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7 DOTCONNECTAFRICA TRUST  
8  
9

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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22  
23  
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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 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 50<sup>th</sup>  
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 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           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 **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