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 9 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12
 13 RUBY GLEN, LLC ,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,

18 Defendant.

Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the
 Honorable Percy Anderson

**OPPOSITION TO *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

[Declarations of J. Rasco, N.
 Bezsonoff, C. Willett and R.
 Weinstein filed concurrently
 herewith]

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TABLE OF CONTENTS

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

	Page
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	4
A. ICANN AND THE NEW GTLD PROCESS	4
B. THE APPLICATIONS FOR .WEB AND PLAINTIFF’S CLAIMS REGARDING NU DOTCO	7
III. LEGAL STANDARD	11
IV. ARGUMENT	12
A. PLAINTIFF SEEKS EMERGENCY RELIEF ONLY BECAUSE OF ITS OWN DELAY	12
B. PLAINTIFF DOES NOT MEET THE REQUIREMENTS FOR THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER	14
1. Plaintiff Is Unlikely To Succeed On The Merits Of Its Claims	14
(a) Plaintiff Is Unlikely To Succeed On The Merits Of The Contract Claim	14
(b) Plaintiff Is Unlikely To Succeed On The Merits Of The Breach Of Implied Covenant Of Good Faith And Fair Dealing Claim	17
(c) Plaintiff Is Unlikely To Succeed On The Merits Of The Negligence Claim.....	18
(d) Plaintiff Is Unlikely To Succeed On The Merits Of The Unfair Competition Claim	18
(e) Plaintiff Is Unlikely To Succeed On The Merits Of The Declaratory Relief Claim	19
2. Plaintiff Will Not Suffer Irreparable Harm In The Absence Of The Requested Injunctive Relief	20
3. The Balance Of The Equities Weighs Against The Issuance Of Injunctive Relief	21
4. The Public Interest Strongly Favors Denying Plaintiff’s Application For A Temporary Restraining Order	21
C. THE COVENANT NOT TO SUE BARS THIS LAWSUIT	22
V. PLAINTIFF’S EXPEDITED DISCOVERY REQUEST MUST ALSO BE DENIED	24
VI. CONCLUSION	25

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

TABLE OF AUTHORITIES

Page

CASES

Alliance for Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011)..... 12

Am. Trucking Assocs. v. City of L.A.,
559 F.3d 1046 (9th Cir. 2009)..... 12

Amylin Pharms., Inc. v. Eli Lilly & Co.,
456 F. App'x 676 (9th Cir. 2011)..... 20

Carnero v. Wash. Mut.,
No. C 09-5330 JF (RS), 2009 U.S. Dist. LEXIS 123532 (N.D. Cal.
Dec. 30, 2009) 13

Commercial Connect v. Internet Corp. for Assigned Names & Nos.,
No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky.
Jan. 26, 2016)..... 19, 22, 24

Dimension Data N. Am., Inc. v. Netstar-1, Inc.,
226 F.R.D. 528 (E.D.N.C. 2005)..... 25

ET Trading, Ltd. v. ClearPlex Direct, LLC,
No. 15-CV-00426-LHK, 2015 U.S. Dist. LEXIS 25894 (N.D. Cal.
Mar. 2, 2015) 21

Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.,
209 Cal. App. 4th 1118 (2012)..... 23

Frittelli, Inc. v. 350 N. Canon Drive, LP,
202 Cal. App. 4th 35 (2011)..... 23

Horne v. Wells Fargo Bank,
969 F. Supp. 2d 1203 (C.D. Cal. 2013)..... 11

TABLE OF AUTHORITIES
(continued)

		Page
3	<i>Image Online Design, Inc. v. Internet Corp. for Assigned Names &</i>	
4	<i>Nos.</i> , No. CV 12-08968 DDP, 2013 U.S. Dist. LEXIS 16896 (C.D.	
5	Cal. Feb. 7, 2013) (Pregerson, J.).....	15
6	<i>In re iPhone Application Litig.</i> ,	
7	844 F. Supp. 2d 1040 (N.D. Cal. 2012).....	18
8	<i>In re Sony Gaming Networks & Customer Data Sec. Breach Litig.</i> ,	
9	996 F. Supp. 2d 942 (S.D. Cal. 2014).....	18
10	<i>Jackson v. AEG Live, Inc.</i> ,	
11	233 Cal. App. 4th 1156 (2015).....	18
12	<i>Klein v. Chevron U.S.A., Inc.</i> ,	
13	202 Cal. App. 4th 1342 (2012).....	15
14	<i>Los Angeles Unified Sch. Dist. v. U.S. Dist. Ct.</i> ,	
15	650 F.2d 1004 (9th Cir. 1981).....	12
16	<i>Mission Power Eng'g Co. v. Con't Cas. Co.</i> ,	
17	883 F. Supp. 488 (C.D. Cal. 1995).....	11
18	<i>Munaf v. Geren</i> ,	
19	553 U.S. 674 (2008).....	12
20	<i>Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.</i> ,	
21	795 F.3d 1124 (9th Cir. 2015).....	4
22	<i>New Motor Vehicle Bd. v. Orrin W. Fox Co.</i> ,	
23	434 U.S. 1345 (1977).....	12
24	<i>Pascascio v. New Century Mortg. Corp.</i> ,	
25	No. CV 12-839 PSG, 2012 U.S. Dist. LEXIS 68533 (C.D. Cal. May	
26	16, 2012).....	12
27	<i>Republic Bank v. Marine Nat'l Bank</i> ,	
28	45 Cal. App. 4th 919 (1996).....	15

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

TABLE OF AUTHORITIES
(continued)

	Page
<i>Robinson Helicopter Co. v. Dana Corp.</i> , 34 Cal. 4th 979 (2004).....	18
<i>San Diego Hospice v. Cty. of San Diego</i> , 31 Cal. App. 4th 1048 (1995).....	22
<i>Semitool, Inc. v. Tokyo Electron Am., Inc.</i> , 208 F.R.D. 273 (N.D. Cal. 2002)	25
<i>Skrbina v. Fleming Cos.</i> , 45 Cal. App. 4th 1353 (1996).....	22
<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009).....	21
<i>Weinberger v. Romero-Barcelo</i> , 456 U.S. 305 (1982)	22
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008)	12
STATUTES	
Cal. Bus. & Prof. Code § 17200	19
Cal. Bus. & Prof. Code § 17203	19
Cal. Civ. Code § 1668.....	22, 23
Fed. R. Civ. P. 65(b).....	11

1 **I. INTRODUCTION**

2 Plaintiff Ruby Glen LLC and six other applicants are all vying to operate the
3 “.WEB” Internet generic top-level domain (“gTLD”). After a detailed review,
4 started in 2012, the Internet Corporation for Assigned Names and Numbers
5 (“ICANN”), the nonprofit public benefit corporation responsible for evaluating
6 such applications, determined that all .WEB applications met the established
7 criteria. But, because each unique gTLD can only have one operator, ICANN
8 placed the .WEB applications into a “Contention Set” according to procedures in
9 place since 2012. On April 27, 2016, again according to procedures in place since
10 2012, ICANN scheduled an auction for July 27, 2016 (“Auction”) to resolve which
11 application in the Contention Set will proceed. Now, to avoid this competition and
12 the auction procedures it agreed to, Plaintiff seeks a temporary restraining order
13 (“TRO”) against ICANN to halt the Auction.¹ But there is no basis in either the
14 Auction procedures, the law or the evidence to grant Plaintiff the relief it seeks.

