Bylaws. *Id.* Ex. 4, Art. IV § 3. One such mechanism is
2 the independent review process ("IRP"), under which independent panelists evaluate whether
3 ICANN Board conduct was consistent with ICANN's Articles and Bylaws. *Id.*, Ex. 4, Art. IV
4 § 3; Atallah Decl. ¶¶ 6-7.

5 **B. Initial Evaluations Of The .AFRICA Applications.**

6 In 2012, ICANN received two applications for .AFRICA, one from ZACR and one from
7 DCA. ZACR submitted 41 letters of support with its application, including over thirty letters
8 from individual African governments and a 2012 letter from the African Union Commission
9 ("AUC"). Willett Decl. ¶ 7. The AUC is the secretariat for the African Union, in which every
10 African nation except Morocco is a member. DCA submitted six letters of support with its
11 application for .AFRICA – one from the AUC, one from the United Nations Economic
12 Commission for Africa ("UNECA"), three from individual African countries, and one from the
13 South African Embassy in Washington, D.C. *Id.*

14 The AUC letter DCA submitted was dated August 27, 2009. Willett Decl. ¶ 8. However,
15 in April 2010 (over two years *before* DCA submitted its application), the AUC sent DCA a letter
16 that formally withdrew its support for DCA's application, stating that the AUC intended to
17 conduct an "open process" to identify the entity the AUC would endorse. Bekele Decl., Ex. 7.
18 Letters Ms. Bekele herself wrote establish that DCA understood this letter to withdraw the AUC's
19 endorsement: the next day, Ms. Bekele wrote to the AUC acknowledging the 2010 withdrawal
20 letter, welcoming the "open process," and promising to be one of the "leading contenders."²
21 LeVee Decl., Ex. L. In 2011, Ms. Bekele sent several more letters to the AUC, complaining that
22 "[t]he endorsement initially bestowed upon us by the AU Chairperson was **unfairly withdrawn**,"
23 and asking that the AUC "**reinstate** our endorsement to enable us to go ahead with our
24 application to ICANN." LeVee Decl., Ex. M, N (emphasis added); *Id.* Ex. H (Bekele Dep. at
25 137:1-138:17; 146:4-147:8). Nevertheless, DCA submitted its application in 2012 and
26 specifically included the 2009 AUC support letter, but did *not* include the 2010 AUC withdrawal

27 ² DCA was invited to participate in the open process but chose not to do so. LeVee Decl. Ex. H
28 (Bekele Dep. 257:9-22).

1 letter. Willett Decl. ¶ 8; McFadden Decl. ¶ 7. In doing so, DCA directly violated Module 6,
2 section 1 of the Guidebook. Bekele Decl. Ex. 3 § 6.1.³

3 By 2013, ICANN had determined that both DCA and ZACR had passed all other stages of
4 the application process. The final stage, the Geographic Names Review, was conducted by the
5 third-party provider InterConnect Communications (“ICC”). McFadden Decl. ¶¶ 1-3. ICC
6 determined in early 2013 that *none* of the letters of support submitted by DCA *or* ZACR in 2012
7 met the fourth requirement of section 2.2.1.4.3 of the Guidebook. McFadden Decl. ¶ 10. When
8 an endorsement letter does not comply with the Guidebook requirements, ICC directs “clarifying
9 questions” to the applicant; the applicant then may attempt to obtain an updated letter. *Id.* ¶ 11.
10 In the Spring of 2013, ICC drafted clarifying questions for both DCA and ZACR. *Id.*

11 On April 11, 2013, ICANN’s Governmental Advisory Committee (“GAC”) issued
12 “consensus advice” that DCA’s application should not proceed.⁴ *See* Atallah Decl. ¶ 5. On
13 June 4, 2013, the ICANN Board accepted the GAC’s advice, which halted the processing of
14 DCA’s application. Atallah Decl., Ex. F. Accordingly, ICANN told ICC to discontinue
15 processing DCA’s application.⁵ McFadden Decl. ¶ 11. ICC sent clarifying questions to ZACR,
16 and in response, ZACR obtained a revised letter from the AUC, which had been supporting
17 ZACR’s application since 2012. *Id.* at ¶ 12. ICC determined that the revised letter satisfied all
18 criteria in the Guidebook; accordingly, ZACR passed the Geographic Names Review.⁶ *Id.*

19 _____
20 ³ Although ICANN was copied on the 2010 letter from the AUC, the “cc” did not identify any
21 specific person at ICANN, and ICANN has no record of receiving the letter. Inasmuch as the
22 letter was sent two years before ICANN began receiving gTLD applications, ICANN had no
23 “files” set up for any particular application. Willett Decl. ¶ 8.

