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DOTCONNECTAFRICA TRUST

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust;

Plaintiff,

v.

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

Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

PLAINTIFF'S OPPOSITION TO DEFENDANT ZA CENTRAL REGISTRY, NPC'S MOTION TO RECONSIDER AND VACATE; MEMORANDUM OF POINTS AND AUTHORITIES

Date: May 31, 2016
Hearing: 9:00 a.m.
Courtroom: 850

[Filed concurrently: Declarations of Sophia Bekele Eshete and Sara Colón; and Evidentiary Objections to Declaration of Mokgabudi Lucky Masilela]

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I. INTRODUCTION

Defendant ZA Central Registry's ("ZACR") motion to reconsider and vacate the Court's preliminary injunction ruling is an attempt at a second bite at the apple. Although ZACR did not appear in the case until April 26, 2016, it had DCA's motion for preliminary injunction by March 22, 2016, at the latest. DCA's counsel also emailed ZACR's CEO with the preliminary injunction and temporary restraining order papers on March 8, 2016. ZACR had counsel at least as of April 1st, 2016. Nevertheless, ZACR apparently chose to sit on the sidelines, rely on ICANN, and wait until after the Court issued its order on April 12, 2016 to raise issues, all but one of which it could have raised before the ruling.

Because ZACR's motion is an attempt to re-litigate the same issues addressed in the preliminary injunction papers, and not the result of changed circumstances, the motion is a motion for reconsideration, not a motion to vacate. Therefore, ZACR is required to show that the Court failed to consider some material fact, that there are newly discovered material facts, or that the Court committed clear error. ZACR fails to make this showing.

ZACR's arguments are as follows: that the Court made a single factual error in its order with regard to DCA's initial evaluation; that DCA did not have sufficient endorsements; that DCA's application received 17 early warnings; that the Court based its ruling on irreparable harm on an incorrect assertion; and that ZACR's submission on the balance of harms, which includes a declaration from its CEO on alleged harm to Africa and ZACR, should change the Court's analysis.

However, nothing that ZACR presents changes the fact that DCA has shown a serious question as to the merits of its ninth cause of action or that the balance of harm weighs sharply in DCA's favor. The facts that the Court previously considered – irrespective of the error – support the issuance of the preliminary injunction. Accordingly, the Court should deny ZACR's motion to reconsider and vacate.

II. FACTS[1]

A. The Court's error and DCA's endorsements

DCA acknowledges that the Court made an error in stating that DCA passed the initial evaluation stage. In fact, DCA presented evidence that ZACR had passed the initial evaluation to make essentially the same point that the Court relied on: DCA's application, which relied on the same endorsements by UNESCA and the African Union Commission (hereinafter, the "AUC") as ZACR's, would have also passed the initial evaluation stage had the standards for ZACR and DCA been the same. In short, the Court's error regarding DCA's passing of the initial evaluation phase does not change the fact that DCA *should* have passed the initial evaluation phase but did not because of ICANN's differential treatment of ZACR. Moreover, the IRP panel must have intended that DCA pass to the delegation phase: it found that ICANN had violated its own rules in processing DCA's application during the initial evaluation phase and that DCA should be allowed to proceed through "the remainder" of the process. Bekele Decl.[2] [Docket No. 17] ¶23, Ex. 1 at p. 24. Accordingly, the preliminary injunction should remain in place.

ICANN required that applicants for the rights to a geographic gTLD such as .Africa obtain endorsements from 60% of the national governments in the region, and no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the region. Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.2. DCA met this requirement. As part of its bid

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[1] DCA has endeavored to repeat as little as possible from its motion for preliminary injunction papers. The Court can reference those papers for a fuller record.

[2] The Declaration of Sophia Bekele Eshete (Docket No. 17) filed in support of DCA's motion for preliminary injunction is referred to throughout as the "Bekele Decl." The Declaration of Sophia Bekele Eshete (Docket No. 45) filed concurrently with DCA's reply in support of the motion for preliminary injunction is referred to as "Bekele Supp. Decl." The Declaration of Sophia Bekele Eshete filed in conjunction with this opposition is referred to throughout as the "Bekele II Decl."

to obtain the delegation rights of the .Africa gTLD, Plaintiff obtained the endorsements of the AUC and the United Nations Economic Commission for Africa (UNECA). Bekele Decl. ¶14, Ex. 6; ¶16, Ex. 8. Plaintiff was the first to obtain official endorsements/letters of support for the .Africa Internet domain name from these organizations.

