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11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

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

14 DOTCONNECTAFRICA TRUST, a
15 Mauritius Trust,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS,
20 a California corporation; ZA Central
21 Registry, a South African non-profit;
22 DOES 1 through 50, inclusive,

23 Defendants.

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

25 **EVIDENTIARY OBJECTIONS TO
26 SUPPLEMENTAL DECLARATION
27 OF MOKGABUDI LUCKY
28 MASILELA**

Date: June 6, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Plaintiff's
Response to ZA Central Registry,
NPC's Consolidated Evidentiary
Objections to Declarations of Sophia
Bekele Eshete and Declarations of Sara
C. Colón]

1 Plaintiff DOTCONNECTAFRICA TRUST (“DCA”) respectfully submits
2 the following evidentiary objections to the Supplemental Declaration of
3 Mokgabudi Lucky Masilela (“Masilela Supp. Decl.”) relied upon by Defendant ZA
4 Central Registry, NPC (“ZACR”) in support of its Motion to Reconsider and
5 Vacate Preliminary Injunction Ruling.

6 As a preliminary matter, DCA objects to the declaration in its entirety.
7 ZACR submits new evidence, not rebuttal evidence, which should have been
8 submitted with its moving papers. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th
9 Cir. 1996) (new evidence in reply may not be considered without giving non-
10 movant an opportunity to respond). It was ZACR’s burden to make a showing that
11 a bond was necessary. DCA pointed out that ZACR failed in that showing. The
12 point of reply evidence is not to allow the moving party to meet their evidentiary
13 burden, it is to address some new issue or defense raised by the responding party.
14 Otherwise, parties could game the system by presenting incomplete evidence with
15 their moving papers and then submit their support in reply after the non-moving
16 party no longer has the opportunity to respond.

17 Exhibit A and the related paragraphs in the declaration should also be
18 stricken because they introduce irrelevant evidence and calculations as to alleged
19 damages ZACR incurred *before* the institution of the preliminary injunction.
20 *Wash. Capitols Basketball Club, Inc. v. Barry*, 304 F. Supp. 1193, 1203 (N.D. Cal.
21 1969) (finding that the main purpose of the injunction bond is to protect defendants
22 from costs and damages incurred as the result of a preliminary injunction
23 improvidently issued). ZACR assumes that the .Africa gTLD should have been
24 delegated in 2014 -- something that the IRP ruled in DCA’s favor on. ZACR
25 cannot get damages from DCA for the non-delegation in 2014 -- the IRP issued a
26 binding ruling saying that ICANN could not and should not have delegated then.
27 *See Colón Decl. II* (Docket No. 92) ¶4, Ex. 3 at ¶¶29 - 33, 45 - 47.

PLAINTIFF’S EVIDENTIARY OBJECTIONS

Masilela Supp. Decl. ¶	DCA Objection	Ruling
<p>¶2: “As stated in paragraph 11 of my Declaration filed with the Court on May 6, 2016, ZACR has incurred monthly costs that are continuing to the delay in the delegation of .Africa. A true and correct copy of a summary of the average costs from July 2015 to April 2016 is included in the attached Exhibit A. As noted in my original declaration, the costs have been running approximately \$20,000 per month. This is based upon a review of the monthly costs incurred during the last 10 months for the .Africa project, including the ongoing costs related to consultants, marketing, sponsorships, and related expenses. In determining these figures, we averaged the monthly expenses for the .Africa project and where necessary converted expenditures from South African Rand to U.S. dollars. These figures were configured by ZACR’s finance section based on ZACR’s financial records. The summary of costs listed in Exhibit</p>	<p>Lacks personal knowledge, lacks foundation [Fed. R. Evid. 602]. Best Evidence Rule [Fed. R. Evid. 1002]. Irrelevant [Fed. R. Evid. 403].</p>	