24 ⁴ The GAC is charged with advising ICANN on “concerns of governments . . . or where they may
25 affect public policy issues.” Bekele Decl., Ex. 3 § 3.1; *see also id.*, Ex. 4, Art. XI, § 2.2. If the
26 GAC issues “consensus advice” against an application, this advice creates a “strong presumption
27 for the ICANN Board that the application should not be approved.” *Id.*, Ex. 3 § 3.1.

28 ⁵ DCA complains that it was prejudiced because, due to the halt of its application, ICC did not
issue clarifying questions to DCA in 2013 – the implication being that if it had, DCA could have
fixed the issue. Mot. at 5. DCA presents no evidence to support its argument, which is
disingenuous as DCA knows it did not have the required support anytime after 2010. Knowing it
needed updated letters in 2013, as opposed to 2015, would not have changed anything.

⁶ DCA complains that ICANN improperly “ghost wrote” the AUC’s updated letter of support for
ZACR. Mot. at 6-7. There was nothing improper about ICANN’s assistance; indeed, to help
applicants ensure that their letters of governmental support met the requirements, the Guidebook

(continued)

1 **C. DCA’s Challenge To ICANN’s Acceptance Of The GAC’s Advice.**

2 DCA submitted an IRP request challenging the Board’s acceptance of the GAC’s advice.
3 Bekele Decl., Ex. 1. The IRP Panel found in DCA’s favor in a Declaration issued on July 9,
4 2015, in which it concluded that, rather than defer to the GAC’s advice, ICANN should have
5 “investigate[d] the matter further.” *Id.* ¶ 113. As DCA has now conceded in deposition, the IRP
6 Panel did *not* address whether DCA had satisfied or should be able to skip the 60% governmental
7 support requirement. LeVee Decl., Ex. H (Bekele Dep. 200:7-201:19, 203:4-7, 206:14-207:2,
8 207:16-208:11). Nor did the IRP Panel address DCA’s request that DCA be given 18 months to
9 try to garner the requisite governmental support, a request in which DCA obviously
10 acknowledged that it lacked the required support at the time of the IRP. *Id.* Ex. H at 208:2-11.
11 Rather, the IRP Panel recommended only that ICANN “continue to refrain from delegating the
12 .AFRICA gTLD and permit [DCA’s] application to proceed through the remainder of the new
13 gTLD application process.” Bekele Decl., Ex. 1 ¶ 133; *see* LeVee Decl. ¶ 6. ICANN’s Board
14 adopted the IRP Panel’s recommendations, and on July 16, 2015, resolved to “continue to refrain
15 from delegating the .AFRICA gTLD” and to “permit [DCA’s] application to proceed through the
16 remainder of the new gTLD application process.” Atallah Decl. ¶ 12 & Ex. F.

17 **D. Post-IRP Processing Of DCA’s Application**

18 In accordance with the Board’s resolution to adopt the IRP Panel’s recommendations,
19 ICANN returned DCA’s application to the exact same place in processing that the application had
20 been in prior to the Board’s 2013 decision to stop work on the application. ICANN asked the
21 Geographic Names Panel to determine whether DCA had the required support or non-objection
22 from 60% of the governments of Africa. Willett Decl. ¶ 11. ICC promptly sent clarifying
23 questions to DCA. *Id.*; Bekele Decl., Ex. 11. The questions explained that the letters DCA had
24 provided from the AUC and UNECA did not meet the Guidebook’s requirements and asked for
25 updated letters. *Id.* The questions were nearly identical to those sent to ZACR in 2013.

26
27 _____ contains a sample form of an endorsement letter. Bekele Decl., Ex. 3 § 2, Attachment. Had DCA
28 asked, it would have received the same guidance as ZACR, but it did not ask. LeVee Decl. Ex. H
 (Bekele Dep. 157:19-158:3).