ICANN asserted during the IRP that it had taken both the AUC and UNECA endorsements into account in evaluating DCA's application. Bekele Decl. ¶5, Ex. 1 ¶90. However, had ICANN treated DCA's and ZACR's AUC endorsements equally, both DCA and ZACR should have either passed or failed the endorsement requirement. *See* Bekele Decl. ¶36, Ex. 23. Rather, ICANN conspired to accept ZACR's endorsements as sufficient while disregarding Plaintiff's endorsements.

In fact, ZACR does not argue that it had more endorsements than DCA or refute DCA's assertion that ZACR submitted many alleged endorsements that were plainly deficient. *See* Bekele Decl. ¶34. Its declaration points only to an endorsement from the AUC and Morocco. Declaration of Mokgabudi Masilela "Masilela Decl." [Docket No. 85-3] ¶6. DCA had an endorsement from UNECA, the AUC, Kenya, the Internationalized Domain Resolution Union and the Corporate Council on Africa. Bekele Decl. ¶¶14, 16, 19, 20, and 21, Exs. 6, 8, 11, 12, 13. Nevertheless, ZACR passed the initial evaluation phase but DCA did not. Bekele Decl. ¶28, Ex. 18. Accordingly, the Court's error does not change the fact that DCA has shown it was entitled to proceed to the delegation phase, just as ZACR did, pursuant to the IRP panel's ruling. At a minimum, it has presented a serious question going to the merits; nothing in ZACR's Motion suggests the contrary.

B. <u>DCA will be irreparably harmed if .Africa is delegated to ZACR.</u>

Nor does ZACR's motion change the fact that DCA will be irreparably harmed if ZACR is delegated .Africa before this case is resolved. DCA was formed with the charitable purpose of advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet

services for the people of Africa. Bekele Decl. ¶5, Ex. 1 ¶2. DCA planned to do this by acting as the registry for the .Africa gTLD. Bekele II Decl. ¶ 2. DCA does not act as the registry for any gTLDs and has not applied to any other gTLD. Bekele II Decl. ¶3. If .Africa is delegated to ZACR, DCA's mission will be seriously frustrated, funders will likely pull their support, and DCA will likely cease to operate. Bekele II Decl. ¶4.

If .Africa is delegated to ZACR, the possibility of its re-delegation to DCA is more of a technicality than a reality. Even ICANN did not try and argue in its opposition to DCA's motion for preliminary injunction that DCA could be re-delegated .Africa[3] -- and ICANN is doubtlessly in the best position to show that re-delegation is a viable option. As far as DCA has been able to determine, re-delegation of a gTLD has never actually been accomplished,[4] and it would prove extremely difficult, if not impossible, in this situation. *See* Bekele II Decl. ¶7; Bekele Decl. ¶3. Re-delegation is contemplated as a step to change management when a registry agreement is expiring and up for renewal. *See* Masilela Decl. ¶15, Ex. E. ICANN states that "The primary requirement of this process is to have an existing contract with ICANN, which reflects the changes related to the management of the gTLD" and that "[t]o update the Root Zone Database to reflect a change to the registry operator for a gTLD, the registry must first secure an executed amendment to its Registry Agreement in accordance with its contractual obligations with ICANN." Masilela Decl. ¶15, Ex. E, at 3. Of course, ZACR has presented no evidence of such a contract or contract amendment.

ICANN's process for re-delegation also dictates that certain contingencies are required before re-delegation including technical testing and certification and approval from the U.S. Department of Commerce pursuant to ICANN's contract

[3] And therefore any attempt to do so now by its joinder is disingenuous.