15 In submitting their applications, Plaintiff and all other applicants agreed to a
16 detailed set of procedures for the application process, which ICANN developed
17 over several years with extensive public participation, including from Plaintiff’s
18 ultimate parent company Donuts, Inc., which through its subsidiaries like Plaintiff,
19 submitted over 300 new gTLD applications. Those procedures are embodied in a
20 338-page New gTLD Applicant Guidebook (“Guidebook”) and, of particular
21 importance here, a 22-page set of “Auction Rules.” Per the Auction Rules, an
22 auction *may* be postponed if all participants agree and each submits such a request
23 to ICANN at least 45 days before the auction. In addition, an ICANN auction can

24 ¹ Despite filing over three days ago, ***Plaintiff still has not served ICANN***
25 with the Complaint or TRO application. ICANN’s counsel had to obtain copies on
26 PACER. Moreover, it is inexplicable why Plaintiff, with its claims of such urgency,
27 would not serve ICANN in the hope of making its TRO application ripe for
28 decision under the Court’s Standing Order, which requires such service. (Standing
Order at ¶ 11 (“The Court will not rule on any application for [TRO] for at least 24
hours after the party subject to the requested order has been served; such party may
file opposing or responding papers in the interim.”).)

1 be avoided altogether, as ICANN encourages in the Guidebook, if all participants
2 agree to private resolution of a contention set.

3 Here, at least one Auction participant, Nu Dotco LLC (“Nu Dotco”), refused
4 to agree to postpone the Auction or private resolution of the Contention Set. As a
5 result, no postponement request was made by the deadline, and ultimately only
6 three participants requested a delay after the deadline. Plaintiff has nonetheless
7 sought to delay, and perhaps ultimately avoid, the Auction by making
8 unsubstantiated claims regarding Nu Dotco’s application for .WEB, arguing that
9 ICANN’s investigation of those claims was insufficient. Specifically, Plaintiff
10 asserts that, on June 7, 2016, it received an email from Nu Dotco’s CFO that,
11 according to Plaintiff, “indicated a potential change in both [Nu Dotco’s]
12 management and ownership.” Plaintiff contends that this – and this alone – should
13 have caused ICANN to postpone the Auction for further investigation.

14 But three separate ICANN bodies – ICANN’s staff, ICANN’s Ombudsman,
15 and ICANN’s Board – have already looked into the alleged change in Nu Dotco’s
16 ownership or management. All three found no credible evidence that any such
17 change had occurred within Nu Dotco, and therefore nothing supported a delay of
18 the Auction. Plaintiff’s TRO application, filed nearly three months after the
19 Auction was scheduled and just two business days before bidding is set to officially
20 begin, relies solely on a strained, and now completely discredited, interpretation of
21 the Nu Dotco CFO’s June 7 email. However, the evidence accompanying this
22 opposition – sworn declarations from ICANN and Nu Dotco executives – confirms
23 that Nu Dotco has not made any change in its ownership or management, much less
24 a “disqualifying” change that should derail the Auction processes already under
25 way or the official start of bidding.

26 Separate and apart from the fact that ICANN performed a thorough
27 investigation of Plaintiff’s allegations and confirmed that nothing had changed,
28 Plaintiff’s TRO application is deficient for other reasons. First, the “emergency”

1 that Plaintiff invokes is an emergency of Plaintiff's own making. **By June 7, 2016**,
2 Plaintiff had the email from Nu Dotco's CFO that forms the entire basis of this suit,
3 and which made clear that Nu Dotco did not consent to private resolution or
4 postponement. Yet Plaintiff waited over two weeks to raise the matter with
5 ICANN. **By July 13, 2016**, Plaintiff was well aware that, based on its investigation,
6 ICANN concluded that the Auction should proceed as scheduled. Yet Plaintiff
7 waited over another week to bring this action. Second, Plaintiff fails to satisfy any
8 of the four requirements for emergency injunctive relief: (1) Plaintiff is not likely
9 to succeed on the merits of its claims because its claims have no merit, particularly
10 since Plaintiff agreed to the Auction Rules that it now seeks to avoid; (2) Plaintiff
11 will not suffer irreparable harm in the absence of injunctive relief because the
12 Auction Rules provide means to address these issues post-Auction and any injuries
13 can be compensated by financial adjustments; (3) the balance of equities weighs
14 against injunctive relief because it would disrupt long-agreed gTLD-assignment
15 procedures that provide needed certainty to applicants; and (4) the public interest
16 strongly favors denying the TRO because the Guidebook and Auction Rules that
17 Plaintiff now seeks to upend have been in place for years and have been relied upon
18 by hundreds of applicants. Third, in its application for .WEB, like the over 300
19 applications submitted by other subsidiaries of Plaintiff's ultimate parent, Plaintiff
20 agreed to a covenant not to sue ICANN for claims associated with Plaintiff's
21 application. This lawsuit plainly violates Plaintiff's contractual obligation and bars
22 the relief sought.

23 To be clear, everything that Plaintiff complains about in this suit is an
24 express term or aspect of the New gTLD Program agreed to by Plaintiff when it
25 applied for .WEB in 2012. For instance, the contention set procedures, the auction
26 provisions, and the covenant not to sue ICANN, were acknowledged and accepted
27 by Plaintiff when it submitted its application pursuant to the Guidebook. Likewise,
28 the principle that ICANN will consider postponing an auction only when **all**

1 participants make such a request is express in the very Auction Rules that Plaintiff
2 accepted when it executed a “Bidder Agreement,” in May 2016, stating that
3 Plaintiff ***agrees to be bound by the Auction Rules.***

4 ICANN, as a nonprofit, has no financial motivation in the Auction
5 proceeding. As has been widely publicized, all auction funds will be utilized for
6 charitable goals to be determined by the broader Internet community. ICANN’s
7 only motivation in the Auction proceeding is ensuring that the Guidebook and
8 Auction Rules are followed, as Plaintiff and all applicants agreed long ago.

9 **II. FACTUAL BACKGROUND**

10 **A. ICANN AND THE NEW GTLD PROCESS.**

11 ICANN is a California non-profit public benefit corporation that oversees the
12 technical coordination of the Internet’s domain name system (“DNS”) on behalf of
13 the Internet community, ensuring the DNS’s continued security, stability and
14 integrity. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795
15 F.3d 1124, 1127–28 (9th Cir. 2015). The DNS’s essential function is to convert
16 easily-remembered domain names, such as “uscourts.gov” or “icann.org,” into
17 numeric IP addresses understood by computers. (Willett Decl. ¶ 2.) The portion of
18 a domain name to the right of the last dot (such as “.gov” and “.org”) is known as a
19 generic top-level domain (“gTLD”). *Name.Space, Inc.*, 795 F.3d at 1127.

20 Throughout its history, ICANN has sought to expand the number of gTLDs
21 to promote consumer choice and competition. (Willett Decl. ¶ 3.) In 2012, ICANN
22 launched a “New gTLD Program” application round, in which it invited any
23 interested party to apply for the creation of a new gTLD and for the opportunity to
24 be designated as the operator of that gTLD. (Willett Decl. ¶ 3.) As the operator,
25 the applicant would be responsible for managing the assignment of names within
26 the gTLD and maintaining the gTLD’s database of names and IP addresses.
27 (Willett Decl. ¶ 3.)

