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7 DOTCONNECTAFRICA TRUST
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10 **UNITED STATES DISTRICT COURT**

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

12 DOTCONNECTAFRICA TRUST, a
Mauritius Charitable Trust

13 Plaintiff,

14 v.

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

19 Defendants.
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Case No. 2:16-cv-00862-RGK-JC

**PLAINTIFF’S FIRST AMENDED
COMPLAINT FOR:**

- 1) **Breach of Contract;**
- 2) **Intentional Misrepresentation;**
- 3) **Negligent Misrepresentation;**
- 4) **Fraud & Conspiracy to Commit Fraud;**
- 5) **Unfair Competition (Violation of Cal. Bus. & Prof. Code §17200);**
- 6) **Negligence;**
- 7) **Intentional Interference with Contract;**
- 8) **Confirmation of IRP Award;**
- 9) **Declaratory Relief;**
- 10) **Declaratory Relief;**
- 11) **Declaratory Relief.**

25 Complaint Filed: January 20, 2016

REQUEST FOR JURY TRIAL

1 Plaintiff DOTCONNECTAFRICA TRUST (hereinafter “Plaintiff”) alleges
2 as follows:

3 **INTRODUCTION**

4 1. Plaintiff was formed for the purpose of applying to the Internet
5 Corporation for Assigned Names and Numbers (“ICANN”) for the right to operate
6 the generic top-level domain (“gTLD”) .Africa. Plaintiff spent years and countless
7 resources aimed at achieving that goal. At each stage of the process, Plaintiff has
8 worked diligently to follow the rules and procedures promulgated by ICANN.

9 2. However, although ICANN put in place rules that ostensibly
10 regulate the delegation of new gTLDs in order to ensure that rights to new gTLDs
11 are awarded transparently through fair competition among applicants, ICANN not
12 only disregarded and acted in contravention of these rules with respect to
13 Plaintiff’s application, but actively picked sides and worked to ensure that a
14 different applicant, UniForum SA, now known as ZA Central Registry (“ZACR”),
15 would obtain the rights to .Africa despite ZACR’s defective application. ICANN
16 even went so far as to draft an endorsement for the AUC to submit in support of
17 ZACR.

18 3. Instead of functioning as a disinterested regulator of a fair and
19 transparent gTLD application process, ICANN used its authority and oversight
20 over that process to unfairly assist ZACR and to wrongfully eliminate its only
21 competitor, Plaintiff, from the process to the great detriment of Plaintiff.

22 4. As a result, ICANN and ZACR deprived Plaintiff of the right to
23 compete for .Africa in accordance with the rules ICANN has established for the
24 new gTLD program, in breach of ICANN’s Articles of Incorporation and Bylaws
25 as previously determined by ICANN’s own Independent Review Process after an
26 extensive arbitration.

27 **JURISDICTION AND VENUE**

28 5. This Court has jurisdiction over the subject matter of this action

1 pursuant to 28 U.S.C. §1332(a).

2 6. This Court has personal jurisdiction of Defendants and venue is
3 proper under 28 U.S.C. §§1965(a); 1391. Defendant ICANN is a California non-
4 profit which is headquartered in California. Defendant ZACR contracted with
5 ICANN and directed the wrongful conduct alleged herein to California.

6 **PARTIES**

7 7. Plaintiff DOTCONNECTAFRICA TRUST was at all times relevant
8 to this matter a non-profit organization established under the laws of the Republic
9 of Mauritius with its Internet registry operation - DCA Registry Services (Kenya)
10 Limited - as its principal place of business in Nairobi, Kenya.

11 8. Defendant INTERNET CORPORATION FOR ASSIGNED
12 NAMES AND NUMBERS (“ICANN”) was at all times relevant to this matter a
13 non-profit corporation under the laws of the State of California and headquartered
14 in Los Angeles County, California.

15 9. Defendant ZA Central Registry (“ZACR”) is a South African non-
16 profit corporation. It was formed as a not-for-profit organization for the purpose of
17 applying to ICANN for the right to operate the generic top-level domain (“gTLD”)
18 .Africa. ZACR has applied for the gTLD, .Africa, in this District and specifically
19 engaged in the wrongful conduct discussed herein in this District.

20 10. Plaintiff is ignorant of the true names and capacities, whether
21 individual, corporate, associate, or otherwise, of the Defendants sued herein as
22 DOES 1 through 50 inclusive, and therefore sues said Defendants by such fictitious
23 names. Plaintiff will amend this Complaint to allege their true names and
24 capacities when the same have been ascertained.

25 11. At all times herein mentioned each of the Defendants was the agent,
26 employee, partner, principal, representative, alter ego, and/or affiliate of each of
27 the remaining Defendants and, was at all times herein mentioned, acting within the
28 course and scope of such relationship. Moreover, at all times herein mentioned,

1 each of the Defendants did confirm, conspire to, consent to, affirm, direct,
2 authorize, acknowledge, and ratify the acts of each and every of the Defendants
3 herein as to each of the acts hereinafter alleged.

4 **FACTUAL BACKGROUND**

5 **ICANN and Generic Top-Level Domains**

6 12. ICANN was established on September 30, 1998 for the benefit of
7 the Internet community as a whole and is tasked with carrying out its activities in
8 conformity with relevant principles of California law, international law,
9 international conventions, and through open and transparent processes that enable
10 competition and open-entry in Internet-related markets.

11 13. ICANN is the sole organization worldwide that assigns rights to
12 Generic Top-level Domains. It therefore yields monopolistic power and can and
13 does force participants in the market for gTLDs to play by its onerous and
14 sometimes self-serving rules.

15 14. ICANN is not an ordinary California non-profit organization.
16 Rather, ICANN's purpose is to operate for the benefit of the Internet community as
17 a whole.

18 15. The following core principles guide the decisions and actions of
19 ICANN: (a) Preserve and enhance the operational stability, reliability, security, and
20 global interoperability of the Internet; (b) Employ open and transparent policy
21 development mechanisms that promote well-informed decisions based on expert
22 advice and ensure that those entities most affected can assist in the policy
23 development process; (c) Make decisions by applying documented policies
24 neutrally and objectively with integrity and fairness; and (d) Remain accountable
25 to the Internet community through mechanisms that enhance ICANN's
26 effectiveness.