1 *Compare* Bekele Decl., Ex. 11 *with* Willett Decl., Exs. B-C (ZACR clarifying questions).

2 DCA did not, however, provide an updated letter from the AUC or UNECA. DCA knew
3 that the AUC had withdrawn its support for DCA in 2010. LeVee Decl., Ex. H (Bekele Dep.
4 146:9-147:8). DCA also knew that UNECA had no intention of supporting its application: in July
5 2015, UNECA copied DCA on a letter stating that its 2008 letter was never meant to endorse
6 DCA's application.⁷ LeVee Decl. Ex. O, H (Bekele Dep. 163:1-165:10). Once again DCA did
7 not provide the this letter to ICANN; instead, DCA continued to take the position that the 2008
8 and 2009 letters were sufficient to pass Geographic Names Review. *Id.* at 180:9-12; Bekele Decl.
9 Ex. 12; Willet Decl. ¶ 10; McFadden Decl. ¶ 15.

10 Because DCA was unable to provide updated support letters, ICC determined that DCA's
11 application did not pass the Geographic Names Review. McFadden Decl. ¶ 15. ICANN then
12 issued an Initial Evaluation Report notifying DCA that its application had failed, but that DCA
13 was eligible for an "Extended Evaluation." Willett Decl. ¶ 12 & Ex. A (Initial Evaluation
14 Report). In the Extended Evaluation, DCA again received clarifying questions explaining that its
15 support letters were deficient. Bekele Decl. Ex. 13; McFadden Decl. ¶ 15. Again, DCA claimed
16 the 2009 AUC letter and 2008 UNECA letter were sufficient. Willett Decl. ¶ 13; McFadden
17 Decl. ¶ 15. Thus, ICANN issued an Extended Evaluation Report on February 17, 2016, notifying
18 DCA that its application had not passed the Geographic Names Review and would not proceed.
19 Willett Decl. ¶ 15; Bekele Decl. Ex. 14. On March 3, 2016, ICANN's Board adopted a resolution
20 lifting the stay on the delegation of .AFRICA. Willett Decl. ¶ 16.

21 **E. Court Proceedings and Prior Motions for Preliminary Injunction**

22 DCA filed this suit on January 20, 2016, in Los Angeles County Superior Court. LeVee
23 Decl. ¶ 10. After the Superior Court denied DCA's request for a temporary restraining order,
24 ICANN timely removed the case to federal court, invoking diversity jurisdiction. *Id.* On

25 _____
26 ⁷ DCA has since acknowledged in deposition that the UNECA letter was written in 2008 even
27 before ICANN had published the first draft Guidebook and, indeed, even before DCA had been
28 created as a legal entity. LeVee Decl. Ex. H (Bekele Dep. 147:16-148:5, 158:17-23.) The letter
was obviously insufficient for purposes of the Guidebook, but DCA knew that UNECA would
not sign an updated letter. *See id.* at 162:2-16.

1 March 1, 2016, DCA moved for a preliminary injunction. The district court granted that motion
2 on April 12, 2016, but did so on the basis of an admitted factual error and before DCA admitted
3 in deposition that the entire basis on which the district court had granted the injunction – that the
4 IRP Panel had allowed DCA to skip the geographic review requirement – was false. *Id.*
5 Following remand, DCA again moved for preliminary injunction based on its ninth cause of
6 action. LeVee Decl. ¶ 11. The Court denied that motion on December 22, 2016. *Id.*

7 LEGAL STANDARD

8 “The trial court considers two interrelated factors when deciding whether to issue
9 preliminary injunctions: the interim harm the applicant is likely to sustain if the injunction is
10 denied as compared to the harm to the defendant if it issues, and the likelihood the applicant will
11 prevail on the merits at trial.” *Choice-in-Educ. League v. L.A. Unified Sch. Dist.*, 17 Cal. App.
12 4th 415, 422 (1993) (citation omitted). A preliminary injunction “must not issue unless it is
13 reasonably probable that the moving party will prevail on the merits.” *Fleishman v. Superior*
14 *Court*, 102 Cal. App. 4th 350, 356 (2002) (citation omitted). “The plaintiff bears the burden of
15 presenting facts establishing the requisite reasonable probability” *Id.*

16 ARGUMENT

17 **I. DCA'S MOTION PROVIDES NO NEW EVIDENCE OF HARM.**

18 Among the arguments that formed the basis of this Court's December 22, 2016 Order were
19 that DCA cannot show irreparable harm because delegation is reversible, and the harm to the
20 people of Africa and ZACR outweighs the harm to DCA. LeVee Decl. ¶¶ 11, 13. Neither DCA's
21 TRO application nor its Motion puts forth any evidence that was not already provided to this
22 Court in the first preliminary injunction motion.