[4] Were it a commonplace occurrence, ICANN certainly could and would have shown that in its Opposition to the Motion for Preliminary Injunction.

with the U.S. government. Masilela Decl. ¶15, Ex. E; Colón Decl. II ¶2, Ex. 1. Moreover, the existence of the re-delegation process in the future is questionable given the expiration of ICANN's contract with the U.S. government in September 2016. Colón Decl. II ¶3, Ex. 2. This means that all of the third parties with whom ZACR contracted to provide domain names under the .Africa gTLD would have to transition technically and contractually to DCA – a process that would be costly and burdensome for all such that re-delegation is simply not viable here. *See* Bekele II Decl. ¶7. Further, the third party registrar's contracts with ZACR would have to be unwound. Bekele II Decl. ¶7. DCA might also lose out on potential registrars if it were forced to keep ZACR's pricing scheme, which is higher than DCA's. Bekele II Decl. ¶7. Finally, DCA's funders would likely pull their funding if .Africa were delegated to ZACR due to added difficulty and uncertainty that would be involved in the remote possibility having .Africa re-delegated from ZACR to DCA. Bekele II Decl. ¶4. Thus, ZACR's arguments do not controvert DCA's showing that it will be irreparably harmed.

C. ZACR was on notice that DCA had filed the Preliminary Injunction and TRO papers.

ZACR had multiple opportunities to address the merits of DCA's motion for preliminary injunction before it filed its motion for reconsideration. ZACR did not file its motion for reconsideration until May 6th 2016, more than three weeks after the Court issued its order on DCA's motion for preliminary injunction, more than six weeks after it was officially served with DCA's motion for preliminary injunction, and almost two months after DCA's counsel emailed the CEO of ZACR with the papers.[5]

[5] "A motion for reconsideration is not a vehicle to reargue the motion to present evidence which should have been raised before." *United States v. Westlands Water Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001).

DCA filed an application for a temporary restraining order, which this Court granted on March 4, 2016. (Docket No. 27). A day *after* Plaintiff filed its application for a TRO, ICANN, in a desperate attempt to render that application moot, held an apparently previously unscheduled board meeting and resolved to "proceed with the delegation of .Africa to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN." (Willet Decl. ¶14, Ex. C). The Court's TRO order issued the next day prevented ICANN from delegating .Africa to ZACR until DCA's motion for preliminary injunction was resolved. (Docket No 27). The application for a temporary restraining order contained arguments largely identical to those in DCA's motion for preliminary injunction. Colón Decl. II ¶5. ZACR must have been aware of that order, as well as its being named as a defendant, as ICANN was expected to delegate .Africa to ZACR in short order. In fact, after the Court issued the TRO, in a GAC meeting with the ICANN board, ICANN board member Mike Silber stated to an AUC member "you have the commitment from ICANN, the board and the staff to not let the litigation issues intervene and we will pursue the finalization of this issue with diligence and all appropriate measures to ensure that the interests of all parties are protected." (Colón Decl. ¶4).[6] After all of this, ZACR remained silent, and made no appearance in the case and affirmatively opted not to weigh in on the pending motion for a preliminary injunction.

On March 8, 2016 counsel for Plaintiff emailed the CEO of ZACR, Lucky Masilela with the first amended complaint and associated documents, the motion for preliminary injunction papers, and the *ex parte* application for a temporary restraining order. *See* Colón Decl. II ¶6, Ex. 4. Mr. Masilela did not respond.

[6] As used herein, "Colón Decl." refers to the declaration of Sara C. Colón, Docket No. 46, filed concurrently with DCA's motion for preliminary injunction. As used herein, "Colón Decl. II" refers to the declaration of Sara C. Colón filed in support of this opposition.

(Colón Decl. II ¶7). Again, ZACR could have acted, but affirmatively decided to rely on ICANN to oppose the motion for preliminary injunction.

As South Africa where ZACR is located is not a signatory to the Hague Convention, on March 10, 2016, the Court ordered a private processes server to serve ZACR by U.S. international mail, return receipt. *See* Docket No. 34. On March 4, 2016, the Court granted the TRO. Docket No. 27. On March 22, 2016 ZACR was officially served pursuant to that order with the first amended complaint and associated documents, the motion for preliminary injunction papers, the *ex parte* application for a temporary restraining order, and ICANN's opposition papers to the *ex parte* application. *See* Docket No. 55. Nevertheless, ZACR made no appearance in the case, and yet again opted not to weigh in on the pending motion for a preliminary injunction.

On April 1, 2016 counsel for ZACR wrote counsel for DCA that he would be representing ZACR and asked for an extension of time to answer until April 26, 2016 noting that ZACR reserved its rights to argue that the Court lacked personal jurisdiction over it. Colón Decl. Ex. 5. DCA stipulated to that extension. Colón Decl. II ¶ 8, Ex. 5. The Court granted DCA's motion for preliminary injunction on April 12, 2016. Docket No. 75. ZACR filed a motion to dismiss on April 26, 2016. Thus, ZACR indisputably had counsel at least 11 days before the preliminary injunction was decided. ZCR made no effort to respond to the motion or request time and opportunity to weigh in.