27 16. Additionally, ICANN's own Bylaws state that it shall not apply its
28 standards, policies, procedures, or practices inequitably or single out any particular

1 party for disparate treatment.

2 17. ICANN is accountable to the Internet community for operating in a
3 manner that is consistent with the above stated policies and with ICANN’s Bylaws
4 and Articles of Incorporation as a whole.

5 18. In or about 2011 ICANN approved the expansion of the number of
6 Generic Top Level Domains (hereinafter “gTLD”) available to eligible applicants
7 as part of its 2012 Generic Top-Level Domains Internet Expansion Program.
8 Examples of gTLDs are .Africa and .Asia

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

10 19. As part of this expansion, eligible parties were invited to submit
11 applications to obtain the rights to operate various new gTLDs including, but not
12 limited to: .Lat (Latin America), .Wales, .Africa, .Swiss.

13 20. In return, ICANN promised to conduct the bid process in a
14 transparent manner, ensure competition, and abide by its own Bylaws and the rules
15 set forth in the gTLD Applicant’s Guidebook.

16 21. In or about March 2012 Plaintiff submitted an application to
17 ICANN for the delegation rights of the .Africa gTLD as part of the 2012 new
18 gTLD Internet Expansion Program.

19 22. In consideration of ICANN’s promises to abide by its own Bylaws,
20 Articles of Incorporation and the rules and procedures set forth in the gTLD
21 Applicant’s Guidebook, and in conformity with the laws of fair competition,
22 Plaintiff paid ICANN the sum of \$185,000.00 - the mandatory application fee.

23 23. According to the Guidebook, a geographic name application for a
24 gTLD such as .Africa would be evaluated by a Geographic Names Evaluation
25 Panel. The evaluation criteria for geographic names requiring government support
26 are stipulated in Section 2.2.1.4.2 of the Guidebook. ICANN required that
27 applicants for the rights to a geographic name such as .Africa obtain endorsements
28 from 60% of the national governments in the region, and no more than one written

1 statement of objection to the application from relevant governments in the region
2 and/or public authorities associated with the continent or the region.

3 24. As part of its bid to apply for the delegation rights of the .Africa
4 gTLD, Plaintiff obtained the endorsements of the African Union Commission
5 (hereinafter the “AUC”) in August 2009 and the United Nations Economic
6 Commission for Africa (hereinafter the “UNECA”) in August 2008. Plaintiff was
7 the first to request and obtain official endorsements/letters of support for the
8 .Africa Internet domain name from these organizations. In April 2010, nearly a
9 year later, AUC wrote DCA and informed DCA that it had “reconsidered its
10 approach in implementing the subject Internet Domain Name (.Africa) and no
11 longer endorses individual initiatives in this matter related to continental resource.”
12 However, the letter did not withdraw its endorsement of DCA.

13 25. Further, the Section 2.2.1.4.3 of the Guidebook states that a
14 government may only withdraw its endorsement if the conditions of its
15 endorsement have not been satisfied: “It is also possible that a government may
16 withdraw its support for an application at a later time, including after the new
17 gTLD has been delegated, *if the registry operator has deviated from the conditions*
18 *of original support or non objection.*” (emphasis added). There were no conditions
19 on the AUC or UNECA endorsements to DCA.

20 **ZACR and the AUC’s Top Level Domain Application**

21 26. AUC itself attempted in 2011 in Dakar, Senegal, to obtain the rights
22 to .Africa by requesting from ICANN to include .Africa in the List of Top-Level
23 Reserved Names. This would mean that the .Africa name and its equivalent in
24 other languages would be unavailable for delegation under the ICANN new gTLD
25 Program, which would enable the AUC benefit from a special legislative
26 protection that would allow the AUC to delegate .Africa new gTLD itself.

27 27. When ICANN denied AUC’s request to reserve .Africa at the
28 immediate insistence of DCA and in compliance with the gTLD guidebook rules,

1 the AUC and ZACR conspired to improperly obtain the rights to .Africa through a
2 third-party company, Uniform ZA Central Registry (ZACR) for their own benefit,
3 in violation of the new gTLD program guidelines.

4 28. ZACR wrongfully campaigned against DCA’s application both to
5 ICANN and the AUC. ZACR also represented to AUC that DCA should not have
6 AUC’s endorsement because it was not a community organization, even though an
7 application by an individual organization is perfectly acceptable under ICANN’s
8 rules. ZACR also invited the ICANN Independent Objector (“IO”) to object to
9 DCA even though DCA was not subject to the IO’s review because DCA’s
10 application was not a community application.

11 29. ICANN then breached its agreement with Plaintiff to review
12 Plaintiff’s .Africa application in accordance with its Bylaws, Articles of
13 Incorporation, and the new gTLD rules and procedures by improperly advising
14 and conspiring with the AUC on how to defeat any applications for .Africa other
15 than its own (via its improper proxy, ZACR).

16 30. In exchange for AUC’s endorsement, ZACR signed a contract with
17 AUC allowing AUC to “retain all rights relating to dotAfrica gTLD,” in
18 contravention of the gTLD Guidebook.” The AUC also had other motives for
19 favoring ZACR. The members of the AUC committee formed to choose who to
20 endorse for the .Africa gTLD were individuals who were also members of various
21 organizations affiliated with ZACR.

22 31. ZACR represented that it was applying for the .Africa gTLD on
23 behalf of the African “community.” However, it failed to submit the required type
24 of application for organizations applying on behalf of a “community,” which is a
25 term of designation and differentiation for gTLDs. Nevertheless, ICANN
26 processed ZACR’s “standard” application. A “standard” application does not
27 require an applicant to show that it represents a community.

28 32. ZACR also made multiple misrepresentations to ICANN in an

1 effort to edge DCA out including (1) that it had the a large number of qualifying
2 endorsements from African governments sufficient to meet the 60% threshold
3 under ICANN rules, and (2) that it had the requisite financial capability to operate
4 as a gTLD operator.