23 There remains no evidence of irreparable harm because delegation is reversible. DCA
24 argues that it would be "difficult as a practical matter" for .AFRICA to be reassigned to DCA
25 should the outcome of the litigation so warrant. Application at 14. However, DCA presents *no*
26 *evidence* to substantiate this claim.⁸ By contrast, ICANN has presented evidence that re-

27 ⁸ As discussed in ZACR's opposition, DCA's argument that the "sunrise" period creates
28 irreparable harm is false: the sunrise period functions to assist trademark owners in obtaining
(continued)

1 delegation or reassignment is a procedure that has occurred numerous times. *See* Declaration of
2 Akram Atallah ¶ 13. Accordingly, once ICANN delegates the .AFRICA gTLD to ZACR, a
3 transfer or assignment of the gTLD in the future would be possible, feasible and consistent with
4 ICANN's previous conduct. *Id.* As a result, the only evidence before this Court establishes that
5 there is no irreparable harm if .AFRICA is delegated while litigation is pending. This also means
6 that DCA cannot establish that any interim harm DCA may suffer if the injunction is denied
7 exceeds the harm if the injunction is granted.⁹

8 **II. DCA CANNOT SHOW LIKELIHOOD OF SUCCESS ON THE MERITS.**

9 **A. DCA Cannot Succeed On Its Second Cause Of Action.**

10 DCA is unable to establish a likelihood of success on the merits as to either its second or
11 fifth causes of action. To prove its intentional misrepresentation claim (second cause of action),
12 DCA must establish, among other things, that ICANN misrepresented an important fact, either
13 knowingly or with reckless disregard for its truth. CACI 1900. DCA alleges that ICANN
14 knowingly misrepresented that it would assess new gTLD applications fairly and equally; that an
15 Accountability Mechanism (such as the IRP) would provide applicants due process in the event of
16 a dispute; and that ICANN would participate in such a process in good faith. Compl. ¶¶ 74-76;
17 Mot. at 4. However, DCA has put forth *no evidence* showing any of these statements were false.

18 **1. There Is No Evidence That ICANN Or ICC Favored ZACR's** 19 **Application.**

20 DCA claims that ICANN "never had any intention of treating applicants the same," but
21 rather "chose applicants based on its own wishes and in exchange for political favors."¹⁰ Compl.
22 ¶ 76. DCA further claims that ICANN "obstruct[ed] DCA's meritorious application," and that

23 their corresponding domain names, not to dole out domain names to the highest bidder. Willett
Decl. ¶ 20. Further, any financial loss DCA might incur can be remedied with damages.

24 ⁹ In its Opposition, ZACR has submitted detailed evidence addressing the heavy financial
25 investment that ZACR has made in the .AFRICA gTLD and the substantial sums of money that
26 ZACR has lost since signing the registry agreement with ICANN in 2014. Further, the African
people have been foreclosed from reaping the benefits of the .AFRICA gTLD due to the delay
caused by DCA's lawsuit. These tangible harms are in sharp contrast to the "harms" DCA has
offered without substantiating evidence.

27 ¹⁰ DCA has not indicated what alleged political favors ICANN sought in exchange for its
28 treatment of the new gTLD applications, and it submitted no evidence to support this charge.