28 In connection with the New gTLD Program, ICANN published the

1 Guidebook, which prescribes the requirements for new gTLD applications to be
2 approved, and the criteria by which they are evaluated. (Willett Decl. ¶ 4.) The
3 Guidebook was developed in a years-long public consultation process in which
4 numerous versions were published for public comment and revised based on
5 comments received from the public. (Willett Decl. ¶ 4.)

6 Because technical, operational and financial capabilities are critical to an
7 applicant's suitability to run a gTLD, applicants are required to identify the entities
8 and people who will be involved in the management of the gTLD applied for.
9 (Zecchini Decl., Ex. C [Guidebook § 2].) Each applicant must also be screened and
10 submit to certain background checks. (*Id.*, §§ 1.2.1, 2.1.) Important to this lawsuit
11 is the Guidebook's provision that, "[i]f at any time during the evaluation process
12 information previously submitted by an applicant becomes untrue or inaccurate, the
13 applicant must promptly notify ICANN." (*Id.*, § 1.2.7.)

14 In the event that more than one application for the same or similar gTLDs
15 passes all of the prescribed levels of evaluation, the applications are placed in a
16 string contention set (since only one registry operator can operate a gTLD
17 consisting of the exact same letters) that can be resolved through a number of
18 processes. (Zecchini Decl., Ex. C [Guidebook § 1.1.2.10].) The Guidebook
19 "encourage[s applicants] to resolve string contention cases among themselves prior
20 to the string contention resolution stage." (*Id.*) Should such a private resolution not
21 occur, the contention set will proceed to an auction of last resort governed by the
22 Auction Rules that all applicants agreed to by applying. (*Id.*)

23 The Auction Rules provide that an auction will be scheduled after ICANN
24 reviews and investigates the applications in a contention set. Then, to facilitate
25 private resolution, "if each and every member of the Contention Set submits a
26 postponement request through the ICANN Customer Portal, ICANN at its sole
27 discretion may postpone the Auction for that Contention Set to a future date."
28 (Zecchini Decl., Ex. J [Auction Rules ¶ 10].) The Auction Rules elaborate that the

1 request “must be submitted at least 45 days prior to the scheduled Auction Date [in
2 this instance, June 13, 2016] and ICANN must receive a request from each member
3 of the contention set.”

4 Any financial proceeds of such an auction initially flow to ICANN. (*Id.* §
5 4.3.) However, these auction proceeds have been fully segregated in separate bank
6 and investment accounts, and earmarked until the community develops and the
7 ICANN Board authorizes a plan for the appropriate use of the funds. (Weinstein
8 Decl. ¶ 12; *see also* Zecchini Decl., Ex. C [Guidebook § 4.3, n.1].) The ICANN
9 community has indicated that it will create a Cross-Community Working Group to
10 develop a proposal for eventual consideration by the ICANN Board on the manner
11 in which the new gTLD auction proceeds should be allocated, and the formation of
12 that working group was discussed at a June 28, 2016 meeting during the ICANN56
13 Public Meeting in Helsinki. (Weinstein Decl. ¶ 13.)²

14 The Guidebook includes critical terms and conditions that all applicants,
15 including Plaintiff, acknowledged and accepted by submitting a gTLD application.
16 (Zecchini Decl., Ex. C [Guidebook § 6].) For instance, the Guidebook contains a
17 release (the “Covenant Not to Sue”), which bars lawsuits against ICANN arising
18 out of its evaluation of any new gTLD application:

19 Applicant hereby releases ICANN and the ICANN Affiliated Parties
20 from any and all claims by applicant that arise out of, are based upon,
21 or are in any way related to, any action, or failure to act, by ICANN or
22 any ICANN Affiliated Party in connection with ICANN’s or an
23 ICANN Affiliated Party’s review of this application, investigation or
24 verification, any characterization or description of applicant or the
25 information in this application, any withdrawal of this application or

26
27 ² *See* [https://icann562016.sched.org/event/7NE0/cross-community-session-
28 charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no](https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no).

1 the decision by ICANN to recommend, or not to recommend, the
 2 approval of applicant’s gTLD application. APPLICANT AGREES
 3 NOT TO CHALLENGE, IN COURT OR IN ANY OTHER
 4 JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN
 5 WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY
 6 WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR
 7 ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER
 8 LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED
 9 PARTIES WITH RESPECT TO THE APPLICATION. . . .

10 (*Id.* § 6.6 (emphasis in original).)

11 Although all gTLD applicants agreed not to file lawsuits against ICANN
 12 related to their applications, applicants are not left without recourse. ICANN’s
 13 Bylaws provide for several accountability mechanisms to ensure that ICANN
 14 operates in accordance with its Articles of Incorporation (“Articles”), Bylaws,
 15 policies and procedures. (Zecchini Decl., Ex. B [Bylaws, Art. IV].) One such
 16 provision establishes an Ombudsman to informally resolve disputes. In addition,
 17 reconsideration requests may be used to challenge ICANN Board actions alleged to
 18 have been undertaken “without consideration of material information” or with
 19 “reliance on false or inaccurate material information,” or may be used to challenge
 20 staff action alleged to contravene ICANN’s established policies. (*Id.*, Art. IV, § 2].)

21 Another accountability mechanism provided for in ICANN’s Bylaws is a
 22 request for an independent review process (“IRP”), under which an aggrieved
 23 applicant can ask independent panelists to evaluate whether an action of ICANN’s
 24 Board was inconsistent with ICANN’s Articles and Bylaws. (*Id.*, Art. IV, § 2.)

25 **B. THE APPLICATIONS FOR .WEB AND PLAINTIFF’S CLAIMS**
 26 **REGARDING NU DOTCO.**

27 In June 2012, Plaintiff, Nu Dotco, and five other applicants applied for .WEB.
 28 Another applicant applied for .WEBS. The seven applications for .WEB and the

1 remaining application for .WEBS passed all applicable evaluations and were placed
2 in the Contention Set, pursuant to the procedures set forth in the Guidebook.
3 (Willet Decl. ¶ 6.)

4 Nu Dotco's application stated that it was a Delaware Limited Liability
5 Company, and listed three people as its officers: Jose Ignacio Rasco III, CFO; Juan
6 Diego Calle, CEO; and Nicolai Bezsonoff, COO. (Zecchini Decl., Ex. E.) It listed
7 Mr. Rasco as its "Primary Contact" and Mr. Bezsonoff as its "Secondary Contact."
8 (*Id.*) It identified two owners having at least 15% interests: Domain Marketing
9 Holdings, LLC and Nuco LP, LLC. (*Id.*)

10 On April 27, 2016, ICANN scheduled the Auction, notified all active
11 members of the Contention Set, and provided them with instructions and deadlines
12 to participate in the Auction. (Willet Decl. ¶ 7.) On May 24, 2016, Plaintiff
13 executed the Bidder Agreement thereby "agree[ing] to be bound by the Auction
14 Rules as published on ICANN's website." (Weinstein Decl., Exs. B-C.) Plaintiff
15 alleges that Nu Dotco is the only applicant in the Contention Set that did not agree
16 to resolve the Contention Set privately. (Compl. ¶ 36.) Thus, on or about June 7,
17 2016, Plaintiff contacted Nu Dotco and asked it to reconsider its decision to forego
18 private resolution of the Contention Set.

