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 13 **ZA Central Registry, NPC**

14 **UNITED STATES DISTRICT COURT**  
 15 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

16 DOTCONNECTAFRICA TRUST, a  
 17 Mauritius Charitable Trust,  
 18 Plaintiff,  
 19 v.  
 20 INTERNET CORPORATION FOR  
 21 ASSIGNED NAMES AND  
 22 NUMBERS; a California  
 23 corporation; DOES 1 through 50,  
 24 inclusive,  
 25 Defendants.

26 CASE NO. 2:16-cv-00862 RGK (JCx)  
 27 *Assigned for all purposes to the*  
 28 *Honorable R. Gary Klausner*  
**ZA CENTRAL REGISTRY, NPC’S**  
**SUPPLEMENTAL BRIEF**  
**ADDRESSING WHETHER ZACR**  
**IS AN INDISPENSABLE PARTY**  
**PURSUANT TO FEDERAL RULE**  
**OF CIVIL PROCEDURE 19**

1 **I. INTRODUCTION**

2 On September 22, 2016, this Court ordered the parties and proposed  
3 intervenor, ZA Central Registry, N.P.C (“ZACR”), to file supplemental briefs  
4 addressing whether ZACR is an indispensable party to Plaintiff DotConnectAfrica  
5 Trust’s (“DCA”) Tenth Claim for Declaratory Relief. Dkt. No. 134. For the  
6 reasons set forth herein, ZACR asserts that the answer is “yes.”

7 **II. ANALYSIS**

8 In its Tenth Claim for Relief, DCA requests a judicial declaration that  
9 ZACR’s application to ICANN for the .Africa gTLD was deficient, and that the  
10 Registry Agreement signed between ZACR and defendant Internet Corporation  
11 for Assigned Names and Numbers (“ICANN”) be declared null and void. Dkt.  
12 No. 10 (First Amended Complaint ¶¶ 126-132).

13 By including a request for declaratory relief that directly impacts ZACR’s  
14 property rights,<sup>1</sup> including a declaration that the Registry Agreement between  
15 ZACR and ICANN be declared null and void, ZACR is a required party under  
16 Fed. R. Civ. P. 19(a).<sup>2</sup> The law in the Ninth Circuit is clear that a claim for  
17 declaratory relief that seeks to invalidate a written agreement makes all parties to

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19 <sup>1</sup> In its order, this Court requested that the parties limit the briefing to  
20 Plaintiff’s Tenth Claim for Declaratory Relief. However, ZACR respectfully  
21 asserts that the Ninth Cause of Action for Declaratory Relief also implicates  
22 ZACR’s rights to the .Africa gTLD. By its Ninth Cause of Action, DCA appears  
23 to seek a declaration requiring ICANN to delegate the .Africa gTLD to DCA.  
24 FAC ¶ 124. Because an order requiring ICANN to delegate the .Africa gTLD to  
25 DCA instead of ZACR necessarily affects ZACR’s property interest in its Registry  
26 Agreement with ICANN, ZACR is an indispensable party to the Ninth Cause of  
27 Action, as well.

28 <sup>2</sup> Rule 19(a) provides that an absentee party will be deemed a required party  
if failure to join it creates a risk that (1) complete relief cannot be accorded among  
the existing parties; *or* (2) disposing of the action will impair or impede the  
person’s ability to protect its interest; *or* (3) the defendant will be subjected to  
double liability or inconsistent obligations because of the interest. *See also*  
Moore’s Federal Practice 4-19, § 19.02.

1 that agreement “required” parties. *See Wilbur v. Locke*, 423 F.3d 1101, 1113 (9th  
 2 Cir. 2005) (“it is a ‘fundamental principle’ that a ‘party to a contract is necessary,  
 3 and if not susceptible to joinder, indispensable to litigation seeking to decimate  
 4 the contract’”) (citation omitted), *overruled on other grounds; Dawavendewa v.*  
 5 *Salt River Project*, 276 F.3d 1150, 1156-57 (9th Cir. 2002); *Northrop Corp. v.*  
 6 *McDonnell Douglas Corp.* 705 F.2d 1030, 1044 (9th Cir. 1983) (“All parties who  
 7 may be affected by a suit to set aside a contract must be present”). Under these  
 8 authorities, the litigation cannot proceed without ZACR – as ZACR’s ability to  
 9 protect its interests would be impaired.

10 The next step in the analysis is whether, as a required party, ZACR’s  
 11 joinder to the litigation destroys this Court’s subject matter jurisdiction. Moore’s  
 12 Federal Practice 4-19, § 19.02[3][b]. If the answer is yes, then, subject to the  
 13 factors set forth in Fed. R. Civ. P. 19(b), ZACR must be deemed an  
 14 “indispensable” party.<sup>3</sup> *See Wilbur*, 423 F.3d at 1113; *Dawavendewa*, 276 F.3d at  
 15 1157.