1 ICANN favored ZACR's application "at every turn." Mot. at 5. But the actual evidence refutes
2 these allegations because it shows that DCA and ZACR's applications were treated equally
3 throughout the application process, and that ZACR passed evaluation – and DCA did not –
4 because only ZACR had the support of 60% of the African governments.¹¹

5 .AFRICA is a “geographic” string. Quite appropriately, the Guidebook requires that any
6 entity seeking to operate a registry for a geographic string must demonstrate that it has the
7 support of at least 60% of the governments in that region. The alternative – which is what DCA
8 is proposing to this Court – is that an entity that clearly does *not* have the support of the
9 governments in the region should, nevertheless, be entitled to operate the registry. The required
10 letters showing this support must contain specific content – a clear expression of the government's
11 support, an understanding of the string being requested, an understanding of its intended use, and
12 a demonstration of "the government's or public authority's understanding that the string is being
13 sought through the gTLD application process and that the applicant is willing to accept the
14 conditions under which the string will be available[.]" Bekele Decl. Ex. 3, §2.2.1.4.3. DCA's
15 argument that this fourth requirement is optional because of the word "should" is a red herring.
16 The entire section regarding endorsement letters is introduced as "should" – "applicants should
17 provide support letters" – yet no party, including DCA, argues that evidence of support from 60%
18 of local governments is optional. ICANN and the Geographic Names Panels have never treated
19 the fourth criterion as “optional.”¹² McFadden Decl. ¶¶ 9, 10.

20
21 ¹¹ This Court has ruled against DCA on this issue already. Although DCA's first motion for
22 preliminary injunction was based on its ninth cause of action, counsel for DCA argued at the
23 hearing that DCA's request was based on the same factual allegations as its second cause of
24 action, including its intentional misrepresentation allegations. LeVeé Decl. Ex. J (12/22/16
25 Hearing Tr. on Plaintiff's Motion for Preliminary Injunction at 37:4-38:11) (arguing that the ninth
26 cause of action "subsumed" the factual allegations in the complaint, including the intentional
27 misrepresentation allegations). DCA's counsel went on to state that, if its motion were denied,
28 DCA would move under a different cause of action, so if the Court "were fundamentally
persuaded" that DCA presented a sufficient case that DCA's application was "denied on a
pretextual basis" – if ICANN's review of DCA's application was not done fairly – the Court
should grant the preliminary injunction motion. *Id.* at 40:19-41:3. The Court nonetheless denied
DCA's motion.

¹² Indeed, the prefatory language above the clarifying questions sent to DCA states that “each
letter of support . . . must meet the following criteria” See Bekele Ex. 13; Masilela Ex. A

1 In applying for .AFRICA, DCA relied on the 2009 AUC letter and the 2008 UNECA
2 letter. As explained above, DCA was aware at the time it submitted its application that neither of
3 these letters actually represented support of DCA's application. DCA knew that the 2009 AUC
4 endorsement had been withdrawn. LeVee Decl. Ex. M, N. And the UNECA letter was written at
5 a time when DCA did not even exist as an entity, and UNECA itself later stated that its letter was
6 never intended to be an endorsement of DCA's application. *Id.* Ex. O. DCA nonetheless
7 submitted the 2008 and 2009 letters as evidence that it met the 60% requirement when it applied
8 for .AFRICA in 2012. And DCA continued to rely on these same letters in 2015.

9 ICANN passed *both* ZACR and DCA on all application requirements except the
10 Geographic Names Panel. And once the applications were turned over to ICC, it processed DCA
11 and ZACR's applications *exactly* the same. ICC analyzed each applicant's support letters and
12 determined that *both* applicants had failed to meet Guidebook requirements. McFadden Decl.
13 ¶¶ 9, 11. ZACR was able to obtain an updated letter that conformed to the Guidebook's
14 requirements. Willett Decl. ¶ 14; McFadden Decl. ¶ 12. Following the IRP, DCA was given two
15 opportunities to obtain updated letters of support. McFadden Decl. ¶¶ 10-12. But by its own
16 admission, DCA *did not even try* because it knew it would fail. LeVee Decl., Ex. H (Bekele Dep.
17 at 174:5-8). When ICC determined that the UNECA and AUC letters failed to meet the fourth
18 requirement outlined in the Guidebook, DCA was unable to obtain updated letters. And *that is*
19 why DCA's application failed, not because ICANN preferred ZACR.¹³

20 2. There Is No Evidence ZACR's Application Was Improper.