5 **The Geographic Names Panel and InterConnect Communications**

6 33. ICANN’S Geographic Names Panel independently evaluates and
7 determines which governments or organizations can give endorsements to gTLD
8 applicants.

9 34. InterConnect Communications (“ICC”) is the organization that
10 ICANN contracted with to perform string similarity and geographic review during
11 the initial evaluation stage of the gLTD application process

12 35. For each application, the Geographic Names Panel will determine
13 which governments are relevant based on the inputs of the applicant, governments,
14 and its own research and analysis. ICC’s staffer Marl McFadden explained to
15 ICANN staff that if the endorsements of regional organizations like the AUC and
16 UNECA were not applied towards the 60% requirement, then neither DCA nor
17 Defendant ZACR would have sufficient geographic support.

18 36. Therefore, the ICC recommended that ICANN take endorsement
19 letters from regional authorities like the AUC and UNECA for both applicants,
20 Plaintiff and Defendant ZACR.

21 37. After some back and forth between ICANN and the ICC, and after
22 both entities changed their positions on the endorsements, ICANN decided to
23 accept endorsements from the AUC. Mr. McFadden emphasized in an email that
24 its position was that criteria that included the AUC would also require accepting
25 UNECA. In 2014 and 2015 during an independent review process, explained more
26 fully below, ICANN asserted that it had accepted UNECA as an endorser.

27 38. Thus, ICANN and not ICC determined that only the AUC
28 endorsements (and not the UNECA endorsements) would be taken into account for

1 the geographic evaluation for both applications.

2 39. Had ICANN treated DCA’s and ZACR’s endorsements equally,
3 both DCA and ZACR should have either passed or failed the endorsement
4 requirement. Rather, as shown below, ICANN conspired to accept ZACR’s
5 regional endorsements as sufficient while disregarding Plaintiff’s endorsements,
6 although the plaintiff received the endorsement earlier than ZACR from AUC.

7 40. Additionally, the ICC did not inform DCA of any problems with
8 their endorsements during the initial evaluation, as the ICC was required to do.
9 DCA’s application should have completed the process first. Although filed after
10 DCA’s application, ZACR’s application was initially placed ahead of DCA by
11 virtue of a lottery system employed by ICANN. However, ICANN put off
12 completing the initial evaluation on ZACR’s application because ZACR did not
13 have the required endorsements and would have failed if ICANN had completed its
14 initial valuation when it came up for evaluation. ICANN thus delayed ZACR to
15 give it more time to submit qualifying endorsements.

16 41. The Guidebook states that the evaluation panels are required to act
17 impartially and transparently; however, the communications and engagements
18 during the evaluation of .Africa applications deviated substantially from the
19 expected code of conduct.

20 **The GAC**

21 42. ICANN has a Governmental Advisory Committee (“GAC”) whose
22 purpose, according to the bylaws, is to “consider and provide advice on the
23 activities of ICANN as they relate to concerns of governments.” Membership on
24 the GAC is open to all representatives of all national governments and, at the
25 invitation through its chair “[e]conomies as recognized in the international fora,
26 and multinational governmental organizations and treaty organizations.”

27 43. The AUC became a member of the GAC in June 2012, apparently
28 on the advice of ICANN. However, its status as a voting member is improper

1 because, unlike the European Union (EU), it has no regulatory authority over its
2 member states.

3 44. Having encouraged the AUC's membership, ICANN then allowed
4 the GAC to be used as a vehicle for the issuance of advice against DCA's
5 application by DCA's only competitor for .Africa, the AUC through ZACR,
6 effectively ensuring that the rights to .Africa would be delegated to AUC's chosen
7 proxy ZACR. Specifically, ICANN allowed the GAC to issue a "consensus
8 advice" that DCA's application should not proceed due to issues with the regional
9 endorsements. Under ICANN's rules, the GAC can recommend that ICANN cease
10 reviewing an application if *all* of the GAC members agree that an application
11 should not proceed because an applicant is sensitive or problematic. However, not
12 all of the members of the GAC agreed that DCA's application should be stopped
13 and the GAC did not issue any statement that DCA was problematic or sensitive.

14 45. For example, Kenya's representative was not even present at the
15 GAC meeting when the advice was issued, but was informed that at a meeting of
16 the GAC and ICANN Board on 9 April 2013, Alice Munyua, Kenya's former GAC
17 advisor and a member of the ZACR Steering Committee as well as a GAC
18 representative for the AUC, made a statement purportedly on behalf of Kenya
19 denouncing DCA's application for .Africa. The current Kenya GAC advisor wrote
20 to the GAC Chairperson later that evening to inform her that Ms. Munyua no
21 longer represented Kenya and that Kenya did not share her viewpoints on .Africa
22 but ICANN Board nonetheless accepted the GAC advice rendered without a
23 consensus.

24 46. In June 2013, the New gTLD Program Committee ("NGPC")
25 accepted the GAC's advice even though DCA informed them that several members
26 of the committee had conflicts of interest with DCA and even though ZACR's
27 application should also have been halted if the GAC's rationale about regional
28

1 endorsements were to be applied equally. Nevertheless, ICANN rejected DCA’s
2 application on the basis of the improper GAC advice while ZACR’s continued.

3 47. ICANN therefore waited to inform DCA of the status of its Initial
4 Evaluation (IE) until after the wrongful GAC Advise was procured on the
5 Plaintiff’s application to stop it from processing further.

6 48. Although ICANN under its rules could have reconsidered this
7 decision, it refused to do so. Meanwhile, ZACR passed the initial evaluation and
8 entered into the contracting phase with ICANN. ZACR did not have sufficient
9 country specific endorsements to meet the ICANN requirements for geographic
10 gTLDs. Only five of the purported endorsement letters submitted by ZACR from
11 African governments actually referenced ZACR by name. Presumably, ZACR
12 passed on the basis of the same regional endorsements that ICANN and GAC had
13 used to derail Plaintiff’s application. ZACR filed purported support letters where
14 African governments were endorsing the AUC’s “Reserved Names” initiative,
15 along with declarations made by the AUC regarding its intention to reserve .Africa
16 for its own use along with its appointment letter from the AUC as evidence of such
17 support. Had ICANN used fair and even-handed criteria, DCA’s application
18 would have passed.