<p>1 A does not included any fees due to 2 ICANN under the Registry 3 Agreement. The summary listed in 4 Exhibit A also omits legal fees that 5 ZACR previously incurred – which 6 explains why the dollar figure listed in 7 Exhibit A is less than \$20,000. If we 8 were to include the actual and 9 expected legal fees for this litigation, 10 the ZACR finance section projects the 11 costs figures would increase 12 significantly beyond \$20,000 per 13 month.</p>		
<p>14 ¶3: “As stated in paragraph 12 of my 15 Declaration filed with the Court on 16 May 6, 2016, the Loss of Net Income 17 after Tax (Opportunity costs) suffered 18 by ZACR from the date of the planned 19 delegation following the Registry 20 Agreement through May 1, 2016, is 21 not estimated to be approximately \$15 22 million (U.S. dollars). These 23 estimates were configured by ZACR’s 24 finance section. A true and correct 25 copy of a summary of the breakdown 26 of ZACR’s opportunity costs are 27 included in the attached Exhibit A.</p>	<p>Lacks personal knowledge, lacks foundation, and speculative [Fed. R. Evid. 602]. Best Evidence Rule [Fed. R. Evid. 1002].</p> <p>In its .Africa application, ZACR submitted a “Continual Performance Guarantee” in the amount of \$140,000, apparently to satisfy ICANN’s Continued Operations Instrument (“COI”) requirements. <i>See</i></p>	

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<p>The estimated number of registration numbers are based on ZACR’s responses to ICANN’s 2012 application questions 46-50. ZACR researched these numbers at the time of application and the application passed ICANN evaluation. To be conservative, ZACR revised down some of these numbers based on trends in the launch of other new gTLDs.”</p>	<p>Declaration of Sophia Bekele (Docket No. 17) at Ex. 20, pg. 613; https://www.icann.org/news/announcement-3-2011-12-23-en. While ZACR’s revenue projections in its application are not public and DCA has not yet received discovery on the issue, ZACR must have projected less income than \$15 million in its application, otherwise such a low COI would not be justified.</p>	
<p>¶5: “Attached as Exhibit B are true and correct copies of exemplar printouts of re-delegations including gTLDs, from the Internet Assigned Numbers Authority (“IANA”) website, https://iana.org/reports. Additional examples can be found on the website.”</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602 and 901]. Best Evidence Rule [Fed. R. Evid. 1002]. The attachments here include irrelevant information regarding the re-delegation of ccTLDs (e.g. .MK and .TG), which</p>	

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	<p>are different from gTLDs. Nor do these reports explain the circumstances or timing of the re-delegations at issue which reveal circumstances very different from a ZACR to DCA re-delegation. It appears that at least several of these “re-delegations” occurred before actual delegation to the root-zone. For example, the transfer in registry owners for .security occurred in June 2015, before it was actually delegated to the root zone in September 2015. https://icannwiki.com/.security. The .ltda gTLD was transferred between two wholly owned subsidiaries of another company. <i>See</i> https://icannwiki.com/.ltda; https://www.iana.org/reports/c.2.9.2.d/20140828-ltda. Furthermore, .org is not</p>	
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	<p>applicable because it was not under the new gTLD program. <i>See</i> https://www.iana.org/reports/2002/org-reports/09dec02.html.</p> <p>The attachments here leave out crucial details regarding the identity of the original applicants, the original registry and back end providers, if the change of registry back end provider was before after delegation, how many domains had been registered at the time of re-delegation, and the time allotted for the re-delegation phase to be completed. This information is relevant to understanding whether a reassignment, transfer, or actual “re-delegation” took place.</p>	
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<p>¶6: “Attached hereto as Exhibit C are true and correct copies of printouts from the following websites which discuss re-delegation of gTLDs: http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already; http://domainincite.com/2020235-minds-machines-dumps-back-end-and-registrar-in-nominet-uniregistry-deals; http://www.afilias.info/news/2003/01/02/public-interest-registry-assumes-control-org-domain-name-registry.”</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602 and 901]. Best Evidence Rule [Fed. R. Evid. 1002].</p>	
<p>¶7: “Attached hereto as Exhibit D is a true and correct copy of the Geographic Names Panel Clarifying Questions submitted by ICANN’s Geographic Names Panel to ZACR during the application process relating to deficiencies in the letter of support from the African Union dated April 4, 2012. The updated letter of support from the AUC was submitted on or about July 2, 2013, as referenced as Exhibit A to my May 6, 2016.</p>	<p>Best Evidence Rule [Fed. R. Evid. 1002].</p>	

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Dated: May 26, 2016

BROWN NERI SMITH & KHAN 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 & Khan LLP, with offices at 11766 Wilshire Blvd., Los Angeles, California 90025. On May 26, 2016, I caused the foregoing **EVIDENTIARY OBJECTIONS TO SUPPLEMENTAL DECLARATION OF MOKGABUDI LUCKY MASILELA** 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 26, 2016

/s/ Ethan J. Brown