Indeed, ZACR does not deny that it was aware of the TRO or DCA's motion for preliminary injunction before the Court ordered the preliminary injunction because it cannot. *See* Declaration of David Kesselman ("Kesselman Decl.") ¶3. In fact, ZACR admits that it *chose* not to intervene on the issue until after the unfavorable order issued. *See* Kesselman Decl. ¶3. There was nothing preventing ZACR from seeking an order allowing it to take part in the briefing after it received the papers on March 8th or after it was served on March 22, 2016. *Kona Enters.*,

Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (internal citation omitted); L.R. 7-18(a).

III. LEGAL STANDARD

A. Standard for challenging a preliminary injunction.

A motion for reconsideration is governed by Federal Rule of Civil Procedure Rule 59(e) and should not be granted "absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marilyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F. 3d 873, 880 (9th Cir. 2009). A motion for reconsideration "may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc.*, 229 F.3d at 890; *See also Ausmus v. Lexington Ins. Co.*, No. 08-CV-2342-L (LSP), 2009 U.S. Dist. LEXIS 63007, at *4-5 (S.D. Cal. July 15, 2009) ["Motions to reconsider are not justified on the basis of new evidence which could have been discovered prior to the court's ruling"]. "A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Moreover, Central District Local Rule 7-18 dictates that reconsideration is allowed only when "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." LR 7-18.

B. Standard for preliminary injunction.

As this Court acknowledged in its order granting the preliminary injunction: "For a court to grant a preliminary injunction, a plaintiff must establish the

following: (1) likelihood of success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors injunction. *Id.* at 20. The Ninth Circuit also employs a 'sliding scale' approach to preliminary injunctions. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). This approach uses the same four factors as the *Winter* test, but allows the plaintiff to receive a preliminary injunction in situations where there are "serious questions" going toward the plaintiff's likelihood of success on the merits, so long as the "balance of hardships tips sharply in the plaintiff's favor." *Id.* at 1134-35. The plaintiff must still demonstrate a likelihood of irreparable harm and that public interest favors the injunction. *Id.* at 1135; Order at 4.

IV. ARGUMENT

A. ZACR's arguments are not timely.

ZACR does not meet the standard for a motion to reconsider pursuant to Rule 59(e) or a motion to vacate pursuant to Rule 54 because they present arguments and facts that could have been raised previously. ZACR argues several grounds on which the Court should remove the preliminary injunction: first, it argues that the Court made a factual error in its order with regard to DCA's initial evaluation; second, it argues that DCA did not have sufficient endorsements; third, it argues that DCA's application received 17 early warnings; fourth, it argues that the Court based its ruling on irreparable harm on an incorrect assertion; and fifth ZACR argues that its submission on the balance of harms should change the Court's analysis. Docket No. 85-5. With the exception of the argument regarding the Court's error on the status of DCA's initial evaluation, ZACR could have made all of its arguments *before* the Court issued its preliminary injunction because it was aware of the proceeding on March 22, 2016, *at the very latest*. This was 13 days before the hearing was scheduled and 21 days before the order was entered. On a motion for reconsideration, the Court should not consider those arguments that could have been

raised previously. *Kona Enters.*, 229 F.3d at 890; L.R. 7-18(a). The only argument the Court should consider is the argument regarding the Court's factual error, which nevertheless did not result in "clear error" warranting a reconsideration of the Order. *Marilyn Nutraceuticals, Inc.*, 571 F. 3d at 880.

ZACR's motion is not properly construed as a motion to vacate because Rule 54 applies to motions based on "new circumstances that have arisen after the district court granted the injunction." *Credit Suisse First Boston Corp. v. Grunwald*, 400 F. 3d 1119, 1124 (9th Cir. 2005). Nothing in ZACR's motion points to a "new circumstance" that arose "after" the Order. *See Aevoe Corp. v. AE Tech. Co.*, Case No. 2:12-cv-0053-GMN-RJJ, 2012 U.S. Dist. LEXIS 30085 at *5 (D. Nev. March 7, 2012).