19 On June 7, 2016, Mr. Rasco, Nu Dotco's CFO, made clear in his response
20 that Nu Dotco would not be changing its position, explaining: "Nicolai [Bezsonoff]
21 is at NSR full-time and is no longer involved with our TLD applications. I am still
22 running our program and Juan [Diego Calle] sits on the board with me and several
23 others. Based on your request, I went back to check with all the powers that be and
24 there was no change in response and will not be seeking an extension." (Nevett
25 Decl., Ex. A.) Over two weeks later, on June 23, 2016, based solely on this email
26 from Nu Dotco's CFO, Plaintiff suggested to ICANN that Nu Dotco had changed
27 its ownership and/or management structure, but had not reported the change to
28 ICANN, as required. (Willet Decl. ¶ 12.) Plaintiff requested that the Auction be

1 delayed pending further investigation. Plaintiff also formally raised the issue with
2 the ICANN Ombudsman during the ICANN56 Public Meeting in late June 2016.
3 (Compl. ¶ 40; Willet Decl. ¶ 16.)

4 After receiving Plaintiff's allegations regarding Nu Dotco and the request to
5 postpone the Auction, ICANN investigated Plaintiff's claims. (Willett Decl. ¶¶ 12-
6 13.) On June 27, 2016, ICANN sent an email to Nu Dotco, asking it to confirm that
7 there had not been any "changes to your application or the [Nu Dotco] organization
8 that need to be reported to ICANN. This may include any information that is no
9 longer true and accurate in the application, including changes that occur as part of
10 regular business operations (*e.g.*, changes to officers and directors, application
11 contacts)." (Willett Decl. ¶ 13, Ex. B.) Mr. Rasco responded that same day to
12 "confirm that there have been no changes to the [Nu Dotco] organization that would
13 need to be reported to ICANN." (Willett Decl. ¶ 13, Ex. B.)

14 Subsequently, both ICANN staff and the Ombudsman contacted Mr. Rasco
15 to again inquire about the claims of potential changes in Nu Dotco's organization.
16 Specifically, ICANN staff interviewed Mr. Rasco by telephone on July 8, 2016
17 regarding the allegations. (Willett Decl. ¶ 18.) During that call, and later in a
18 confirming email on July 11, 2016, Mr. Rasco stated that: "Neither the ownership
19 nor the control of Nu Dotco, LLC has changed since we filed our application. The
20 Managers designated pursuant to the company's LLC operating agreement (the
21 LLC equivalent of a corporate Board) have not changed. And there have been no
22 changes to the membership of the LLC either." (Willett Decl. ¶ 18, Ex. F.) Mr.
23 Rasco also stated that he had already provided this same information to the ICANN
24 Ombudsman in responding to the Ombudsman's investigation of the complaint
25 lodged with him. (Willett Decl. ¶ 18.) After receiving information from Nu Dotco
26 and ICANN, the Ombudsman informed ICANN that, in his opinion, there was
27 nothing to justify a postponement of the Auction based on unfairness to the other
28 applicants. (Willett Decl. ¶ 21, Ex. G.)

1 After completing its investigation of the allegations regarding Nu Dotco's
2 application, on July 13, 2016, ICANN sent a letter to the members of the
3 Contention Set stating, among other things, that "in regards to potential changes of
4 control of [Nu Dotco], we have investigated the matter, and to date we have found
5 no basis to initiate the application change request process or postpone the auction."
6 (Zecchini Decl., Ex. G.)

7 On 17 July 2016, Plaintiff filed a reconsideration request ("Reconsideration
8 Request"), seeking postponement of the Auction and requesting a "thorough and
9 transparent investigation into the apparent discrepancies and/or changes in [Nu
10 Dotco's] .WEB/.WEBS application." (Zecchini Decl., Ex. H., § 9, Pg. 11.) On
11 July 21, 2016, ICANN's Board Governance Committee ("BGC") issued a twelve-
12 page determination denying Plaintiff's Reconsideration Request. ("Reconsideration
13 Request Determination," Zecchini Decl., Ex. I.) The Reconsideration Request
14 Determination explained that no postponement of the Auction was warranted
15 because: (1) ICANN had thoroughly investigated Plaintiff's claims and found that
16 Nu Dotco had not undergone a change in leadership or control; and (2) there was no
17 pending accountability mechanism (*i.e.*, a reconsideration request or IRP) that could
18 support a postponement of the Auction, because the accountability mechanisms
19 were not initiated before April 27, 2016, the day on which the Auction was
20 scheduled. As the BGC pointed out, under the agreed-upon Auction Rules, an
21 auction postponement is only warranted if there is a pending accountability
22 mechanism "prior to the scheduling of an Auction." (Zecchini Decl., Ex. J ¶ 10.)

23 Plaintiff is correct that the Auction is scheduled to officially begin on July 27,
24 2016 at 6:00 am Pacific time. But as Plaintiff knows well, many facets of the
25 Auction process ***are already underway***. For instance, by July 20, the Auction
26 participants transferred deposits into escrow accounts overseen by the Auction
27 provider, which may amount to as much as \$16 million in total. (Weinstein Decl. ¶
28 7.) Likewise, on July 20, the "blackout period" began, which is a period of time

1 called for in the Auction Rules during which auction participants are prohibited
2 from communicating, or cooperating, with one another in terms of the auction.
3 (Weinstein Decl. ¶ 7.) Tomorrow, on July 26, around 6:00 am Pacific time, the
4 Auction provider will conduct a “mock auction” in order to allow participants to
5 test connectivity and familiarize themselves with the system, if they are not already
6 familiar with it. (Weinstein Decl. ¶ 7.) About an hour later, the Auction provider
7 will open “early bidding,” which allows participants to submit their first round bids
8 in preparation for the start of the Auction. (Weinstein Decl. ¶ 7.) These early bids,
9 however, will not be accepted until after the Auction officially begins at 6:00 am
10 Pacific time on July 27. (Weinstein Decl. ¶ 7.)

11 **III. LEGAL STANDARD**

12 “The opportunities for legitimate ex parte applications are extremely
13 limited.” *Horne v. Wells Fargo Bank*, 969 F. Supp. 2d 1203, 1205 (C.D. Cal. 2013)
14 (citation and internal quotation marks omitted). A successful ex parte application
15 must demonstrate that there is good cause to allow the moving party to “go to the
16 head of the line in front of all other litigants and receive special treatment.”
17 *Mission Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal.
18 1995). “The use of such a procedure is justified only when (1) there is a threat of
19 immediate or irreparable injury; (2) there is danger that notice to the other party
20 may result in the destruction of evidence or the party’s flight; or (3) the party seeks
21 a routine procedural order that cannot be obtained through a regularly noticed
22 motion (*i.e.*, to file an overlong brief or shorten the time within which a motion may
23 be brought).” *Horne*, 969 F. Supp. 2d at 1205.

24 A temporary restraining order is available when the applicant may suffer
25 irreparable injury before the court can hear the application for a preliminary
26 injunction. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*
27 *Practice and Procedure* § 2951 (3d. 1998); *see* Fed. R. Civ. P. 65(b). But requests
28 for temporary restraining orders are governed by the same general standards that

1 govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. Of*
 2 *Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); *L.A. Unified Sch. Dist. v.*
 3 *U.S. Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981).

