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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 Charitable 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 company; and DOES 1 through 50,
23 inclusive;

24 Defendants.

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

**PLAINTIFF’S RESPONSE TO
DEFENDANT ZA CENTRAL
REGISTRY, NPC’S MOTION TO
INTERVENE PURSUANT TO
RULE 24**

Date: September 19, 2016

Hearing: 9:00 a.m.

Courtroom: 850

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff DotConnectAfrica Trust (“DCA”) takes issue with numerous factual
4 misrepresentations ZA Central Registry NPC (“ZACR”) makes in its motion to
5 intervene. DCA does not oppose ZACR’s permissive intervention in this matter.
6 But, ZACR is not a required party and the Court must make a determination
7 regarding ZACR’s status in order to preserve jurisdiction over DCA’s case against
8 defendant Internet Corporation for Assigned Names and Numbers (“ICANN”).
9 Accordingly, DCA requests that the Court determine ZACR is not a required party
10 before allowing it to intervene.

11 **II. FACTS**

12 DCA will not repeat the relevant facts of this case. However, DCA does feel
13 it pertinent to correct certain of ZACR’s assertions in its motion to intervene.¹

14 First, ZACR was not a qualified applicant for .Africa. ZACR states that
15 “[h]aving successfully completed each of ICANN’s requirements to operate the
16 .Africa gTLD, ZACR and ICANN entered into a ten year Registry Agreement on
17 March 24, 2014.” (Dkt. 122-1 at 3:13 – 15.) But ZACR did not meet all of ICANN’s
18 requirements. Nearly all of ZACR’s letters of support fail to mention it by name.
19 (Dkt. No. 17 ¶34.) Many actually provide support for *the AUC’s* initiative to
20 categorize .Africa as a “reserved” domain. (*Id.*) ICANN denied the AUC’s attempt
21 to do this after DCA pointed out ICANN’s rules did not permit it. Later, ICANN
22 ghost wrote an endorsement letter from the AUC for ZACR. (Dkt. No. 45, ¶3, Ex.
23 2.) ICANN should not have considered the AUC as a valid endorser for ZACR,
24 considering that ZACR had entered into an assignment of rights with the AUC for
25 the .Africa domain, if ZACR succeeds. (Dkt. No. 17 ¶32.)

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27
28 ¹ ZACR makes numerous factual assertions with which DCA disagrees, but DCA
only addresses those most relevant to this motion.

1 Further, ZACR omits the fact that the signing of the registry agreement
2 resulted from ICANN’s attempt to avoid an unfavorable ruling in the Independent
3 Review Process that was already pending. (Dkt. No. 17, ¶5, Ex. 1 ¶¶12 – 20; ¶9 Ex.
4 20.) The IRP panel, when advised of this development by DCA, issued emergency
5 relief in the form of an order instructing ICANN to refrain from further moves to
6 delegate .Africa. (*Id.*) ZACR was on notice that the delegation of .Africa was in
7 dispute and that the signing of the registry agreement was improper. Therefore its
8 interest in .Africa is as an applicant, not a party with a “right” to .Africa.

9 In an apparent attempt to bolster its legitimacy over that of DCA, ZACR
10 purports to be the “largest domain registry” on the African continent. (Dkt. No. 85-
11 3, ¶2.) However, this position is highly questionable as the registry CentralNic, the
12 back-end operator for DCA Trust, has many clients across the African continent and
13 is one of the top-ranked registries in the world. Moreover ZACR’s relationship with
14 DNServices, its registrar, the AUC, and the South African government call into
15 question its ability to operate as a transparent registry given the numerous conflicts
16 of interest under which it operates. DCA, on the other hand is already executing its
17 mission as a trust, independently.

18 Finally, ZACR continually references a special interest in the case due to a
19 charity it will allegedly fund with proceeds from the operation of .Africa. However,
20 it has yet to provide any evidence showing a commitment to make these
21 contributions, which are speculative and reliant on proceeds to which ZACR is not
22 entitled.

23 ZACR’s stake in this case is as an interested applicant, nothing more. DCA
24 agrees that on this basis, and this basis alone it should be allowed to intervene in the
25 case. However, ZACR is not a required party, for the reasons set forth in greater
26 detail below.