19 **The Independent Review Process**

20 49. ICANN provides applicants with an independent review process
21 (“IRP”), as a means to challenge ICANN’s actions with respect to a gTLD
22 application. The IRP is a binding arbitration, operated by the International Centre
23 for Dispute Resolution, comprised of an independent panel of arbitrators.
24 Nonetheless, once its wrongful conduct came to light ICANN took the position that
25 the IRP was not in fact binding.

26 50. Mr. McFadden, an ICC employee, stated in an email to ICANN that
27 he was monitoring the press “on the .dotafrika application,” and added “so far, so
28

1 good, I think. The ball is now in Sophia’s court – if she wants to invoke
2 Independent Review, then good luck to her.”

3 51. In October 2013, DCA successfully sought an IRP to review
4 ICANN’s processing of its application, including ICANN’s handling of the GAC
5 opinion.

6 52. DCA’s panel was comprised of the Honorable William J. Cahill
7 (Ret.)(who replaced the Honorable Richard C. Neal (Ret.) after his passing), Babak
8 Barin, and Professor Catherine Kessedjian. The Honorable William J. Cahill is a
9 JAMS arbitrator who spent nearly ten years as a judge in San Francisco County
10 Superior Court. Mr. Barin is an experienced attorney, professor, and author on
11 international arbitration. Ms. Kessedjian is a professor of law at the University
12 Pantheon-Assas Paris II and a deputy director of the European College of Paris –
13 she has also acts as an arbitrator for ICSID, ICC, LCIA and AAA.

14 53. Despite the initiation of the IRP, ICANN continued to review
15 ZACR’s application and went so far as to sign a contract for the operation of
16 .Africa with ZACR.

17 54. The IRP panel issued a final and thorough 63-page declaration in
18 the matter in July 2015, finding against ICANN. The panel found, *inter alia*, that:

- 19 a. The IRP arbitration was binding, despite ICANN’s protests to
20 the contrary.
- 21 b. ICANN’s actions and inactions with respect to DCA’s
22 application were inconsistent with ICANN’s bylaws and
23 articles of incorporation.
- 24 c. ICANN should “continue to refrain from delegating the
25 .Africa gTLD and permit DCA Trust’s application to proceed
26 through the remainder of the new gTLD application process.”

27 The IRP Panel did not conclude that there were any deficiencies with DCA’s
28 application. Rather, the arbitration panel concluded that “both the actions and

1 inactions of the Board [of ICANN] with respect to the application of DCA Trust
2 relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation
3 and Bylaws of ICANN.”

4 55. This was the first time in its history of the new gTLDs that ICANN
5 was not the prevailing party in an IRP arbitration.

6 56. A true and correct copy of the IRP panel’s declaration is attached
7 hereto as Exhibit A.

8 **ICANN’s Processing of DCA’s Application After the IRP Declaration**

9 57. Despite the IRP’s express ruling against ICANN, ICANN did not
10 act in accordance with the IRP’s Declaration.

11 58. Instead of allowing DCA’s application to proceed through the
12 remainder of the application process – referred to as the delegation phase --
13 ICANN restarted ICANN’s application and re-reviewed its endorsements.

14 59. ICANN intended to deny DCA’s application on any pretext. For
15 example, in September 2015 ICANN Geographic Name Evaluators issued DCA
16 clarifying questions regarding its endorsements, which it intentionally did not send
17 during the initial evaluation, more than two years after the IRP Panel declared
18 ICANN’s wrongful suspension of its application, and then indicated that DCA’s
19 responses to those questions were inadequate.

20 60. Hoping to gain insight into what exactly was allegedly wrong with
21 its application, DCA agreed to an extended evaluation. But, ICANN merely asked
22 the exact same questions without further guidance or clarification - clearly a
23 pretext to deny DCA’s application. After all, ICANN had already entered into a
24 registry agreement with ZACR, as ICANN’s general counsel had made public after
25 the IRP Declaration issuance. In short, the process ICANN put Plaintiff through
26 was a sham with a predetermined ending – ICANN’s denial of Plaintiff’s
27 application so that ICANN could steer the gTLD to ZACR.

1 61. In February 2016, ICANN rejected DCA’s application after the
2 extended evaluation. It is believed that ICANN is on the verge of awarding and
3 delegating .Africa to ZACR within the next few weeks

4 **FIRST CAUSE OF ACTION**

5 **(Breach of Contract—Against Defendant ICANN)**

6 62. Plaintiff incorporates by reference Paragraphs 1 through 61 as
7 though set forth in full herein.

8 63. In or about March 2012 Plaintiff submitted an application to
9 ICANN for the delegation rights of the .Africa gTLD as part of the 2012 new
10 gTLD Internet Expansion Program.

11 64. In consideration of ICANN’s promises to abide by its own Bylaws,
12 Articles of Incorporation and the rules and procedures set forth in the gTLD
13 Applicant’s Guidebook, and in conformity with the laws of fair competition,
14 Plaintiff paid ICANN the sum of \$185,000.00 - the mandatory application fee.

15 65. Plaintiff additionally agreed to abide by all rules and regulations as
16 those rules and regulations pertained to what constituted proper paperwork for
17 applying for the .Africa gTLD.

18 66. In consideration of Plaintiff paying the sum of \$185,000.00,
19 ICANN promised to conduct the bid process for the .Africa gTLD in a manner
20 consistent with its own Bylaws, Articles of Incorporation, the rules and procedures
21 set forth in the gTLD Applicant’s Guidebook, and in conformity with the laws of
22 fair competition.

23 67. Plaintiff would not have paid the sum of \$185,000 absent the
24 mutual consideration and promises. Plaintiff performed all conditions, covenants,
25 and promises required on its part to be performed in accordance with the agreed
26 upon terms of participating in the new gTLD Program.

