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 11 **ZA Central Registry, NPC**

12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST, a
 15 Mauritius Charitable Trust,
 16
 17 Plaintiff,
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 19 v.

20 INTERNET CORPORATION FOR
 21 ASSIGNED NAMES AND
 22 NUMBERS; a California corporation;
 23 ZA Central Registry, a South African
 24 non-profit company; DOES 1 through
 25 50, inclusive,
 26
 27 Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)
*Assigned for all purposes to the
 Honorable R. Gary Klausner*

**ZA CENTRAL REGISTRY, NPC’S
 RESPONSE TO PLAINTIFF’S
 EVIDENTIARY OBJECTIONS TO
 DECLARATION OF MOKGABUDI
 LUCKY MASILELA**

[Filed concurrently: with: Reply ISO of
 Motion to Reconsider and Vacate
 Preliminary Injunction; Supplemental
 Declaration of Mokgabudi Lucky
 Masilela ISO Motion; Consolidated
 Evidentiary Objections to Declaration
 of Sophia Bekele Eshete; Consolidated
 Evidentiary Objections to Declaration
 of Sarah Colón; and Declaration of
 Akram Atallah ISO of Motion]

Date: June 6, 2016
 Time: 9:00 a.m.
 Location: Courtroom 850

1 Defendant ZA Central Registry, NPC (“ZACR”) hereby responds to
 2 Plaintiff DotConnectAfrica Trust’s (“DCA”) objections to the Declaration of
 3 Mokgabudi Lucky Masilela. (Masilela Declaration.) “Due to the urgency of
 4 obtaining a preliminary injunction at a point when there has been limited factual
 5 development, the rules of evidence do not apply strictly to preliminary injunction
 6 proceedings. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1250
 7 n. 5 (9th Cir. 2013).

Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>9 ¶3: “Due to its 10 well-known 11 reputation for 12 independence and 13 neutrality, as well 14 as technical 15 competence and 16 operational 17 excellence, ZACR 18 is the single 19 largest domain 20 name registry on 21 the African 22 continent.”</p>	<p>Lacks personal knowledge, lacks foundation [Fed. R. Evid. 602].</p>	<p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of ZACR’s reputation and operations. “Personal knowledge can be inferred from a declarant's position within a company or business.” <i>Edwards v. Toys</i> <i>"R" Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal.</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
		2007) (collecting cases).	
<p>¶5: “I am familiar with the ICANN selection criteria for the gTLD. ICANN set forth selection criteria in an Applicant Guidebook. Among other things, ICANN made clear that because the .Africa gTLD represented the name of a geographic region, an applicant would need to provide documentation showing support from at least 60% of the</p>	<p>The Application Guidebook is the best evidence of the document [Fed. R. Evid. 1002]. Lacks foundation, lacks personal knowledge [Fed. R. Evid. 602]</p>	<p>The Court may refer to the Guidebook which, in addition to being accessible online, is part of the record. (Declaration of Sophia Bekele Eshete, Docket No. 17, ¶ 7 & Ex. 3.)</p> <p>Additionally, Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of the process for the delegation of the .Africa gLTD. “Personal</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>governments in the region. Further ICANN criteria provided that no more than one objection from a government or public entity associated with the geographic region would be permitted. These criteria are set forth in ICANN Application Guidebook Module 2, and available online at http://newgtlds.icann.org/en/applications/ags/par.2.2.1.4.2.4.”</p>		<p>knowledge can be inferred from a declarant's position within a company or business.” <i>Edwards v. Toys "R" Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases).</p>	
<p>¶6 “ZACR submitted its application to ICANN with the</p>	<p>The letters are the best evidence of the documents [Fed. R. Evid</p>	<p>The Court may refer to the letters, which are attached to the</p>	

	Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>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</p>	<p>full support of African Union member states via the African Union Commission (“AUC”) endorsement. Specifically, the AUC, which serves as the Secretariat of the African Union, provided a letter supporting ZACR’s application. A true and correct copy of the July 2, 2013 AUC letter is attached as Exhibit A. In addition, the only nonmember, Morocco, separately provided a letter supporting</p>	<p>1002].</p>	<p>Masilela Declaration as Exhibits A and B.</p> <p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of ZACR’s application for the .Africa gLTD.</p> <p>“Personal knowledge can be inferred from a declarant’s position within a company or business.”</p> <p><i>Edwards v. Toys “R” Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases).</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>ZACR’s application. A true and correct copy of the March 28, 2012 Moroccan letter of support is attached as Exhibit B.</p>			
<p>¶7: “ZACR received the support of the African Union only after the AUC publicized a request for proposal (“RFP”). This was an open bid process. The AUC made clear that it was only going to support one applicant. By way of background, the AUC RFP process began because it</p>	<p>Lacks personal knowledge, lacks foundation [Fed. R. Evid. 602]. The letter is the best evidence of the document [Fed. R. Evid. 1002]. Misleading based upon the fact that ZACR assigned all rights to the AUC prior to the “open bid process.” See Dkt. No. 17 - Bekele Decl. ISO Motion for Preliminary</p>	<p>The Court may refer to the letter, which is attached to the Masilela Declaration as Exhibit C.</p> <p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of the AUC RFP, which ZACR participated in.</p> <p>“Personal knowledge can be</p>	

	Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>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</p>	<p>was well known that ICANN was considering a new gTLD program, including .Africa. It was in anticipation of this new gTLD program that the AUC decided to hold an RFP to support a single, qualified applicant for the African Union. This is because the AUC was specifically mandated by member states to set up the structures and modalities for the implementation of the dotAfrica (.Africa) gTLD. Details of the</p>	<p>Injunction, Ex. 20, p.617, ¶22 (7) [“It should be noted that the AUC shall retain all rights relating to the dotAfrica TLD, including in particular, intellectual property and other rights to the registry databases required to ensure the implementation of the agreement between the AUC and the ZACR, and the right to re-designate the registry function.”]</p>	<p>inferred from a declarant's position within a company or business.” <i>Edwards v. Toys "R" Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases). Plaintiff’s objection that Mr. Masilela’s testimony is “[m]isleading” is argumentative and not a proper objection under the Federal Rules of Evidence. Plaintiff’s improper arguments in the guise of evidentiary</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>process are set forth in the September 29, 2015 AUC letter attached hereto as Exhibit C. This letter is also available at: http://africanonespace.org/downloads/GNP.PDF</p>		<p>objections should be disregarded.</p>	
<p>¶9: “The Registry Agreement between ICANN and ZACR was effective on March 24, 2014 and runs for ten years. Yet, over two years into the Agreement, the .Africa gTLD has still not been delegated to ZACR. In effect, 20% of the period of the Agreement</p>	<p>Lacks personal knowledge, lacks foundation, speculative, conclusory [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R. Civ.P.</p>	<p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of the Registry Agreement between ZACR and ICANN, as well as the business and economic consequences of the delayed implementation of</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>has already lapsed without any benefit to ZACR. This delay has resulted in unforeseen and mounting costs, as well as lost opportunities, for the .Africa project.”</p>	<p>56(c)(4)]. Biased and misleading in that it was entered into after the initiation of the IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending, and on the grounds that the IRP ordered ICANN to refrain from further processing ZACR’s application until the IRP resolution concluded. <i>See</i> Dkt. No. 64 - First Amended Complaint, Ex. A,</p>	<p>that agreement. “Personal knowledge can be inferred from a declarant’s position within a company or business.” <i>Edwards v. Toys “R” Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases). Plaintiff’s objections that Mr. Masilela’s testimony is “[b]iased” and “misleading” are argumentative and not proper objections under the Federal Rules of Evidence. Plaintiff’s</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
	pg. 31- 32, ¶¶13-19.	improper arguments in the guise of evidentiary objections should be disregarded.	
<p>¶11: “ZACR has incurred considerable expenses both prior to and after entering into the Registry Agreement. The current and continuing cost due to the delay in the delegation is running at approximately \$20,000 per month. This is based upon a review of the monthly costs incurred during the last 10 months</p>	<p>Lacks personal knowledge, lacks foundation, speculative and conclusory [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)]. Irrelevant and vague [Fed. R. Evid. 403].</p>	<p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of ZACR’s expenses in connection with the Registry Agreement. “Personal knowledge can be inferred from a declarant's position within a company or business.” <i>Edwards v. Toys "R" Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal.</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>for the .Africa project, including the ongoing costs related to consultants, marketing, sponsorships and related expenses. The importance of maintaining visibility for the .Africa project, coupled with the ongoing need to interface with government officials throughout the African continent, makes clear that these ongoing expenses will continue during the course of this litigation. In determining these figures, we</p>		<p>2007) (collecting cases).</p> <p>Mr. Masilela further testified that his estimate of monthly expenses was based on a review of actual costs incurred by ZACR. Costs incurred by ZACR as a result of the delay in the delegation of the .Africa gLTD are directly relevant to hardship ZACR will suffer if the preliminary injunction in this action is sustained.</p> <p>“Vague” is not a proper evidentiary</p>	