4 A preliminary injunction is an “extraordinary and drastic remedy” that is
 5 never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation
 6 omitted). The court must determine whether the plaintiff has established **all** of the
 7 following: (1) it is likely to succeed on the merits; (2) it is likely to suffer
 8 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips
 9 in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def.*
 10 *Council, Inc.*, 555 U.S. 7, 20 (2008).

11 Before these standards were announced in *Winter*, courts in the Ninth Circuit
 12 applied an alternative “sliding-scale” test for evaluating preliminary injunctions that
 13 allowed the movant to offset the weakness of a showing on one factor with the
 14 strength of another, which is what Plaintiff erroneously relies upon as an
 15 “alternative” test. *See Mot. at 20-21; Alliance for Wild Rockies v. Cottrell*, 632
 16 F.3d 1127, 1132-35 (9th Cir. 2011). The Ninth Circuit has since held, however,
 17 that “[t]o the extent our cases have suggested a lesser standard, they are no longer
 18 controlling, or even viable.” *Am. Trucking Assocs. v. City of L.A.*, 559 F.3d 1046,
 19 1052 (9th Cir. 2009). Accordingly, Plaintiff must show it can meet all four of the
 20 preliminary injunction requirements set forth above. Plaintiff has not.

21 **IV. ARGUMENT**

22 **A. PLAINTIFF SEEKS EMERGENCY RELIEF ONLY BECAUSE** 23 **OF ITS OWN DELAY.**

24 *Ex parte* relief may not be awarded if the “emergency” nature of the request
 25 is of the plaintiff’s “own making.” *See, e.g., Pascascio v. New Century Mortg.*
 26 *Corp.*, No. CV 12-839 PSG (FMOx), 2012 U.S. Dist. LEXIS 68533, at *7 (C.D.
 27 Cal. May 16, 2012) (denying temporary restraining order). Here, the urgent timing
 28 of Plaintiff’s *ex parte* TRO was caused by its own delay.

1 Plaintiff's Complaint squarely admits that as of June 7, 2016, it was in
2 possession of all facts that it now submits as support for this dispute. Namely, that
3 as of at least June 7, 2016, Plaintiff purportedly believed there was a discrepancy
4 between Nu Dotco's application and its current ownership or management, and that
5 Nu Dotco would not agree to postpone the Auction. (Compl. ¶ 38.) On June 29,
6 2016, ICANN met with Mr. Nevett to discuss a number of business matters,
7 including his claims regarding Nu Dotco's management. (Willett Decl. ¶ 15.)
8 During that meeting, Mr. Nevett requested that the Auction be postponed because
9 of his claimed concerns that Nu Dotco had undergone a change in ownership or
10 management. (Willett Decl. ¶ 15.) ICANN informed him that it had already
11 investigated the alleged management changes with Nu Dotco's representative, who
12 had confirmed that no such changes had occurred. (Willett Decl. ¶ 15.) Based on
13 the fact that ICANN had no evidence of such a management change, ICANN was
14 continuing to proceed with the Auction as scheduled. Thus, in *early June* Plaintiff
15 could have filed its action and sought the relief it now seeks on an *ex parte* basis.
16 And at the very latest, Plaintiff could have sought relief shortly after ICANN
17 informed Plaintiff, on July 13, 2016, that ICANN "has investigated the matter" and
18 had no intention of postponing the Auction. (Compl. ¶ 43.) Instead, Plaintiff
19 waited until July 22 to file this matter, after many facets of the Auction process had
20 already begun (*see* Weinstein Decl. ¶ 7), and just two business days before bidding
21 officially begins.

22 ICANN and the Court are both therefore forced to rush into this matter,
23 which Plaintiff could have commenced weeks earlier. Because the emergency
24 Plaintiff invokes is entirely of Plaintiff's own making, the relief must be denied.
25 *See, e.g., Carnero v. Wash. Mut.*, No. C 09-5330 JF (RS), 2009 U.S. Dist. LEXIS
26 123532, at *4 (N.D. Cal. Dec. 30, 2009) ("Plaintiffs would have had to receive
27 notice of any sale some time ago; accordingly, the 'emergency' nature of their
28 application appears to be of their own making.").

1 **B. PLAINTIFF DOES NOT MEET THE REQUIREMENTS FOR**
 2 **THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.**

3 **1. Plaintiff Is Unlikely To Succeed On The Merits Of Its**
 4 **Claims.**

5 Plaintiff is not likely to succeed on the merits of its claims. Each of
 6 Plaintiff's causes of action is completely dependent on the assertion that there was a
 7 change to Nu Dotco's ownership or management that required ICANN to halt the
 8 Auction. The evidence submitted by ICANN with this Opposition—in particular,
 9 the sworn declarations of Nu Dotco's officers—demonstrate that Plaintiff's
 10 assertion is false and that ICANN reached the correct conclusion in finding no basis
 11 to delay the Auction. For instance, Nu Dotco's CFO, Mr. Rasco, has again
 12 confirmed, now under penalty of perjury, that "[t]here have been no changes or
 13 amendments made to Nu Dotco's management since the time that Nu Dotco
 14 submitted its .WEB application to ICANN" and that "[t]here have been no changes
 15 or amendments made to Nu Dotco's membership, nor has any transfer of
 16 membership otherwise occurred, since the time that Nu Dotco submitted its
 17 application to ICANN." (Rasco Decl. ¶¶ 6, 8.) Nu Dotco's COO, Mr. Bezsonoff,
 18 confirms the same in his declaration and explains that even though he is employed
 19 by another company currently, he is still performing his duties as an officer of Nu
 20 Dotco while they await resolution of the .WEB Contention Set. (Bezsonoff Decl.
 21 ¶¶ 5-6, 8-9.) Finally, Mr. Rasco explains in his declaration that the single email
 22 Plaintiff relies upon to support its claims was taken completely out of context and
 23 in no way communicated a change of ownership or management at Nu Dotco
 24 because there was no such change. (Rasco Decl. ¶¶ 11-15.)

25 Because there is no evidence justifying postponement of the Auction, each of
 26 Plaintiff's claims fail. And each claim is further deficient for the following reasons.

27 **(a) Plaintiff Is Unlikely To Succeed On The Merits Of The**
 28 **Contract Claim.**

Plaintiff's breach of contract claim alleges that ICANN did not fulfill its

1 obligations set forth in the Bylaws, Articles or Guidebook in two ways, yet Plaintiff
2 will not succeed on the merits of either. (Compl. ¶¶ 54-63.)

3 First, Plaintiff alleges that ICANN breached its commitments under the
4 Bylaws to operate in a transparent, expedient, neutral and prompt manner. (Compl.
5 ¶ 60.) To start, the only contractual relationship between ICANN and Plaintiff is by
6 virtue of its status as an applicant for .WEB; Plaintiff does not cite any reasoning or
7 authority that suggests the terms of ICANN's Bylaws are incorporated into the
8 contractual relationship between Plaintiffs and ICANN. *See Klein v. Chevron*
9 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (courts “must determine whether
10 the alleged agreement is ‘reasonably susceptible’ to the meaning ascribed to it in
11 the complaint” for breach of contract claims) (citation omitted); *Republic Bank v.*
12 *Marine Nat’l Bank*, 45 Cal. App. 4th 919, 923 (1996) (“A secondary document
13 becomes part of a contract as though recited verbatim *when it is incorporated into*
14 *the contract by reference* provided that the terms of the incorporated document are
15 readily available to the other party.”) (emphasis added and citation omitted).
16 Indeed, this Court has considered this precise issue in connection with another case
17 filed by a disappointed applicant against ICANN, and held that ICANN is only
18 bound by the contractual obligations set forth in the application documents to which
19 ICANN agreed to be bound, not other extraneous materials. *See Image Online*
20 *Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP
21 (JCx), 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013) (dismissing
22 breach of contract claim because the contract’s “provisions give ICANN no
23 responsibilities with respect to [the plaintiff’s new gTLD] Application beyond its
24 initial consideration of the Application . . . [the applicant] has pointed to no contract
25 terms that ICANN has breached.”) (Pregerson, J.).