21 DCA makes baseless allegations regarding the propriety of ZACR's application. Mot. at
22 6. ICANN in no way assisted the AUC in obtaining any rights to .AFRICA. As an example, the
23 AUC requested that ICANN put .AFRICA on a Reserved Names List (in other words, reserve the
24 name to the AUC without the need for an application), but ICANN *denied* the request. Bekele
25 Decl. Ex. 10, p. 2. The balance of ICANN's letter denying the reserve request does not instruct

26 _____
27 ¹³ DCA's failure to include the 2010 withdrawal letter with its 2012 application, and its failure to
28 notify ICANN of the letter from UNECA disavowing its support, constitutes an omission of a
material fact that violates Guidebook terms and conditions. Bekele Decl. Ex. 3 § 6.1.

1 the AUC on how to "block other applicants," but in fact does nothing more than cite portions of
2 the Guidebook that ensure African countries – 53 of which the AUC represents – have a say in
3 who operates .AFRICA. *Id.*, pp. 2-3 (*compare with* Guidebook §§ 1.1.2.3, 2.2.1.4 *et seq.*). DCA
4 also takes issue with ZACR's assignment of certain intellectual property rights to the AUC;
5 however, the only part of the Guidebook DCA could identify in support of this assertion is a
6 clause in a sample registry agreement – which expressly reserves ICANN's rights to alter the
7 terms. LeVee Decl. Ex. H (Bekele Dep. at 28:24-30:11); Bekele Decl. Ex. 3 (attachment to
8 Module 5, "Draft New gTLD Agreement"). Indeed, the AUC itself could have applied for
9 .AFRICA, Willet Decl. ¶ 18, in which case there would have been no basis to assert that any
10 assignment of rights to the AUC was improper.¹⁴

11 **3. ICANN's Acceptance Of The GAC Advice Already Has Been**
12 **Adjudicated In DCA's Favor.**

13 DCA continues to challenge ICANN's acceptance of the GAC advice, citing testimony
14 from GAC Chairperson Heather Dryden given during the IRP proceedings as evidence that
15 ICANN's actions were contrary to its Bylaws and procedures. Compl. ¶ 75(a); Mot. at 5-6. After
16 ICANN accepted the GAC advice, DCA utilized the IRP to challenge ICANN's acceptance, and
17 DCA *won*, causing ICANN to reinstate DCA's application. Accordingly, DCA already has
18 prevailed on (and been given redress for) its claim that the GAC's conduct was improper.
19 Similarly, when ICANN signed a registry agreement with ZACR, DCA objected and successfully
20 paused the delegation of .AFRICA pending resolution of the IRP proceedings. To the extent
21 ICANN took any actions prior to or during the IRP that contradicted its Articles of Incorporation,
22 Bylaws, or statements made in the Guidebook, these matters have been resolved in DCA's favor,
23 and ICANN's Board adopted the IRP Declaration in full and allowed DCA's application to
24 proceed. DCA has suffered no injury as a result of ICANN's acceptance of the GAC advice.

25 ¹⁴ DCA also argues that ZACR should have submitted a "community" application – another
26 baseless allegation. A "community" application is a special application available under the
27 Guidebook that requires an application to meet heightened criteria, and may be given priority
28 over other applications. Willet Decl. ¶ 19. Both ZACR and DCA have indicated they intend to
operate .AFRICA for the benefit of the African community; and neither had an obligation to
submit a "community" application. *Id.*

1 **4. DCA Admits That ICANN Followed The IRP Declaration.**

2 DCA admits that ICANN followed the IRP Declaration by returning DCA's application to
3 processing, which directly contradicts its claims that ICANN failed to participate in the IRP
4 process in good faith or abide by the result.¹⁵ Compl. ¶ 74(b); LeVee Decl., Ex. H (Bekele Dep.
5 200:7-201:19, 203:4-7, 206:14-207:2, 207:16-208:11). ICANN participated in the IRP process in
6 good faith, and followed the Declaration by placing DCA's application back into processing.¹⁶

7 **5. DCA's Alleged Harm Was Not The Result Of Any Action by ICANN.**

8 DCA's lawsuit is based on the notion that DCA had – at the time of its application – the
9 AUC's support, but in fact DCA *knew* that it did not. DCA's decision to apply for .AFRICA
10 despite the fact that its application was doomed to fail is the cause of its harm, not any action by
11 ICANN. DCA's sensationalist accusations of collusion and bias merely attempt to obfuscate the
12 real issue, which is that DCA did not have the support it claimed.