27 68. ICANN breached its agreement with Plaintiff to review Plaintiff’s
28 .Africa application in accordance with ICANN’s Bylaws, Articles of Incorporation,

1 and the new gTLD rules as evidenced by the IRP Declaration. For example,
2 ICANN improperly advised the AUC on how to defeat any application for .Africa
3 other than its own (via its improper proxy, ZACR).

4 69. In a letter dated 8 March 2012, ICANN Board Chairman Stephen
5 Crocker explained to the AUC that although ICANN could not reserve .Africa for
6 AUC's use because the Reserved Names list was already closed, the AUC could
7 "play a prominent role in determining the outcome of any application" for .Africa:
8 first, as a "public authorit[y] associated with the continent ," the AUC could block
9 a competing application by filing "one written statement of objection;" second, the
10 AUC could file a Community Objection (a type of formal objection recognized by
11 ICANN and decided by an independent evaluator); or finally, the AUC could
12 utilize the GAC to combat a competing application for .Africa.

- 13 a. ICANN prevented DCA's application from proceeding through
14 the new gTLD review process and by coordinating with the
15 AUC and the ICANN Governmental Advisory Committee
16 (hereinafter the "GAC") and others, to ensure that the AUC
17 obtained the rights to .Africa, in a manner that violated
18 Defendant's obligations of independence, transparency, and due
19 process contained in ICANN's Articles of Incorporation and
20 Bylaws and the gTLD Guidebook.
- 21 b. ICANN has also failed to abide by the results of its own IRP
22 process in contravention of its agreement with DCA.
- 23 c. ICANN further breached its agreement with Plaintiff by failing
24 to permit competition for .Africa and by abusing its regulatory
25 authority in its differential treatment of ZACR.
- 26 d. ICANN breached its agreement with Plaintiff by working with
27 InterConnect Communications (ICC), an independent evaluator
28 of the applications for ICANN, to ensure that ZACR, but not

1 Plaintiff, would be able to pass a crucial evaluation process.

2 e. ICANN breached the agreement by drafting a letter supporting
3 ZACR for the AUC to submit back to ICANN.

4 f. ICANN breached their agreement with Plaintiff by failing to
5 conduct the necessary due diligence into recommendations and
6 decision by Defendant's advisory councils.

7 g. In violation of the new gTLD Program rules of transparency
8 and fair competition, the GAC sent steady messages to
9 ICANN's Board that it must ensure that nothing interferes with
10 the delegation of .Africa to ZACR. During ICANN's 50th
11 International Conference in London, UK, the AUC GAC
12 members threatened that ICANN would not get the African
13 Union's support, which ICANN was seeking for its Internet
14 transition plans away from National Telecommunications and
15 Information Administration oversight, if Plaintiff's application
16 was approved.

17 70. A representative of ICANN, who was also called to testify on
18 behalf of the ICANN during the IRP, Ms. Heather Dryden, admitted under
19 questioning and cross examination that ICANN breached its agreement with
20 Plaintiff. Specifically, Ms. Dryden admitted that the GAC did not act with
21 transparency or in a manner designed to ensure fairness. See Exhibit A,
22 International Centre for Dispute Resolution, Independent Review Panel, Case # 50
23 2013 001083, Final Declaration, pgs. 43-45.

24 71. The Plaintiff alleges on information and belief that ICANN
25 willfully committed wrongful actions in a manner that was detrimental to the
26 Plaintiff's application for the .Africa new gTLD, and refused to take corrective
27 actions to redress such evident wrongdoing satisfactorily even after the conclusion
28 of the IRP Proceeding.

1 72. As a direct, foreseeable, and proximate result of ICANN’s breach
2 of the Agreement, Plaintiff has suffered damages, and been damaged and continues
3 to be damaged in an amount to be determined at trial but not less than nine-million
4 United States of America dollars (\$9,000,000.00), plus interest. Additionally, as a
5 result of the breach by ICANN of the Agreement, Plaintiff has incurred legal fees
6 and costs. Plaintiff reserve the right to amend this Complaint to state the true
7 nature and extent of its damages when ascertained or at time of trial.

8 **SECOND CAUSE OF ACTION**

9 **(Intentional Misrepresentation—Against ICANN)**

10 73. Plaintiff incorporates by reference Paragraphs 1 through 72 as
11 though set forth in full herein.

12 74. ICANN made the following intentional misrepresentations on its
13 website and in the Guidebook to Plaintiff or to Plaintiff’s agents or representatives
14 and on which Plaintiff relied to its detriment in, among other things, applying for
15 .Africa and paying the \$185,000 fee to do so:

- 16 a. ICANN represented to Plaintiff that Plaintiff’s application for
17 .Africa would be reviewed in accordance with, ICANN’s
18 Articles of Incorporation, and the new gTLD Applicant
19 Guidebook; all of which promise a fair and transparent bid
20 process, fair competition, and non-interference with an
21 applicant’s application by a competitor or third-party.
- 22 b. ICANN represented that it had in place an Accountability
23 Mechanism including an Independent Review Panel (IRP)
24 process to ensure that Plaintiff would be provided proper due
25 process in the event of a dispute regarding any decisions by
26 ICANN regarding Plaintiff’s application under the new gTLD
27 Program.
- 28 c. ICANN represented that it would participate in good-faith with

1 any applicant who desired to initiate an IRP process in order to
2 ensure that applicants received proper due process.

3 d. ICANN represented that all applicants for the .Africa gTLD
4 would be subject to the same agreement, rules, and procedures.

5 75. However, ICANN:

6 a. Had no intention of following its Bylaws, Articles of
7 Incorporation, or the rules outlined in the gTLD Applicant
8 Guidebook. ICANN's rules state that three criteria are used to
9 object to a specific applicant by the GAC: problematic,
10 potentially violating national law, and raises sensitivities.
11 However, ICANN's Board representative testified on behalf of
12 ICANN during the IRP hearing that the GAC and ICANN's
13 Board did not in fact follow the published rules for issuing a
14 GAC objection. See Exhibit A, IRP Declaration, pgs. 43-52.