Nevertheless, for the reasons discussed in the following section, none of ZACR's arguments warrant reconsidering or vacating the preliminary injunction order.

B. DCA has shown a serious question on the merits.

DCA's ninth cause of action seeks a declaration from the Court that ICANN failed to follow the IRP's order and that the DCA application should be allowed to proceed through the delegation phase of the application process. The Court previously determined that DCA showed a serious question on the merits of this cause of action.

i. The Court's factual error is not determinative.

Both the facts DCA has presented and the Court's analysis in its Order demonstrate that the factual error regarding DCA's initial evaluation is not determinative. *The crux of the issue is that although the Court was mistaken as to whether or not DCA actually passed the initial evaluation, DCA should have because its endorsements were equal to or better than ZACR's, and ZACR did pass the initial evaluation based on endorsements from the same entities.* Despite ZACR's assertions to the contrary, DCA has shown a serious question on the merits

of its ninth cause of action regardless of this error and the Court's order remains proper.

In its Order, the Court finds that "the evidence suggests that ICANN intended to deny DCA's application based on pretext." Order at 5. Despite the Court's factual error, the evidence supports this notion and the maintenance of the preliminary injunction. DCA's argument in its preliminary injunction papers was that if ZACR passed the geographic names evaluation, DCA should have also passed and moved on to the delegation phase, pursuant to the IRP's ruling. ZACR points out that it has endorsements from the AUC and Morocco.[7] Masilela Decl. ¶6, Exs. A and B. DCA had an endorsement from the AUC and UNECA, which includes Morocco amongst its member states. *See* Bekele Decl. ¶¶14 & 16, Exs. 6 & 8. So while ICANN did not approve DCA's endorsements at the initial evaluation before the IRP, it should have -- just as it had done for ZACR. For example, the Court notes the March 2013 email from the ICC stating that ICANN needs to clarify the AUC's endorsements as it had endorsed both DCA and ZACR. *See* Order at 6. The Court also acknowledges the undisputed evidence that ICANN claims it accepted endorsements from both the AUC and UNECA. Order at 2. Nevertheless, ZACR passed the initial evaluation phase but DCA did not. Neither ICANN nor ZACR have presented any evidence as to why ZACR's endorsements were sufficient when DCA's were not.

Ultimately, ICANN did not follow its own rules in rejecting DCA's endorsements. Under ICANN's own rules, withdrawal is proper only if there were some conditions between the applicant and the endorser that were not fulfilled. Bekele Decl. ¶7, Ex. 3, p.172. There were no such conditions in either the AUC's or UNECA's endorsement letters to DCA and therefore the withdrawal of support

[7] ZACR does not contest the problems DCA raised in its motion for preliminary injunction papers with ZACR's individual country letters. Thus, ZACR effectively concedes that it passed the initial stage on the back of the endorsements from AUC and UNESCA.

was improper. Bekele Decl. ¶¶15 & 16, Exs. 7 & 8. Additionally, the alleged withdrawal letter from the AUC came from an individual, Moctar Yadley, and not the chairman's office as the initial endorsement had been. Bekele Decl. ¶15, Ex. 7. DCA disclosed this letter in its initial application, and explained its belief that it was not valid. Bekele Supp. Decl. ¶2, Ex. 1. There was no question that UNECA's endorsement was valid at the time DCA submitted its application for .Africa. In fact, ICANN *admitted* in the IRP that UNECA was a proper endorser! See Bekele Decl. ¶5, Ex.1, p.44 ¶90 (¶45).

ICANN improperly allowed the AUC, effectively itself an applicant for .Africa through ZACR, to influence DCA's application after the IRP. ICANN invited ZACR to opine on the IRP Declaration. Colón Dec. ¶5, Ex. 3. In violation of ICANN's rules, ZACR wrote to the chairperson at ICANN in order to lobby for its view on how ICANN should handle the post IRP processing of DCA's application. *See id*; Bekele Decl. ¶7, Ex. 3, p.179 [Section 2.2.4]. This letter prejudiced ICANN's post IRP evaluation of DCA's application.

Therefore, ICANN should have allowed DCA to proceed through to the delegation phase of the application process as the IRP panel surely intended by its final ruling.

ii. The 17 early warnings were part of the improper GAC process.