26 Moreover, ICANN did *not* breach any of the cited Bylaws. As discussed
27 above, and as is replete in the evidence, ICANN engaged in a thorough and
28 transparent investigation of Plaintiff’s claims about Nu Dotco’s ownership or

1 management. Through multiple steps, ICANN staff verified that this claim was
2 factually inaccurate, and transparently informed Plaintiff of the results of its
3 investigation in its July 13, 2016 letter. (Compl. ¶ 43.) In addition, ICANN’s
4 Ombudsman investigated Plaintiff’s claims and found there was no support for
5 them. (Willett Decl. ¶¶ 11, 17, 19, 21.) Finally, ICANN’s BGC independently
6 evaluated Plaintiff’s assertions and concluded that there was no evidence showing
7 that postponement was necessary. (Zecchini Decl., Ex. I.) And, tellingly, each of
8 these separate findings have been confirmed by the declarations of Nu Dotco
9 executives stating, under penalty of perjury, that no ownership or management
10 change has occurred. (*See generally* Rasco Decl.; Bezsonoff Decl.)

11 As to the second portion of Plaintiff’s breach of contract claim, Plaintiff
12 alleges that “ICANN also promised that a contention set would only proceed to
13 auction where all active applications in the contention set have ‘no pending ICANN
14 Accountability Mechanisms’.” (Compl. ¶ 61.) This argument ignores the plain text
15 of the Auction Rules. All applicants agreed to the terms of the Guidebook when
16 they applied, and Plaintiff has recently signed a Bidder’s Agreement agreeing that
17 the Auction is governed by the Auction Rules. The operative Auction Rules, dated
18 February 24, 2015, state that all “*pending* ICANN Accountability Mechanisms”
19 must be resolved “prior to the *scheduling* of an Auction.” (Zecchini Decl., Ex. J ¶
20 10 (emphasis added).) Here, the Auction was *scheduled* on April 27, well before
21 Plaintiff invoked any ICANN accountability mechanism. Plaintiff did not lodge a
22 complaint with the Ombudsman until late June, two months after the Auction was
23 scheduled. (Compl. ¶ 40.) Similarly, Plaintiff did not submit a Reconsideration
24 Request until July 17. (Compl. ¶ 49.) And Plaintiff did not even attempt to initiate
25 a Request for Independent Review until July 22, 2016. (Nevett Decl. ¶ 9.) Thus,
26 no ICANN accountability mechanisms were pending on April 27, 2016 when the
27 Auction was scheduled. Indeed, the Auction Rules were designed to, among other
28 things, prevent exactly this sort of late, unilateral attempt to delay an auction.

1 Finally, Plaintiff's allegation that ICANN was motivated by money to not
 2 investigate Plaintiff's claims regarding Nu Dotco because ICANN receives the
 3 financial proceeds of all new gTLD auctions (Compl. ¶ 62), is misguided. As a
 4 nonprofit, ICANN has no interest in financial gain for its own sake. The plain text
 5 of the Guidebook makes clear that ICANN will put all proceeds stemming from
 6 new gTLD auctions toward charitable purposes: "Any proceeds from auctions will
 7 be reserved and earmarked until the uses of funds are determined. Funds must be
 8 used in a manner that supports directly ICANN's Mission and Core Values and also
 9 allows ICANN to maintain its not for profit status." (Guidebook § 4.3, n.1.) More
 10 specifically, the Guidebook provides that "[p]ossible uses of auction funds include
 11 formation of a foundation with a clear mission and a transparent way to allocate
 12 funds to projects that are of interest to the greater Internet community" (*Id.*)
 13 As has been widely publicized, the auction proceeds will be utilized in a manner to
 14 be determined by the community, which is likely to predominantly include various
 15 global charitable purposes, as the Guidebook suggests. These auction proceeds
 16 have been reserved until the ICANN Board authorizes a plan for the appropriate use
 17 of the funds. (Weinstein Decl. ¶ 7.) The ICANN community has indicated that it
 18 wants to create a Cross-Community Working Group to develop proposals for
 19 eventual consideration by the ICANN Board. (Weinstein Decl. ¶ 7.) During the
 20 ICANN56 Public Meeting, a meeting took place on June 28, 2016 to discuss the
 21 formation of that Cross-Community Working Group.³

22 **(b) Plaintiff Is Unlikely To Succeed On The Merits Of The**
 23 **Breach Of Implied Covenant Of Good Faith And Fair**
 24 **Dealing Claim.**

24 Plaintiff's breach of the implied covenant of good faith and fair dealing claim
 25 relies on the same allegations asserted in the breach of contract claims—that

26 _____
 27 ³ See <https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no>.
 28

1 ICANN did not conduct an “adequate investigation” of Nu Dotco and improperly
2 failed to postpone the Auction. (Compl. ¶ 67.) Thus, Plaintiff’s breach of the
3 implied covenant claims is as deficient as its breach of contract claim.

4 **(c) Plaintiff Is Unlikely To Succeed On The Merits Of The**
5 **Negligence Claim.**

6 Plaintiff is on even less firm footing with respect to its negligence claim.
7 “Actionable negligence is traditionally regarded as involving the following: (a) a
8 legal duty to use due care; (b) a breach of such legal duty; (c) the breach as the
9 proximate or legal cause of the resulting injury.” *Jackson v. AEG Live, Inc.*, 233
10 Cal. App. 4th 1156, 1173 (2015) (citation omitted). ICANN, however, owes
11 Plaintiff no legal duty of care, and, in any event, ICANN did not breach any duty
12 owed to Plaintiff.

13 To start, the economic loss rule bars Plaintiff’s negligence claim, because
14 ICANN owes no legal duty to Plaintiff above and beyond its contractual
15 obligations. As the California Supreme Court has recognized, “[t]he economic loss
16 rule requires a [contractual party] to recover in contract for purely economic loss
17 due to disappointed expectations, unless he can demonstrate harm above and
18 beyond a broken contractual promise.” *Robinson Helicopter Co. v. Dana Corp.*, 34
19 Cal. 4th 979, 988 (2004); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040,
20 1064 (N.D. Cal. 2012) (“Purely economic damages to a plaintiff which stem from
21 disappointed expectations from a commercial transaction must be addressed
22 through contract law; negligence is not a viable cause of action for such claims.”).
23 Plaintiff has not alleged any harm other than purported damages stemming from its
24 contractual relationship with ICANN. The negligence claim must therefore fail as a
25 matter of law. *See In re Sony Gaming Networks & Customer Data Sec. Breach*
26 *Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014) (granting motion to dismiss
27 negligence claim with prejudice based on economic loss rule).