15 b. ICANN had no intention of ever participating in an IRP process
16 in good-faith and at all times believed it would do whatever it
17 wanted. And when forced to participate in IRP proceedings,
18 ICANN argued that the IRP was not binding. After the IRP
19 Declaration, ICANN followed through with its intention to act
20 according to its own wishes and desires regardless of the IRP
21 ruling and procedure. For example, ICANN's CEO, Mr. Fadi
22 Chehade, wrote to the AUC's Infrastructure and Energy
23 Commissioner on or about June 15, 2014 and said that ICANN
24 not only did not approve of the IRP proceedings but also that
25 ICANN promised to proceed expeditiously with delegating
26 .Africa to the AUC's improper proxy ZACR.

27 76. ICANN never had any intention of treating applicants the same or
28 making them follow the same rules. Instead, ICANN simply chose applicants

1 based on its own wishes and in exchange for political favors. As an example,
2 ICANN allowed ZACR to break its rules and procedures by not requiring ZACR to
3 submit a Community Top Level Domain application for .Africa even though the
4 AUC had claimed that it had endorsed ZACR to apply on behalf of the African
5 community.

6 77. When ICANN made these representations they knew them to be
7 false and made these representations with the intention to induce Plaintiff to act in
8 reliance on these representations.

9 78. In doing the acts herein alleged, ICANN acted with oppression,
10 fraud, and malice, and Plaintiff is entitled to punitive damages.

11 **THIRD CAUSE OF ACTION**

12 **(Negligent Misrepresentations—Against ICANN)**

13 79. Plaintiff incorporates by reference Paragraphs 1 through 78 as
14 though set forth in full herein.

15 80. ICANN made the following misrepresentations through its website
16 and the Guidebook to Plaintiff or to Plaintiff's agents or representatives and on
17 which Plaintiff relied to its detriment:

- 18 a. ICANN represented to Plaintiff that Plaintiff's application for
19 .Africa would be reviewed in accordance with, ICANN's
20 Articles of Incorporation, and the new gTLD Applicant
21 Guidebook; all of which promise a fair and transparent bid
22 process, fair competition, and non-interference with an
23 applicant's application by a competitor or third-party.
- 24 b. ICANN represented that it had in place an Accountability
25 Mechanism including an Independent Review Panel (IRP)
26 process to ensure that Plaintiff would be provided proper due
27 process in the event of a dispute regarding any decisions by
28 ICANN regarding Plaintiff's application under the new gTLD

1 Program.

- 2 c. ICANN represented that it would participate in good-faith with
3 any applicant who desired to initiate an IRP process in order to
4 ensure that applicants received proper due process.
- 5 d. ICANN represented that all applicants for the .Africa gTLD
6 would be subject to the same agreement, rules, and procedures.

7 81. However, ICANN:

- 8 a. Had no intention of following its Bylaws, Articles of
9 Incorporation, or the rules outlined in the gTLD Applicant
10 Guidebook. ICANN's rules state that three criteria are used to
11 object to a specific applicant by the GAC: problematic,
12 potentially violating national law, and raises sensitivities.
13 However, ICANN's Board representative testified on behalf of
14 ICANN during the IRP hearing that the GAC and ICANN's
15 Board did not in fact follow the published rules for issuing a
16 GAC objection. See Exhibit A, IRP Declaration, pgs. 43-52.
- 17 b. ICANN had no intention of ever participating in an IRP process
18 in good-faith and at all times believed it would do whatever it
19 wanted. And when forced to participate in IRP proceedings,
20 ICANN argued that the IRP was not binding. After the IRP
21 Declaration, ICANN followed through with its intention to act
22 according to its own wishes and desires regardless of the IRP
23 ruling and procedure. For example, ICANN's CEO, Mr. Fadi
24 Chehade, wrote to the AUC's Infrastructure and Energy
25 Commissioner on or about June 15, 2014 and said that ICANN
26 not only did not approve of the IRP proceedings but also that
27 ICANN promised to proceed expeditiously with delegating
28 .Africa to the AUC's improper proxy ZACR.

1 82. Plaintiff is entitled to compensatory damages, legal fees, and costs.

2 **FOURTH CAUSE OF ACTION**

3 **(Fraud & Conspiracy to Commit Fraud—Against All Defendants)**

4 83. Plaintiff incorporates by reference Paragraphs 1 through 82 as
5 though fully set forth herein.

6 84. ICANN conspired with the AUC and its proxy company ZACR to
7 defraud Plaintiff and Defendants did in fact commit fraud by assisting each other in
8 improperly denying Plaintiff's application.

9 85. Plaintiff had complained to ICANN that its competitor ZACR had
10 submitted a fraudulent application, but the ICANN did not take any action against
11 ZACR. Plaintiff believes that by not taking any action to investigate the obvious
12 deficiencies in ZACR's application, as described herein, Defendants were
13 complicit in this act of accepting and approving a fraudulent application.

14 86. No provision in the gTLD Applicant's Guidebook allows for a
15 third-party organization such as the AUC, a non-applicant, and an organization that
16 is not a registry operator, to have all rights to a Top Level Domain and other rights
17 over registry databases and the right to re-designate the registry function.

18 87. In contravention of the established rules, Plaintiff is informed and
19 believes that ICANN allowed the AUC and its proxy company ZACR to violate
20 the rules and procedures for acquiring the delegation rights of a new gTLD in
21 exchange for the AUC's political support in favor of Defendant's efforts to become
22 a non-regulated organization that would have overall stewardship of the Internet
23 domain technical management functions.

24 88. ICANN improperly allowed ZACR's application, which admitted
25 that ZACR had agreed to assign any .Africa rights to AUC, because there is no
26 provision in the Guidebook that allows a third party organization like AUC, a non-
27 applicant, and an organization that is not a registry operator, to have all rights to a
28 TLD and other rights over registry databases.

1 89. Plaintiff is informed and believes that ICANN allowed the AUC to
2 unilaterally appoint its proxy applicant as the chosen registry operator for .Africa
3 in contravention of new gTLD Program guidelines and ICANN’s agreement with
4 Plaintiff.