ZACR also argues that 17 early warnings somehow support rejection by the Geographic Names Panel. *See* Motion 13:3-13:5. This is not true[8]. Those early warnings were issued in 2012 as a part of the GAC process that was found invalid by the IRP. *See* Masilela Decl. Ex. D; Bekele Decl. ¶5, Ex. 1, ¶115, p.60; ¶148, p.67. The IRP issued its ruling in 2015. Bekele Decl. ¶5, Ex. 1. ICANN did not reject DCA's application until 2016. Bekele Decl. ¶28, Ex. 18. ICANN never

[8] This is also not new evidence proper for the Court's consideration.

determined that those early warnings constituted an "objection" or any other basis to deny DCA's application pursuant to Guidebook Section 2.2.1.4.3. *See* Bekele Decl. ¶28, Ex. 18.

Therefore, DCA has shown that there are serious questions as to whether ICANN followed the IRP ruling in holding DCA in the initial evaluation phase and subjecting its endorsements to another geographic names panel review rather than allowing DCA to go on to the delegation phase.

C. <u>DCA will suffer irreparable harm if the Preliminary Injunction is lifted.</u>

Plaintiff will suffer irreparable injury because the .Africa gTLD is a unique asset for which Plaintiff cannot be compensated through monetary damages. As this Court acknowledged in its Order, there is but one holder to the delegation rights to .Africa, and if ZACR is granted those rights after DCA has been improperly denied the fair and transparent gTLD application process ICANN was required to provide, DCA will not be able to obtain those rights elsewhere. (*See* Bekele Decl. ¶2; Order at 7). Without the preliminary injunction order, DCA will likely lose funding and be forced to shut down its business, as its principal goal was to obtain the .Africa gTLD. Bekele Decl. II ¶5.

ZACR suggests that because ICANN has a re-delegation process[9], DCA will not be irreparably harmed if ICANN delegates .Africa to ZACR during the pendency of this litigation. Motion at 13:19 – 14:4. Even if DCA's statement that ".Africa can be delegated only once" is incorrect *as a technical matter*, it is highly unlikely that .Africa could ever be re-delegated to DCA from ZACR. As an initial matter, registrar contracts are long term contracts for 10 year periods. *See* Masilela Decl. ¶10. ICANN's re-delegation process was clearly intended to apply to a situation where a registry's contract with ICANN was expiring (a "routine" re-delegation),

[9] Again, ZACR could have raised this argument before the preliminary injunction order issued.

not a situation where ICANN was found to have wrongfully delegated a gTLD in the first place. *Presumably this is why ICANN itself did not make this argument in its opposition to DCA's motion for preliminary injunction.*

Moreover, the re-delegation process that ZACR points to is contingent on a number of factors beyond this Court's, ICANN's, ZACR's or DCA's control. For example, the re-delegation requires the approval of the U.S. Department of Commerce. Masilela Decl. ¶15, Ex. E at 5; Colón Decl. II ¶2, Ex. 1 at C.2.9.2.d. However, the U.S. Department of Commerce's contract with, and oversight of, ICANN is set to expire in September 2016. *See* Colón Decl. II ¶3, Ex. 2. This creates a serious question as to whether or not 4 months from now ICANN will have procedures for re-delegation, what those procedures will look like, or whether ICANN will even follow its own rules. Other contingencies of re-delegation include technical testing, supplemental technical testing, and review by ICANN. Masilela Decl. ¶15, Ex. E at 5. Further, re-delegation would surely require registrars to modify their contracts with ZACR if .Africa were re-delegated to DCA and those registrars may have to change their contracts with their end users, the actual purchasers of the web addresses containing the .Africa gTLD, all of which may result in lost business to DCA. *See* Bekele II Decl. ¶7. In sum, despite the technical possibility of re-delegation from ZACR to DCA, the practical and procedural requirements for re-delegation make it unlikely to happen at all let alone in a reasonable amount of time.

Finally, even if DCA were ultimately re-delegated .Africa, it would suffer irreparable losses in the form of lost funders and a loss of its business purpose. Bekele II Decl. ¶4.

D. <u>The public interest does not favor vacating the Preliminary Injunction.</u>

The public interest weighs in favor of maintaining the preliminary injunction. The preliminary injunction ensures that the .Africa gTLD will be awarded to the

proper party through the process that ICANN promised to the public. Holding ICANN accountable to its own standards is a benefit to .gTLD applicants and their end users from all over the world, not only Africa. This Court has already recognized this fact. Order at 7 ("Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today's society.")