28

1 **(d) Plaintiff Is Unlikely To Succeed On The Merits Of The**
2 **Unfair Competition Claim.**

3 Plaintiff makes allegations under all three prongs of Section 17200. First,
4 Plaintiff claims that ICANN acted in an “unlawful” manner by the including the
5 Covenant Not to Sue in the Guidebook. (Compl. ¶ 77.) Second, Plaintiff alleges
6 that ICANN acted “unfair[ly] when it conducted what Plaintiff views as a “cursory
7 investigation” into Plaintiff’s claims about Nu Dotco, and decided based on that
8 investigation not to postpone the Auction. (Compl. ¶ 78.) Third, Plaintiff alleges
9 that ICANN acted in a fraudulent manner when it represented that it would adhere
10 to the terms of its Bylaws and the Auction Rules. (Compl. ¶ 79.) All three claims
11 fail because there is nothing unlawful about the Covenant Not to Sue, as discussed
12 below, ICANN fully investigated Plaintiff’s claims regarding Nu Dotco and
13 ICANN’s conduct at all times complied with its obligations under its Bylaws and
14 the Guidebook. In addition, Plaintiff has not established standing to assert its
15 Section 17200 claim because Plaintiff has not “lost money or property” because of
16 the alleged violations of the statute, as required. Cal. Bus. & Prof. Code § 17203.

17 **(e) Plaintiff Is Unlikely To Succeed On The Merits Of The**
18 **Declaratory Relief Claim.**

19 Plaintiff’s declaratory relief claim seeks a judicial declaration concerning one
20 and only one matter: “the legality and effect” of the Covenant Not to Sue. Yet for
21 all of the reasons discussed below, the Covenant Not to Sue is fully enforceable.
22 *See generally Commercial Connect v. Internet Corp. for Assigned Names & Nos.*,
23 No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky. Jan. 26, 2016)
24 (denying an application for emergency injunctive relief seeking to prevent a new
25 gTLD auction from taking place the next day). Moreover, the enforceability of the
26 Covenant Not to Sue has no bearing on whether the Auction should proceed. Even
27 if Plaintiff were successful in challenging the Covenant Not to Sue, Plaintiff has no
28 cause of action against ICANN. In other words, the Auction could and should

1 proceed while Plaintiff litigates whether it can litigate with ICANN.

2 **2. Plaintiff Will Not Suffer Irreparable Harm In The Absence**
3 **Of The Requested Injunctive Relief.**

4 Plaintiff will *not* suffer irreparable harm in the absence of the requested
5 injunctive relief. To start, monetary loss does not comprise irreparable injury for
6 purposes of assessing the propriety of injunctive relief. *Amylin Pharms., Inc. v. Eli*
7 *Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir. 2011) (affirming denial of preliminary
8 injunction because “harm that is fully compensable through money damages . . .
9 does not support injunctive relief”). Whatever the results of the Auction, any harm
10 Plaintiff might claim to have suffered is purely financial. Indeed, Plaintiff may well
11 win the Auction for .WEB. Should that occur, its only claim would arise from the
12 presence of Nu Dotco in the Auction, possibly raising Plaintiff’s winning bid. But
13 the risk that an auction might include a participant subject to later disqualification is
14 already fully addressed in the agreed Auction Rules. In particular, paragraph 62 of
15 the Auction Rules concerns “Effect of Ineligibility of Winner To Sign a Registry
16 Agreement or To Be Delegated the Contention String.” It provides mechanisms to
17 address the situation when an auction took place with a participant that is later
18 disqualified. Having agreed to these mechanisms, Plaintiff has no basis to assert
19 that losses from such circumstances are irreparable. To the extent it is concerned
20 about “disclosure of how each of the applicant’s [sic] valued .WEB as well as the
21 bidding strategies for each bidder,” (Mot. at 28) it has already agreed that such
22 disclosure does not justify cancelling an auction.

23 Moreover, the results of an auction “could be undone” if a disqualification is
24 discovered even long afterward. (*Cf.* Mot. at 28.) There is no technological barrier
25 that would prevent the transfer of the Registry Agreement for a gTLD from one
26 registry operator to another after the gTLD is contracted or even delegated into the
27 root zone and in operation. (Weinstein Decl. ¶ 15.) In fact, Section 7.5 of the
28 Registry Agreement defines the rules and regulations regarding the process for

1 transferring a gTLD from one registry operator to another. (Weinstein Decl. ¶ 15.)
2 For that reason as well, Plaintiff cannot demonstrate that it will suffer irreparable
3 harm if the Auction goes forward.

4 Plaintiff has not shown irreparable harm, and that failure alone serves as a
5 basis to deny the requested relief. *ET Trading, Ltd. v. ClearPlex Direct, LLC*, No.
6 15-CV-00426-LHK, 2015 U.S. Dist. LEXIS 25894, at *8 (N.D. Cal. Mar. 2, 2015)
7 (“The Court need not address all of the *Winter* factors because the Court finds that
8 Plaintiff has failed to carry its burden of demonstrating that it would be irreparably
9 harmed absent a temporary restraining order”).

10 **3. The Balance Of The Equities Weighs Against The Issuance**
11 **Of Injunctive Relief.**

12 As for the balance of the harms, Plaintiff claims that “ICANN cannot claim
13 any actual harm” were the Auction to be postponed. Not so. If ICANN postpones
14 the Auction with no basis (and there is none here), it would be manifestly unfair to
15 the other applicants that have invested time and money in their applications, and
16 have deposited funds into an escrow account in preparation for the Auction. In
17 addition, should the Auction be cancelled, ICANN would suffer a monetary loss of
18 at least \$10,000, in the form of a fee the Auction provider would charge ICANN,
19 and then pay more fees and invest more administrative expense when the Auction is
20 almost certainly re-scheduled. (*See* Weinstein Decl. ¶ 13.) Others of the scheduled
21 participants, many of which did not join Plaintiff’s request to postpone, would also
22 be harmed by delay. They have made large deposits (up to \$2 million each) in
23 anticipation of the auction and have otherwise engaged in significant preparation.
24 (Weinstein Decl. ¶ 7.) In short, a delay in the Auction and resolution of the
25 Contention Set will disrupt the orderly progression of the New gTLD Program.

26 **4. The Public Interest Strongly Favors Denying Plaintiff’s**
27 **Application For A Temporary Restraining Order.**

28 Plaintiff bears the burden of showing that its requested injunctive relief is in

1 the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).
2 Indeed, where rules are at play that all relevant parties have relied upon, the public
3 interest weighs in favor of enforcing those rules. *Id.* at 1140. Here, there is no
4 authority in the Guidebook, Auction Rules, elsewhere that requires ICANN to
5 postpone the Auction. Such delay would set a precedent that would upset the
6 orderly expansion of gTLDs. Should the Court award Plaintiff the relief it seeks,
7 any applicant headed to auction could concoct a minor discrepancy it claims exists
8 with respect to another applicant within the same contention set, and seek to rely on
9 this Court’s ruling to support postponement of the auction. When such widespread
10 harm could result from the issuance of injunctive relief, affecting public rights as
11 well as those of the parties to the lawsuit, “the court may in the public interest
12 withhold relief until a final determination of the rights of the parties, though the
13 postponement [of the requested relief] may be burdensome to the plaintiff.”
14 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted).