5 90. As per Article 1 (Delegation and Operation of Top-Level Domain:
6 Representation and Warranties) of the new gTLD Registry Agreement, only
7 ICANN can designate a registry operator for any Top Level Domain.

8 91. ZACR’s improper relationship with the AUC is evident in the
9 signed contract in which ZACR signed over all its rights to .Africa to the AUC.
10 Specifically, that “the AUC shall retain all the rights relating to the dotAfrica TLD
11 [Top Level Domain], including in particular, intellectual property and other rights
12 to the registry databases required to ensure the implementation of the agreement
13 between the AUC and the ZACR, and the right to re-designate the registry
14 function.”

15 92. ICANN allowed ZACR to break its rules and procedures by not
16 requiring ZACR to submit a Community Top Level Domain application for .Africa
17 even though the AUC had claimed that it had endorsed ZACR to apply on behalf
18 of the African community.

19 93. These fraudulent acts in violation of Plaintiff’s agreement with
20 ICANN prevented the only proper application [Plaintiff’s] from proceeding
21 through the new gTLD process and prevented Plaintiff from acquiring the
22 delegation rights of the .Africa new gTLD.

23 94. In doing the acts herein alleged, ICANN acted with oppression,
24 fraud, and malice, and Plaintiff is entitled to punitive damages.

25 95. Furthermore, the registry agreement ICANN signed with ZACR
26 should be declared null and void as that contract was the result of a fraudulent
27 application that was accepted and approved by ICANN in violation of due process
28 and while Plaintiff was in the IRP

1 **FIFTH CAUSE OF ACTION**

2 **(Unfair Competition (Violation of Cal. Bus. & Prof. Code §17200—Against**
3 **All Defendants)**

4 96. Plaintiff incorporates by reference Paragraphs 1 through 95 as
5 though fully set forth herein.

6 97. Defendant’s conduct as alleged herein constitutes unlawful, unfair,
7 or fraudulent business acts or practices in violation of California Business and
8 Professions Code § 17200 et seq.

9 98. Unless Defendants are restrained from continuing these unlawful,
10 unfair, and fraudulent business acts or practices Plaintiff will suffer irreparable
11 harms and injuries.

12 99. As a direct and proximate result of the foregoing conduct,
13 Defendants have been unjustly enriched. Plaintiff is entitled to full disgorgement of
14 all profits obtained by Defendants as a result of their unlawful, unfair, and
15 fraudulent acts as alleged herein.

16 **SIXTH CAUSE OF ACTION**

17 **(Negligence – Against ICANN)**

18 100. Plaintiff incorporates by reference Paragraphs 1 through 99 as
19 though fully set forth herein.

20 101. ICANN owed Plaintiff a duty to act with proper care in processing
21 Plaintiff’s application in accordance with its own Bylaws, Articles of
22 Incorporation, and rules and procedures as stated in the gTLD Applicant’s
23 guidebook.

24 102. ICANN owed Plaintiff a duty to refrain from anticompetitive and
25 unfair business practices under California and Federal law.

26 103. ICANN breached the duty owed to Plaintiff by accepting a
27 fraudulent application submitted by Uniforum/ZACR.

1 104. ICANN breached the duty owed to Plaintiff by failing to conduct
2 due diligence and an investigation concerning GAC's recommendation to not
3 approve Plaintiff's application.

4 105. ICANN breached the duty owed to Plaintiff by allowing the GAC
5 to disregard its established rules and procedures and by failing to provide a
6 rationale for the GAC advice regarding Plaintiff's application.

7 106. ICAN breached the duty owed to Plaintiff by moving forward with
8 the registry agreement with ZACR even while the IRP proceedings were on-going.

9 107. ICANN breached the duty owed to Plaintiff, as admitted by
10 ICANN's own witness at the IRP proceeding, by failing to act in a transparent
11 manner and consistent with procedures designed to ensure fairness and
12 accountability.

13 **SEVENTH CAUSE OF ACTION**

14 **(Intentional Interference with Contract Against ZACR)**

15 108. Plaintiff incorporates by reference Paragraphs 1 through 107 as
16 though fully set forth herein.

17 109. A contract existed between Plaintiff and ICANN in the form of the
18 Guidebook.

19 110. ZACR knew of this contract.

20 111. ZACR's conduct as described herein, including its improper
21 lobbying efforts to AUC and ICANN, induced breach of the contract and/or
22 prevented performance of the contract and/or made its performance more difficult.

23 112. ZACR intended to disrupt performance of the contract because it
24 wanted to obtain the delegation rights to .Africa for itself.

25 113. ZACR's actions were a substantial factor in causing Plaintiff's
26 harms.

27 114. In doing the acts herein alleged, ICANN acted with oppression,
28 fraud, and malice, and Plaintiff is entitled to punitive damages.

1 **EIGHTH CAUSE OF ACTION**

2 **(Confirmation of IRP Declaration)**

3 115. Plaintiff incorporates by reference Paragraphs 1 through 114 as
4 though fully set forth herein.

5 116. As set forth herein, the IRP is a binding proceeding.

6 117. As set forth herein, the IRP issued an arbitration award in favor of
7 Plaintiff in July 2015.

8 118. Accordingly, Plaintiff requests that the court confirm the IRP's
9 award.

10 **NINTH CAUSE OF ACTION**

11 **(Declaratory Relief Against ICANN)**

12 119. Plaintiff incorporates by reference Paragraphs 1 through 118 as
13 though fully set forth herein.

14 120. As set forth herein, the IRP Declaration mandates that ICANN
15 allow DCA's application to proceed through the remainder of the new gTLD
16 application process.

17 121. As set forth herein, ICANN did not allow DCA's application to
18 proceed through the remainder of the new gTLD application process but instead
19 forced DCA to proceed through parts of the process that it had already completed,
20 including review of its geographic endorsements.

21 122. The holdings and findings of fact found in the IRP are conclusive
22 for purposes of this proceeding based on principals of res judicata.

23 123. An actual controversy exists among the parties as to the proper
24 implementation of the directives in the IRP declaration.

25 124. Plaintiff seeks a judicial declaration that ICANN follow the IRP
26 Declaration and allow the DCA application to proceed through the delegation
27 phase of the application process.