13 **B. DCA Cannot Succeed On Its Fifth Cause Of Action.**

14 DCA's fifth cause of action alleges that ICANN violated the Business and Professions
15 Code Section 17200 (the "UCL") by engaging in the "unfair" prong of the UCL, under which
16 "[a]n act or practice is unfair if the consumer injury is substantial, is not outweighed by any
17 countervailing benefits to consumers or to competition, and is not an injury the consumers
18 themselves could reasonably have avoided." *Daugherty v. Am. Honda Motor Co., Inc.* 144 Cal.
19 App. 4th 824, 839 (2006). DCA's support for the fifth cause of action appears to consist of a
20 reiteration of the allegations underlying its second cause of action. Mot. at 10. For the same
21 reasons that DCA lacks any likelihood of success on the second cause of action, so too does DCA

22 _____
23 ¹⁵ This issue was before this Court with respect to DCA's ninth cause of action, which sought
24 declaratory relief regarding ICANN's compliance with the IRP Declaration. In denying DCA's
25 first motion for preliminary injunction, this Court ruled that DCA cannot succeed on an argument
26 that ICANN did not participate in good faith in the IRP proceedings and/or comply with the IRP
27 Declaration. LeVee Decl. ¶ 11, 13.

28 ¹⁶ DCA cites to an email from Fadi Chehade, the former CEO of ICANN, supposedly showing
ICANN's disregard for the IRP process. Mot. at 8; Supp. Brown Decl. Ex. C. This is a gross
mischaracterization of the email: a plain reading shows that the main point of the communication
was to emphasize the importance of ICANN following its procedures and policies. Further, the
email was written well before the IRP Declaration was issued, and ICANN followed the IRP
Declaration in its entirety.

1 lack any likelihood of success on the fifth cause of action.

2 **C. DCA's Claims Are Barred By The Covenant.**

3 The Court already has ruled that the Covenant bars DCA's ninth cause of action. The
4 Covenant also bars DCA's second and fifth causes of action. As detailed in ICANN's opposition
5 to DCA's first motion for a preliminary injunction, a federal district court recently dismissed a
6 gTLD applicant's lawsuit against ICANN on the sole ground that the Covenant bars all "claims
7 related to ICANN's processing and consideration of a gTLD application." *Ruby Glen, LLC v.*
8 *Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS
9 163710, at *10-11 (C.D. Cal. Nov. 28, 2016); LeVee Decl., Ex. P (Ruby Glen Order). Because
10 DCA's allegations relate solely to ICANN's "processing and consideration" of its .AFRICA
11 application, the ruling in *Ruby Glen* supports dismissal of this entire lawsuit.

12 DCA argues that Civil Code section 1668 invalidates the Covenant. Mot. at 1-2. That
13 provision invalidates clauses that "exempt anyone from responsibility for his own fraud, or
14 willful injury to the person or property of another." Cal. Civ. Code § 1668. But all of DCA's
15 claims (including the second and fifth causes of action) boil down to the "processing and
16 consideration of a gTLD application," and pursuant to *Ruby Glen* are barred by the Covenant.
17 *See Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *9-11 ("Because the [Covenant] only
18 applies to claims related to ICANN's processing and consideration of a gTLD application, it is
19 not at all clear that such a situation would ever create the possibility for ICANN to engage in the
20 type of intentional conduct to which . . . section 1668 applies."). DCA's fifth cause of action in
21 particular is barred: DCA does not assert a claim under the unlawful or fraudulent prongs of the
22 UCL, but only under the "unfair" prong of the statute, which makes actionable business practices
23 that are merely unfair. Because DCA's invocation of the UCL does not allege willful or
24 fraudulent conduct, section 1668 does not apply.¹⁷

25 ¹⁷ As discussed at length during the hearing on DCA's first motion for preliminary injunction, a
26 release can act to bar some of a plaintiff's claims even if it does not apply to other claims. *See*
27 *Werner v. Knoll*, 89 Cal. App. 2d 474 (1948); *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*,
28 209 Cal. App. 4th 1118, 1125-26 (2012); *Frittelli, Inc. v. 350 North Canon Drive, LP*, 202 Cal.
App. 4th 35, 43, 53 (2011). Accordingly, even if the Court finds that the Covenant does not bar
DCA's second cause of action, its fifth cause of action is still barred.