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1 **III. ZACR IS NOT A REQUIRED PARTY.**

2 Although ZACR has styled its motion as one to intervene pursuant to Rule 24,
3 ZACR asserts that it is a “required party,” which is not a category set forth in Rule
4 24. Rule 24 does speak of intervention as of right, and DCA does not dispute that
5 ZACR has a right to intervene in this suit pursuant to its interest in ICANN’s
6 delegation of the .Africa gTLD. However, DCA does not agree that ZACR is also a
7 “required party” as described in Fed. R. Civ. P. 19.

8 Rule 19 states that a required party is a person whose absence means that “the
9 court cannot accord complete relief among existing parties” and that “person claims
10 an interest relating to the subject of the action and is so situated that disposing of the
11 action in the person’s absence may: (i) as a practical matter impair or impede the
12 person’s ability to protect the interest; or (ii) leave an existing party subject to a
13 substantial risk of incurring double, multiple, or otherwise inconsistent obligations
14 because of the interest.” Fed. R. Civ. P. 19(a).

15 By dismissing ZACR, the Court has effectively concluded that it is not a
16 required party, despite the existence of the declaratory relief causes of action. (*See*
17 *Dkt. No. 112.*) The Court noted that “the Court finds Plaintiff’s first request against
18 ZACR (*i.e.*, that the Court declare the registry agreement null and void) unnecessary,
19 as a favorable ruling on its claims against ICANN will result in the relief it seeks.
20 As to the second request (*i.e.*, that the Court declare that ZACR’s application does
21 not meet ICANN’s standards) the Court finds that regardless of the existence of a
22 separate substantive basis for liability, there is an insufficient nexus between the
23 relief requested and the alleged wrongful conduct.” (*Dkt. No. 112 at 5.*) ZACR’s
24 absence from the case *as a party* does not impair or impede its ability to protect its
25 interest because the Court can allow it to intervene as a non-required intervenor,
26 which DCA does not oppose. Furthermore, neither ICANN nor DCA will be at
27 substantial risk of incurring multiple or inconsistent obligations because of the
28 interest. If ZACR intervenes, any claims it might seek against ICANN would be

1 issue precluded to the extent that they overlapped with the issues here. *See Ross v.*
2 *Alaska*, 189 F. 3d 1107, 1110-1114 (9th Cir. 1999) (issue preclusion applied to party
3 in subsequent action where the party voluntarily intervened in a prior action); *see*
4 *also Arizona v. California*, 460 U.S. 605, 615 (1983).

5 **IV. THE COURT MUST DECIDE WHETHER ZACR IS A REQUIRED**
6 **PARTY BEFORE IT ALLOWS ZACR TO INTERVENE.**

7 In any event, regardless of whether ZACR is asserting that it is a required party,
8 the Court must make that determination before it allows ZACR to intervene.
9 ZACR’s intervention, if it is a required party, could impair this Court’s jurisdiction.
10 *See Mattel, Inc. v. Bryant*, 446 F. 3d 1011, 1014 (9th Cir. 2006). The Court has a
11 continuing obligation to assess its jurisdiction over matters, regardless of whether
12 the parties have raised the issue. *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011).
13 Even if the Court finds that ZACR is a required party that cannot be joined due to
14 jurisdiction, the Court should allow the case between ICANN and DCA to proceed
15 pursuant to Fed. R. Civ. P. 19(b). DCA requests that if the Court finds that ZACR
16 is a required party, it allow further briefing on whether the action should proceed
17 amongst ICANN and DCA without ZACR.

18 **V. CONCLUSION**

19 Accordingly, DCA respectfully requests that the Court determine that ZACR
20 is not a required party before allowing it to intervene. DCA opposes the notion that
21 ZACR is a required party, and its intervention as such would destroy this Court’s
22 jurisdiction over this matter.

24 Dated: August 29, 2016

BROWN NERI SMITH & KHAN LLP

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

27 *Attorneys for Plaintiff*
28 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., Suite 1670, Los Angeles, California 90025. On August 29, 2016, I caused the foregoing **PLAINTIFF’S RESPONSE TO DEFENDANT ZA CENTRAL REGISTRY, NPC’S MOTION TO INTERVENE PURSUANT TO RULE 24** 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 August 29, 2016

/s/ Ethan J. Brown