1 125. Plaintiff is entitled to an injunction (1) requiring ICANN to abide
2 by the IRP ruling and place DCA's application at the proper place in the evaluation
3 process, and (2) directing ICANN to refrain from delegating the rights to .Africa
4 until DCA's application has been fully processed.

5 **TENTH CAUSE OF ACTION**

6 **(Declaratory Relief Against All Defendants)**

7 126. Plaintiff incorporates by reference Paragraphs 1 through 125 as
8 though fully set forth herein.

9 127. As set forth herein, ZACR submitted an improper application and
10 fraudulently obtained a contract for registration rights to .Africa from ICANN.

11 128. As set forth herein, the IRP declaration stated that ZACR's
12 application should not continue to be processed until DCA's application was fully
13 reviewed.

14 129. As set forth herein, ICANN has not processed DCA's application in
15 accordance with the IRP Declaration.

16 130. The holdings and findings of fact found in the IRP are conclusive
17 for purposes of this proceeding based on principals of res judicata.

18 131. An actual controversy exists among the parties as to ZACR's
19 entitlement to the .Africa registration rights.

20 132. Plaintiff seeks a judicial declaration that the registry agreement
21 between ZACR and ICANN be declared null and void and that ZACR's
22 application does not meet ICANN standards.

23 **ELEVENTH CAUSE OF ACTION**

24 **(Declaratory Relief Against ICANN)**

25 133. Plaintiff incorporates by reference Paragraphs 1 through 132 as
26 though fully set forth herein.

27 134. ICANN required Plaintiff and other applicants to sign the
28 Guidebook which contained a covenant not to sue in order to apply for .Africa:

1 “Applicant hereby releases ICANN and the ICANN Affiliated Parties [i.e.,
2 ICANN’s affiliates, subsidiaries, directors, officers, employees, consultants,
3 evaluators, and agents] from any and all claims by applicant that arise out of, are
4 based upon, or are in any way related to, any action, or failure to act, by ICANN or
5 any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated
6 Party’s review of this application, investigation or verification, and any
7 characterization or description of applicant or the information in this application,
8 any withdrawal of this application or the decision by ICANN to recommend, or not
9 to recommend, the approval of applicant’s gTLD application. APPLICANT
10 AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL
11 FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE
12 APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR
13 PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF
14 ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFILIATED
15 PARTIES WITH RESPECT TO THE APPLICATION.”

16 135. Plaintiff could not obtain the rights to .Africa from anyone but
17 ICANN. ICANN maintained monopolistic power over gTLDs on the Internet.
18 The covenant not to sue was non-negotiable.

19 136. The covenant not to sue is void as a matter of California public
20 policy and law (See Cal. Civ. Code §1668).

21 137. The covenant not to sue is unconscionable. It is a contract of
22 adhesion, entirely one-sided and not subject to negotiation. It allows ICANN to
23 absolve itself of wrongdoing while affording no remedy to applicants. It does not
24 equally apply to applicants because it does not prevent ICANN from resorting to
25 Court or litigation against applicants.

26 138. The covenant not to sue was procured by fraud. ICANN’S website
27 and guidebook describe the IRP as an “Independent Third-Party REVIEW OF
28 Board actions alleged by an affected party to be inconsistent with ICANN’s

1 Articles of Incorporation or Bylaws.” In addition, the covenant not to sue in the
2 Guidebook presents the IRP as an alternative to hold ICANN accountable for any
3 wrongdoing: “PROVIDED THAT APPLICANT MAY USE ANY
4 ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR
5 PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN
6 WITH RESPECT TO THE APPLICATION.”

7 139. In fact, ICANN denies in practice that the IRP is binding and does
8 not respect or follow its decisions. ICANN induces and intends to induce
9 applicants to sign the guidebook covenant by falsely representing it has a real and
10 effective dispute resolution mechanism outside of court. However, ICANN has
11 failed to act in accordance with the IRP ruling against it. Plaintiff relied on those
12 misrepresentations in applying to ICANN for .Africa and in instituting the IRP
13 process and investing time and resources in it.

14 140. As set forth herein, ICANN did not comply with its obligations
15 under the Guidebook.

16 141. An actual controversy exists among the parties as to the
17 enforceability of the covenant not to sue.

18 142. Plaintiff seeks a judicial declaration that the covenant not to sue is
19 unenforceable, unconscionable, procured by fraud and/or or void as a matter of law
20 and public policy.

21
22 **WHEREFORE**, Plaintiff DOTCONNECTAFRICA TRUST prays for
23 relief as follows:

- 24 1. For compensatory damages according to proof at the time of trial;
- 25 2. For general damages according to proof;
- 26 3. For punitive damages according to proof;
- 27 4. For confirmation of the IRP Declaration;
- 28 5. For specific performance of the IRP Declaration;

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- 6. For rescission of ICANN’s registry agreement with ZACR as a null and void contract;
- 7. An injunction requiring ICANN to consider DCA’s application in accordance with the IRP ruling;
- 8. An injunction requiring ICANN to refrain from processing the ZACR application until they have processed DCA’s application in accordance with the IRP ruling;
- 9. For legal interest on said sums;
- 10. Attorneys’ fees and costs to the extent permitted by law; and
- 11. For such other and further relief as the Court deems just and proper against all Defendants.

Dated: February 26, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown

Ethan J. Brown

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST

4837-3717-4830, v. 9-3717-4830, v. 5-3717-4830, v. 4

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 February 26, 2016, I caused the foregoing **PLAINTIFF'S FIRST AMENDED COMPLAINT FOR: 1) Breach of Contract; 2) Intentional Misrepresentation; 3) Negligent Misrepresentation; 4) Fraud and Conspiracy to Commit Fraud; 5) Unfair Competition (Violation of Cal. Bus. & Prof. Code §17200); 6) Negligence; 7) Intentional Interference with Contract; 8) Confirmation of IRP Award; 9) Declaratory Relief; 10) Declaratory Relief; 11) Declaratory Relief** 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 February 26, 2016

/s/ Ethan J. Brown