1 Finally, this Court has already ruled that the Covenant is not unconscionable nor procured
2 by fraud. DCA quotes this Court's tentative ruling to state that "this Court agreed with DCA that
3 'the Covenant is likely to be found unenforceable' under either section 1668 or unenforceable."
4 Mot. at 1. But the Court withdrew the tentative in its December 22, 2016 Order denying the
5 preliminary injunction. LeVee Decl. ¶ 11. The Court denied DCA's first motion for preliminary
6 injunction based in part on defense counsel's argument that the Covenant barred its ninth cause of
7 action, meaning that the Court found that the Covenant was not unconscionable.¹⁸ *Id.* And DCA
8 again argues that the Covenant was procured by fraud because ICANN represented that IRP
9 "provided redress in lieu of court review" and then allegedly did not adhere to the IRP
10 Declaration. But the evidence shows, and this Court has ruled, *and DCA now admits*, that
11 ICANN engaged in the IRP process, that DCA *won*, and that ICANN followed the IRP
12 Declaration. *See* Mot. at 3; *see also* Ex. H (Bekele Dep. 200:7-201:19, 203:4-7, 206:14-207:2,
13 207:16-208:11). DCA provides no evidence to the contrary.

14 CONCLUSION

15 In perhaps the most disingenuous statement in a motion with more than its fair share,
16 DCA writes that "[a]s a result of ICANN's unfair practice toward DCA, DCA has been arbitrarily
17 rejected from serving as the registry for the .AFRICA gTLD." Mot. at 10. DCA knew its
18 application for .AFRICA did not have the support of 60% of the African governments required by
19 the Guidebook, but in direct violation of the Guidebook, DCA applied for .AFRICA in 2012
20 anyway. And it has used this litigation to delay delegation to the entity that does, in fact, have
21 that support. The delay has harmed the entire African continent. DCA's motion should be
22 denied.

23
24
25
26
27 ¹⁸ Given the Court's ruling, for brevity's sake ICANN's arguments regarding unconscionability are
28 not repeated here, but are stated in detail in its opposition to DCA's first motion for preliminary
injunction at 11:13-13:11.

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

Dated: January 20, 2016

JONES DAY

By: Jeffrey A. LeVee J.V.
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORP.
FOR ASSIGNED NAMES AND NUMBERS

NAI-1502374259

1 **PROOF OF SERVICE**

2 I, Diane Sanchez, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On January 20,
6 17, I served a copy of the within document(s):

7 **ICANN'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY
8 INJUNCTION**

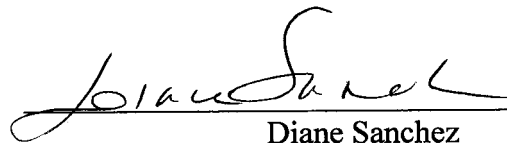
- 9 by placing the document(s) listed above in a sealed envelope with postage thereon
10 fully prepaid, in the United States mail at Los Angeles, California addressed as set
11 forth below.
- 12 by placing the document(s) listed above in a sealed Federal Express envelope and
13 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery
14 Service agent for delivery.
- 15 by personally delivering the document(s) listed above to the person(s) at the
16 address(es) set forth below.
- 17 by transmitting via e-mail or electronic transmission the document(s) listed above
18 to the person(s) at the e-mail address(es) set forth below.

16 Ethan J. Brown
17 ethan@bnslawgroup.com
18 Sara C. Colón
19 sara@bnslawgroup.com
20 Rowennakete "Kete" Barnes
21 kete@bnsklaw.com
22 BROWN NERI & SMITH LLP
23 11766 Wilshire Boulevard, Suite 1670
24 Los Angeles, California 90025
25 Telephone: (310) 593-9890

David W. Kesselman, Esq.
Kesselman Brantly Stockinger LLP
1230 Rosecrans Ave, Suite 690
Manhattan Beach, CA 90266
(310) 307-4556
(310) 307-4570 fax
dkesselman@kbslaw.com

22 I declare that I am employed in the office of a member of the bar of this court at whose
23 direction the service was made.

24 Executed on January 20, 2017, at Los Angeles, California.

25 
26 _____
27 Diane Sanchez

27 NAI-1501037652v2