The only evidence ZACR offers – evidence that it could have offered before the Court's order -- that the public interest favors vacating the preliminary injunction comes from the declaration of ZACR's CEO, who fails to explain why he is qualified to opine on the public interest. ZACR argues that Africa is continuing to be deprived of "brand value" and that African business would benefit from the use of .Africa. Motion at 16:5-16:15. However, these statements are conclusory and without foundation and do not actually specify any businesses (except for ZACR) allegedly suffering harm due to the preliminary injunction. These statements echo those in the Yedaly declaration that this Court has already rejected. *See* Docket No 40; Order at 75. The Court should likewise disregard them and afford them little weight as they come from ZACR, a party that stands to directly benefit from the lifting of a preliminary injunction. *See* Order at 7-8.

E. <u>The balance of harms weighs in DCA's favor.</u>

For the foregoing reasons, the balance of harms weighs in DCA's favor. Both the public interest in a transparent gTLD delegation process and the harm to DCA in having the .Africa gTLD delegated to ZACR, when DCA was created for the purpose of acting as the registry of .Africa, is greater than any *possible* lost revenue for ZACR or *possible* donations to a foundation that may not exist yet. *See* Bekele II Decl. ¶2; *see* Masilela Decl. ¶12. ZACR will continue to operate as the "single largest domain name registry on the African continent" whereas DCA will likely be out of business without .Africa. *See* Masilela Decl. ¶3; Bekele Decl. II ¶5. Furthermore, ZACR has caused unnecessary harm to itself by spending money on

"consultants, marketing, sponsorship and related expenses" while the IRP was pending and now during this proceeding. ZACR suggests that the registry agreement requires it to expend resources, but has failed to attach the registry agreement or reference any particular provisions. *See* Motion at 10:6 – 10:8. The IRP also found that entering into the registry agreement during the IRP was improper. Colón Decl. II ¶4, Ex. 3 at ¶¶29 - 33, 45 - 47. .Africa has not been delegated to ZACR and it is its choice to act as though it will be is what has caused it harm, if it has in fact been harmed.

F. ZACR is not entitled to a bond.

A district court may grant a preliminary injunction, "only if the movant gives security in an amount that the court considers proper to pay for the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The district court retains discretion as to the amount of security required, if any. *Diaz v. Brewer*, 656 F.3d 1008, 1015 (9th Circ. 2011). The bond amount may be set at zero if there is no evidence the party will suffer damages from the injunction. *Wells Fargo Bank, N.A. v. Weems*, CV15-7768 RSW (PJWx), 2015 U.S. Dist. LEXIS 166466, at *14 (C.D. Cal. Dec. 11, 2015), citing *Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, F.3d 878, 882 (9th Cir. 2003).

ZACR is not entitled to a bond because it has not been delegated .Africa. Any costs ZACR is sustaining in acting as though it was already delegated .Africa are the result of its failure to mitigate, not the preliminary injunction. ZACR claims the delay in delegation of .Africa has caused damages in the amount of $20,000 per month. Masilela Decl. ¶11. ZACR claims that the $20,000 per month includes costs for consultants, marketing, sponsorships and related expenses. Masilela Decl. ¶11. But ZACR is under no obligation to spend this amount.[10] ZACR's alleged losses

[10] ZACR seems to suggest that it is spending these amounts pursuant to the Registry Agreement with ICANN. Masilela Decl. ¶11. However, the Registry Agreement is conspicuously absent from its exhibits. The IRP Panel also found that it was

are the result of ZACR and ICANN's willful disregard of the IRP proceeding by signing a registry agreement prior to the IRP's final declaration. Colón Decl. ¶5, Ex. 3. The IRP panel issued its final 63-page declaration in the matter on July 9, 2015, finding that ICANN should continue to refrain from delegating the .Africa gTLD. Bekele Decl. ¶5, Ex. 1, p. 24. ZACR continued to spend these funds even after DCA initiated its case against ICANN in state court and added ZACR as a defendant to the case after ICANN removed it to federal court. Moreover, the delay in delegation has been caused by ICANN's failure to follow its own bylaws and rules. Therefore, these "losses" were caused by ZACR's voluntary acts in the face of uncertainty and ICANN's wrongdoing, not the preliminary injunction, and the Court should not base a bond amount on these figures.