16 Here, DCA and ZACR are both foreign entities. DCA is a non-profit  
 17 organization established under the laws of the Republic of Mauritius with its  
 18 principal place of business in Kenya. Dkt. No. 10 (FAC ¶ 7). ZACR is a non-  
 19 profit South African company with its principal place of business in South Africa.  
 20 *See id.* (FAC ¶ 9.) The presence of foreign nationals on both sides of an action  
 21 normally destroys a federal court’s diversity jurisdiction. *See Craig v. Atlantic*  
 22

23 <sup>3</sup> In determining whether ZACR is an indispensable party, the Court  
 24 considers the factors enumerated in Fed. R. Civ. P. 19(b) “in equity and good  
 25 conscience.” The factors include: (1) the extent to which a judgment rendered in  
 26 the person’s absence might prejudice that person or the existing parties; (2) the  
 27 extent to which any prejudice could be lessened or avoided by: (A) protective  
 28 provisions in the judgment; (B) shaping the relief; or (C) other measures; (3)  
 whether a judgment rendered in the person’s absence would be adequate; and (4)  
 whether the plaintiff would have an adequate remedy if the action were dismissed  
 for nonjoinder.

1 *Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994) (no diversity where foreign  
2 plaintiff sued both foreign and US defendants); *Nike, Inc. v. Comercial Iberica De*  
3 *Exclusives Desportivas, S.A.*, 20 F.3d 987, 990-91 (9th Cir. 1994) (presence of  
4 citizen plaintiff does not salvage diversity jurisdiction in case with foreign  
5 plaintiff and defendants); *Fayesound, Ltd. v. United Coconut Chemicals, Inc.*, 878  
6 F.2d 290, 294 (9th Cir. 1989).

7 Where, as here, diversity jurisdiction is destroyed due to the intervention of  
8 a required party, ZACR is an indispensable party pursuant to Fed. R. Civ. P.  
9 19(b). The resulting prejudice from proceeding without ZACR is manifest, and it  
10 cannot be lessened or avoided while DCA maintains its claims for declaratory  
11 relief.<sup>4</sup> Moreover, DCA has an adequate remedy if the case is dismissed for lack  
12 of subject matter jurisdiction – it can simply proceed in state court where it  
13 originally filed the case. In this circumstance, the matter must be remanded to the  
14 state court. *See Takeda v. Northwestern Nat’l Life Ins. Co.*, 765 F.2d 815, 819  
15 (9th Cir. 1985) (“Intervention destroys diversity if the intervening party is  
16 indispensable” and remanding matter to state court); *see also Neuman v. Baker*,  
17 2006 U.S. Dist. LEXIS 86691, at \*11-12 (S.D. Cal. Nov. 27, 2006) (granting  
18  
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20 <sup>4</sup> In DCA’s Response to ZACR’s Motion to Intervene, DCA suggested that  
21 “[e]ven if the Court finds that ZACR is a required party that cannot be joined due  
22 to jurisdiction, the court should allow the case between ICANN and DCA to  
23 proceed pursuant to Fed. R. Civ. P. 19(b).” Dkt. No. 128. DCA provides no basis  
24 for this suggestion. The Ninth Circuit cases referenced herein make clear that the  
25 litigation cannot proceed without ZACR so long as DCA seeks declaratory relief  
26 that directly impacts ZACR’s rights to the .Africa gTLD. However, if this Court  
27 concludes that ZACR is not indispensable under Fed. R. Civ. P. 19(b), the result is  
28 that the Court retains jurisdiction but ZACR remains a party by virtue of being a  
required party under Fed. R. Civ. P. 19(a) and one entitled to intervene as of right  
under Fed. R. Civ. P. 24(a). *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1012-14  
(9th Cir. 2006) (finding intervenor to be dispensable, and thus holding that district  
court retained jurisdiction).

1 motion to intervene and remanding case to state court because adding  
2 indispensable party necessarily divested district court of diversity jurisdiction).

3 **III. CONCLUSION**

4 Because of the manner in which DCA pled its claims for declaratory relief,  
5 ZACR is an indispensable party. DCA should either dismiss its claims for  
6 declaratory relief, or accept that its First Amended Complaint divests this Court of  
7 subject matter jurisdiction. ZACR respectfully submits that, if DCA refuses to  
8 dismiss its claims for declaratory relief, this Court lacks subject matter  
9 jurisdiction, its prior rulings must be vacated, and the case remanded to the state  
10 court for further proceedings. See *Takeda*, 765 F.2d at 820, 822 (directing district  
11 to vacate its preliminary injunction order after holding that a third party was  
12 indispensable and destroyed diversity); see also *Wang Zong Xiao v. Barr*, 979  
13 F.2d 151, 156 (9th Cir. 1992) (“Lacking jurisdiction, the district court erred in  
14 entering the preliminary injunction . . . Consequently, the preliminary injunction is  
15 VACATED”); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001)  
16 (“The district court lacked subject matter jurisdiction. . . . The preliminary  
17 injunction is vacated and this case is remanded to the district court with  
18 instructions to dismiss the City's underlying action.”).

19 Because the Court’s preliminary injunction is currently on appeal, the Court  
20 lacks jurisdiction at this juncture to vacate it. *Prudential Real Estate Affiliates,*  
21 *Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 880 (9th Cir. 2000) (holding that district  
22 court lacked jurisdiction to vacate preliminary injunction order that had been  
23 appealed). Accordingly, if the Court concludes that it lacks subject matter  
24 jurisdiction, ZACR submits that the proper procedure is for this Court to enter an  
25 order under Fed. R. Civ. P. 62.1 stating the Court’s conclusion and its intention to  
26 vacate the preliminary injunction and to dismiss the case for lack of jurisdiction.  
27 That will allow the parties to seek an appropriate order from the Ninth Circuit  
28 remanding the case to this Court for that disposition.

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DATED: September 27, 2016 Respectfully submitted,

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By:                   /s/ David W. Kesselman                  

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