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<p>averaged the monthly expenses for the .Africa project and where necessary converted expenditures from South African Rand to U.S. dollars.</p>		<p>objection under the Federal Rules of Evidence.</p>	
<p>¶12: “The Loss of Net Income after Tax (opportunity costs) suffered by ZACR from the date of the planned delegation following the Registry Agreement through May 1, 2016, are now estimated to be approximately \$15 million (U.S. dollars). Of that</p>	<p>Lacks foundation, lacks personal knowledge, speculative and conclusory. [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)]. Biased</p>	<p>Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of the economic consequences of the delayed delegation of the .Africa gLTD. “Personal knowledge can be inferred from a declarant's position within a company or</p>	

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amount, approximately \$5.5 million would have been donated to the dotAfrica Foundation for African online development. Until such time as delegation takes place, the .Africa gTLD in effect stagnates and generates no income and no value in the marketplace. The ongoing delay is also prejudicial to the gTLD itself (no matter who the operator is) in that the initial interest surrounding the launch of this	and misleading in that it was entered into after the initiation of the IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending, and on the grounds that the IRP ordered ICANN to refrain from further processing ZACR’s application until the IRP resolution concluded. <i>See</i> Dkt. No. 64 - First Amended Complaint, Ex. A, pg. 31- 32, ¶¶13-	business.” <i>Edwards v. Toys “R” Us</i> , 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases). Plaintiff’s objections that Mr. Masilela’s testimony is “[b]iased” and “misleading” are argumentative and not proper objections under the Federal Rules of Evidence. Plaintiff’s improper arguments in the guise of evidentiary objections should be disregarded.	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>domain name will have faded, and persons who may have sought to register will have lost interest.”</p>	<p>19.</p>		
<p>¶13: “Once a gTLD is delegated it starts increasing in value. The gTLD is at its lowest value prior to delegation and increases as the number of second level domain delegations (for example: xyz.africa) increases. If Plaintiff is redelegated the .Africa gTLD, it will suffer no irreparable harm as it will inherit a more valuable</p>	<p>Lacks personal knowledge, lacks foundation, speculative, and conclusory [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)]. Biased and misleading in that it was entered into after the initiation of the</p>	<p>Mr. Masilela is Chief Executive Officer of ZACR, the single largest domain name registry of the African continent. As such, he has personal knowledge of the economics of domain delegations. “Personal knowledge can be inferred from a declarant's position within a company or business.” <i>Edwards v. Toys</i></p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>gTLD without incurring the cost to develop it.”</p>	<p>IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending, and on the grounds that the IRP ordered ICANN to refrain from further processing ZACR’s application until the IRP resolution concluded. <i>See</i> Dkt. No. 64 - First Amended Complaint, Ex. A, pg. 31- 32, ¶¶13-19.</p>	<p>”R” <i>Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases). Plaintiff’s objections that Mr. Masilela’s testimony is “[b]iased” and “misleading” are argumentative and not proper objections under the Federal Rules of Evidence. Plaintiff’s improper arguments in the guise of evidentiary objections should be disregarded.</p>	
<p>¶14: “In my role as ZACR’s CEO, and based upon</p>	<p>Lacks personal knowledge, lacks foundation,</p>	<p>Mr. Masilela is Chief Executive Officer of ZACR,</p>	

	Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>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</p>	<p>my numerous and ongoing discussions with political, business and civic leaders throughout the African Union, it is my firm understanding and belief that the ongoing delay in the delegation of .Africa is depriving the people of the African continent of an important opportunity to expand internet domain name capabilities. The .Africa domain name would add brand value to the continent and would provide a platform that</p>	<p>speculative, and conclusory [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4); <i>See also Bank Melli Iran v. Pahlavi</i>, 58 F.3d 1406, 1412-1413 (9th Cir. 1995) (Holding “the Bank’s response to Pahlavi’s evidence was information and belief declarations from their counsel. Those were entitled to</p>	<p>the single largest domain name registry of the African continent. He has personal knowledge of the economics of domain delegations and the value of the .Africa domain. “Personal knowledge can be inferred from a declarant’s position within a company or business.” <i>Edwards v. Toys “R” Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal. 2007) (collecting cases). That Mr. Masilela’s</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
connects products, businesses and individuals that have interests in Africa. The African people are further harmed because the agreement between ZACR and the AUC required that a foundation be created upon delegation and that a significant portion of the revenues received from second level domain delegations (for example: xyz.africa) be directed to the “dotAfrica Foundation.” The Foundation would	no weight because the declarant did not have personal knowledge.” [emphasis added]]. Hearsay [Fed. R. Evid. 801].	understanding was formed in part by conversations with political, business, and civic leaders does not make his testimony about his own conclusions hearsay.	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>use the revenues to fund various African domain name and Internet related developmental projects which are now delayed as a result of the preliminary injunction.”</p>			
<p>¶15: “I am aware that ICANN Builds in time limits in its gTLD registry agreements. I am further informed, based upon my experience in the industry and discussions with technical personnel within ZACR, that a re-delegation of a gTLD is entirely</p>	<p>The manual is the best evidence of the document [Fed. R. Evid. 1002]. Hearsay [Fed. R. Evid. 801].</p>	<p>The Court may refer to the manual, which is attached to the Masilela Declaration as Exhibit E.</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>feasible. In fact, ICANN has prepared for this precise eventuality and issued a manual in 2013 providing step-by-step instructions for how to redelegate a gTLD. The manual, titled “User Documentation on Delegating and Redelegating a Generic Top Level Domain (gTLD),” makes clear that the process is available and feasible if necessary. A true and correct copy of the manual is attached hereto as</p>			

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
<p>Exhibit E. It is also available on ICANN’s website: http://www.icann.org/en/stem/files/files/gtd-drd-ui-10sep13-en.pdf</p>			
<p>¶16: “ZACR has never operated in California. ZACR has no personnel, no offices, no bank accounts, and maintains no operations in California. ZACR has no telephone listings or mailing addresses in California.”</p>	<p>Irrelevant [Fed. R. Evid. 403].</p>	<p>ZACR’s lack of California contacts is relevant to show that serious questions exist as to whether a proper basis for personal jurisdiction exists absent ZACR’s consent. Accordingly, ZACR was entitled to a reasonable period of time after service of the</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
		First Amended Complaint to evaluate whether and how to respond.	
<p>¶17: “I have read Plaintiff’s First Amended Complaint, including the allegation against ZACR. Contrary to what is asserted in the First Amended Complaint, there was no fraud or conspiracy between ZACR and ICANN. Nor was there any fraud or conspiracy with the AUC. Similarly, there was no interference with</p>	<p>Lacks foundation and conclusory [Fed. R. Evid. 602].</p>	<p>As the Chief Executive Officer, Mr. Masilela has personal knowledge of ZACR’s application for the .Africa gLTD and its actions in connection thereto. “Personal knowledge can be inferred from a declarant’s position within a company or business.” <i>Edwards v. Toys “R” Us</i>, 527 F. Supp. 2d 1197, 1201 (C.D. Cal.</p>	

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Masilela Decl.	DCA’s Objection	ZACR’s Response	Court’s Ruling
Plaintiff’s application to ICANN. At all times, ZACR competed fairly and abided ICANN’s procedures in seeking the award for the generic top level domain .Africa.		2007) (collecting cases).	

DATED: May 23, 2016 KESSELMAN BRANTLY STOCKINGER LLP

By: /s/ David W. Kesselman
David W. Kesselman
Amy T. Brantly

Attorneys for Defendant ZA Central
Registry, NPC