15 **C. THE COVENANT NOT TO SUE BARS THIS LAWSUIT.**

16 Apart from Plaintiff’s delay in bring this action and Plaintiff’s inability to
17 satisfy the elements required for issuance of the TRO, Plaintiff’s claims against
18 ICANN are barred by the Covenant Not to Sue, which Plaintiff acknowledged and
19 Plaintiff’s ultimate parent company accepted over 300 times through its
20 subsidiaries. Indeed, as the district court in the Western District of Kentucky
21 recently held under nearly identical circumstances, the Covenant Not to Sue is
22 “clear and comprehensive” and bars claims “aris[ing] out of ICANN’s review of [a
23 new gTLD application]” *Commercial Connect*, 2016 U.S. Dist. LEXIS 8550,
24 at *9-10.

25 A written release extinguishes any claim covered by its terms. *Skrbina v.*
26 *Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, “a general release can
27 be completely enforceable and act as a complete bar to all claims (known or
28 unknown at the time of the release) despite protestations by one of the parties that

1 he did not intend to release certain types of claims.” *San Diego Hospice v. Cty. of*
2 *San Diego*, 31 Cal. App. 4th 1048, 1053 (1995).

3 Plaintiff recognizes these principles, and argues that the Covenant Not to Sue
4 is unenforceable for one and only one reason: California Civil Code § 1668
5 (“Section 1668”). (See Mot. at 25, 27.) But Section 1668 only invalidates contracts
6 that “exempt anyone from responsibility for his own fraud, or willful injury to the
7 person or property of another.” Cal. Civ. Code § 1668. Courts have interpreted
8 Section 1668’s phrase “willful injury to the person or property of another” to mean
9 more than merely intentional conduct (such as breach of the contract), but instead
10 “**intentional wrongs.**” *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th
11 35, 43 (2011) (“Ordinarily, the statute invalidates contracts that purport to exempt
12 an individual or entity from liability for future intentional wrongs and gross
13 negligence.”) (emphasis added and citations omitted).

14 The most Plaintiff alleges in its Complaint is that ICANN failed to
15 thoroughly investigate Nu Dotco’s ownership and management because ICANN
16 preferred the Auction to proceed. (Compl. ¶ 68.) But even such wild accusations
17 do not comprise the kind of intentional wrongs covered by Section 1668. Indeed,
18 *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118 (2012),
19 is on point. There, a food-disinfectant equipment manufacturer alleged that a food-
20 safety equipment tester failed to test the equipment using agreed-upon standards, in
21 bad faith, and employed “slovenly procedures which seemed to be slanted towards
22 a preconceived conclusion.” *Id.* at 1125 (citation omitted). Despite these
23 allegations and an invocation of Section 1668, the court held that a limitation of
24 liability clause in the parties’ contract was enforceable and barred not only the
25 plaintiff’s claim for breach of contract but also plaintiff’s “bad faith” claim. *Id.* at
26 1125–27, 1130.

27 In addition, interpreting Section 1668 to invalidate the Covenant Not to Sue
28 runs contrary to the public interest. The Guidebook is not merely a contract

1 between two parties. It was adopted through an extensive public comment process
2 to govern the nearly 2,000 applications that ICANN received and was tasked with
3 evaluating—including competing applications for the same gTLD such as those of
4 Plaintiff and Nu Dotco. The Covenant Not to Sue ensures that the processing of
5 these applications does not get ensnared in endless litigation by disappointed
6 applicants. If Plaintiff’s argument is accepted, the Covenant Not to Sue could
7 become dead letter—and the important purposes it serves frustrated.

8 Plaintiff argues that the recent, unpublished district court decision in
9 *DotConnectAfrica Trust v. ICANN* supports its position. (See Mot. at 9 (citing
10 *DotConnectAfrica Trust v. Internet Corporation for Assigned Names & Nos., et al.*,
11 Case No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016) (“*DCA*”).) That
12 argument is unavailing for three reasons. First, it cannot be squared with another
13 recent ruling upholding the Covenant Not to Sue, namely *Commercial Connect,*
14 *LLC v. Internet Corp. for Assigned Names and Numbers*, No. 3:16CV-00012-JHM,
15 2016 U.S. Dist. LEXIS 8550, at *1 (W.D. Ky. Jan. 26, 2016). In *Commercial*
16 *Connect*—which, unlike *DCA*, involved an effort to enjoin an auction – the court
17 denied a temporary restraining order requested by an applicant for the .SHOP gTLD
18 one day before the auction was to take place. *Id.* at *1, 11. The district court ruled
19 that the Covenant Not to Sue appeared enforceable and for that reason denied the
20 requested injunctive relief. *Id.* at *10-11. That Plaintiff does not cite the case from
21 Kentucky in its TRO is telling; it comprises a well-reasoned, directly on point
22 decision. Second, the district court’s ruling in *DCA* was issued at the preliminary
23 injunction stage, so it is merely the view of one court that there are “serious
24 questions” as to its enforceability. Third, that very ruling is currently on appeal to
25 the Ninth Circuit on an expedited basis.

26 **V. PLAINTIFF’S EXPEDITED DISCOVERY REQUEST MUST ALSO**
27 **BE DENIED.**

28 Plaintiff’s request for expedited discovery, from both ICANN and non-

1 parties alike, is unjustifiably onerous and there is no legal basis for the request.

2 Such an extreme demand may only be granted with good cause, which
3 exists only where the need for expedited discovery, in consideration of the
4 administration of justice, outweighs the prejudice to the responding party.
5 *Semitoool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).
6 Here there is no good cause. To put it simply, whether Nu Dotco changed
7 ownership or management is a yes or no question. After a reasonable investigation,
8 ICANN determined that the answer is no.⁴ Now, Nu Dotco’s managers have
9 declared the same under penalty of perjury. No discovery could possibly aid the
10 Court in resolving the baseless claims Plaintiff raises here, and the request for
11 expedited discovery should therefore be denied, along with the TRO application.
12 *See Dimension Data N. Am., Inc. v. Netstar-1, Inc.*, 226 F.R.D. 528, 532 (E.D.N.C.
13 2005) (denying expedited discovery where requests not narrowly tailored to obtain
14 information relevant to requested preliminary injunction).

15 **VI. CONCLUSION**

16 For the foregoing reasons, Plaintiff’s TRO application must be denied.

17
18 Dated: July 25, 2016

JONES DAY

19 By: /s/ Eric P. Enson
Eric P. Enson

20 Attorneys for Defendant
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS

23 ⁴ Even if the answer were “yes,” the ordinary response would be to allow Nu
24 Dotco to amend its application. And even if Nu Dotco had submitted a change
25 request because it had undergone a change of control or ownership, it would not
26 have been disqualified from the auction set to take place on July 27, 2016. (Willett
27 Decl. ¶ 11.) In fact, a large number of applications have made a change the
28 questions pertaining to ownership or control of the applicant, and no application has
been disqualified to date over one of these changes. (Willett Decl. ¶ 11.) The
Auction Rules also provide that “ICANN reserves the right . . . to postpone a
scheduled Auction if a change request by one or more applicants in the Contention
Set is pending, *but believes that in most instances the Auction should be able to
proceed without further delay.*” (Zecchini Decl., Ex. C ¶ 8 (emphasis added).)