Moreover, ZACR has not presented sufficient evidence that it will suffer damages as a result of the injunction. In *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.* (*Nintendo*), on which ZACR relies, the court executed a $15 million bond in favor of Lewis Galoob Toy, Inc., after a meticulous accounting proved the preliminary injunction caused Galoob at least $15 million in damages. 16 F.3d 1032, 1033 (9th Cir. 1994). To determine Galoob's damages the court considered: 1) Galoob's received order for over 550,000 Game Genie units; 2) the "Canadian multiplier method", which showed that, in general, a product will sell ten to twelve times as well in the United States as in Canada; and 3) multiplied Galoob's 1.6 million unit sales lost by the net wholesale price of $34.28, times the 27.6 percent profit margin reaching a loss of at least $15,138,048 in lost profits due to the injunction *Id.* at 1034-1035.

ZACR has not provided the Court with any concrete evidence to support its exorbitant $15,000,000 bond claim. It has no evidence of how many registrars it would license .Africa to, nor does it have evidence of how much ZACR would make

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improvidently entered into and stayed the parties from acting on it. Bekele Decl. ¶5, Ex. 1.

from each third party agreement. In short, it has no evidentiary support for the massive profits it claims in conclusory fashion it would make if it were to receive .Africa. In *Nintendo*, in contrast, the court considered actual orders that were in place prior to the issuance of the preliminary injunction and lost as a direct result of the issuance of the order. ZACR has produced no evidence of the number of third party registrars it would currently have but for the preliminary injunction. The Masilela declaration conclusorily alleges $15 million in lost net income without detailing the basis or calculation for that claim or providing any expert support for any such calculations. ZACR's claim fails to present evidence remotely on par with the evidence in *Nintendo* and not enough to support any bond.

In *Netlist Inc. v. Diablo Techs., Inc.* the court set a bond in the amount of $900,000, the approximate amount of the net profits Diablo would have received for chipset sales affected by the preliminary injunction. No. 13-cv-05962-YGR, 2015 U.S. Dist. LEXIS 3285, at 39-40 (N.D. Cal. Jan. 12, 2015). *Netlist* is readily distinguishable because Diablo breached a Supply Agreement and a Nondisclosure Agreement with Netlist. *Id.* at *28. DCA does not have a contractual relationship with ZACR. Unlike Diablo, who was already selling the chipsets in question and could accurately quantify their lost net profits, ZACR does not have a revenue stream to base its claimed losses on, nor does it have evidence beside a conclusory declaration claiming $15,000,000 in losses.

Finally, ZACR cites *Mead Johnson & Co., v. Abbott Labs* and Moore's Federal Practice §65.50 (a Seventh Circuit case and a treatise) in support of its argument that bond should be set on the "high side" are not precedential. 201 F.3d 883, 888 (7th Cir. 2000). *Mead Johnson*, is also distinguishable because the court's reasoning for setting the bond high was to hold businesses' in check from imposing unnecessary costs on their "rivals." *Id.* ["Trademark suits, like much other commercial litigation, often are characterized by firms' desire to heap costs on their rivals, imposing marketplace losses out of proportion to the legal fees. That's why

bonds must reflect full costs."]. DCA does not desire to "heap costs" on ZACR or cause the marketplace losses the court in *Mead Johnson* was trying to prevent. Only one entity can serve as the registry for .Africa. DCA's action is to ensure ICANN processes the application and delegates gTLD's fairly to all applicants.

Finally, as explained *supra* at IV.A, ZACR had ample opportunity to request a bond as part of the initial motion for preliminary injunction. It chose not to participate in the briefing, apparently hoping ICANN would prevail. It ought not now be heard to demand relief it could have requested before the order issued. *Kona Enters.*, 229 F.3d at 890.

Therefore, the Court should use its discretion and find DCA is not required to post a bond in this matter.

V. CONCLUSION

Accordingly, DCA respectfully requests that the Court deny ZACR's motion to reconsider and vacate the preliminary injunction ruling.

Dated: May 16, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown
Ethan J. Brown

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST

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 May 16, 2016, I caused the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT ZA CENTRAL REGISTRY, NPC'S MOTION TO RECONSIDER AND VACATE; MEMORANDUM OF POINTS AND AUTHORITIES** 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 May 16, 2016

/s/ Ethan J. Brown