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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 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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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

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

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

1 **II. FACTS¹**

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

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

17 ICANN required that applicants for the rights to a geographic gTLD such as
18 .Africa obtain endorsements from 60% of the national governments in the region,
19 and no more than one written statement of objection to the application from relevant
20 governments in the region and/or public authorities associated with the region.
21 Bekele Decl. ¶7, Ex. 3 at § 2.2.1.4.2. DCA met this requirement. As part of its bid
22

23
24 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.

25 ² The Declaration of Sophia Bekele Eshete (Docket No. 17) filed in support of
26 DCA's motion for preliminary injunction is referred to throughout as the "Bekele
27 Decl." The Declaration of Sophia Bekele Eshete (Docket No. 45) filed concurrently
28 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."

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

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

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

24 **B. DCA will be irreparably harmed if .Africa is delegated to ZACR.**

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

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

7 If .Africa is delegated to ZACR, the possibility of its re-delegation to DCA is
8 more of a technicality than a reality. Even ICANN did not try and argue in its
9 opposition to DCA’s motion for preliminary injunction that DCA could be re-
10 delegated .Africa³ -- and ICANN is doubtlessly in the best position to show that re-
11 delegation is a viable option. As far as DCA has been able to determine, re-
12 delegation of a gTLD has never actually been accomplished,⁴ and it would prove
13 extremely difficult, if not impossible, in this situation. *See* Bekele II Decl. ¶7;
14 Bekele Decl. ¶3. Re-delegation is contemplated as a step to change management
15 when a registry agreement is expiring and up for renewal. *See* Masilela Decl. ¶15,
16 Ex. E. ICANN states that “The primary requirement of this process is to have an
17 existing contract with ICANN, which reflects the changes related to the management
18 of the gTLD” and that “[t]o update the Root Zone Database to reflect a change to the
19 registry operator for a gTLD, the registry must first secure an executed amendment
20 to its Registry Agreement in accordance with its contractual obligations with
21 ICANN.” Masilela Decl. ¶15, Ex. E, at 3. Of course, ZACR has presented no
22 evidence of such a contract or contract amendment.

23 ICANN’s process for re-delegation also dictates that certain contingencies are
24 required before re-delegation including technical testing and certification and
25 approval from the U.S. Department of Commerce pursuant to ICANN’s contract
26

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

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

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

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

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

25
 26
 27 ⁵ “A motion for reconsideration is not a vehicle to reargue the motion to present
 28 evidence which should have been raised before.” *United States v. Westlands Water
 Dist.*, 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001).

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

20 On March 8, 2016 counsel for Plaintiff emailed the CEO of ZACR, Lucky
21 Masilela with the first amended complaint and associated documents, the motion for
22 preliminary injunction papers, and the *ex parte* application for a temporary
23 restraining order. *See* Colón Decl. II ¶6, Ex. 4. Mr. Masilela did not respond.
24
25

26 ⁶ As used herein, “Colón Decl.” refers to the declaration of Sara C. Colón, Docket
27 No. 46, filed concurrently with DCA’s motion for preliminary injunction. As used
28 herein, “Colón Decl. II” refers to the declaration of Sara C. Colón filed in support of
this opposition.

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

3 As South Africa where ZACR is located is not a signatory to the Hague
4 Convention, on March 10, 2016, the Court ordered a private processes server to serve
5 ZACR by U.S. international mail, return receipt. *See* Docket No. 34. On March 4,
6 2016, the Court granted the TRO. Docket No. 27. On March 22, 2016 ZACR was
7 officially served pursuant to that order with the first amended complaint and
8 associated documents, the motion for preliminary injunction papers, the *ex parte*
9 application for a temporary restraining order, and ICANN's opposition papers to the
10 *ex parte* application. *See* Docket No. 55. Nevertheless, ZACR made no appearance
11 in the case, and yet again opted not to weigh in on the pending motion for a
12 preliminary injunction.

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

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

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

3 **III. LEGAL STANDARD**

4 **A. Standard for challenging a preliminary injunction.**

5 A motion for reconsideration is governed by Federal Rule of Civil Procedure
6 Rule 59(e) and should not be granted “absent highly unusual circumstances, unless
7 the district court is presented with newly discovered evidence, committed clear error,
8 or if there is an intervening change in the controlling law.” *Marilyn Nutraceuticals,*
9 *Inc. v. Mucos Pharma GmbH & Co.*, 571 F. 3d 873, 880 (9th Cir. 2009). A motion
10 for reconsideration "may *not* be used to raise arguments or present evidence for the
11 first time when they could reasonably have been raised earlier in the litigation." *Kona*
12 *Enters., Inc.*, 229 F.3d at 890; *See also Ausmus v. Lexington Ins. Co.*, No. 08-CV-
13 2342-L (LSP), 2009 U.S. Dist. LEXIS 63007, at *4-5 (S.D. Cal. July 15, 2009)
14 [“Motions to reconsider are not justified on the basis of new evidence which could
15 have been discovered prior to the court’s ruling”]. "A party seeking modification or
16 dissolution of an injunction bears the burden of establishing that a significant change
17 in facts or law warrants revision or dissolution of the injunction." *Sharp v. Weston*,
18 233 F.3d 1166, 1170 (9th Cir. 2000). Moreover, Central District Local Rule 7-18
19 dictates that reconsideration is allowed only when "(a) a material difference in fact
20 or law from that presented to the Court before such decision that in the exercise of
21 reasonable diligence could not have been known to the party moving for
22 reconsideration at the time of such decision, or (b) the emergence of new material
23 facts or a change of law occurring after the time of such decision, or (c) a manifest
24 showing of a failure to consider material facts presented to the Court before such
25 decision." LR 7-18.

26 **B. Standard for preliminary injunction.**

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

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

12 **IV. ARGUMENT**

13 **A. ZACR’s arguments are not timely.**

14 ZACR does not meet the standard for a motion to reconsider pursuant to Rule
15 59(e) or a motion to vacate pursuant to Rule 54 because they present arguments and
16 facts that could have been raised previously. ZACR argues several grounds on
17 which the Court should remove the preliminary injunction: first, it argues that the
18 Court made a factual error in its order with regard to DCA’s initial evaluation;
19 second, it argues that DCA did not have sufficient endorsements; third, it argues that
20 DCA’s application received 17 early warnings; fourth, it argues that the Court based
21 its ruling on irreparable harm on an incorrect assertion; and fifth ZACR argues that
22 its submission on the balance of harms should change the Court’s analysis. Docket
23 No. 85-5. With the exception of the argument regarding the Court’s error on the
24 status of DCA’s initial evaluation, ZACR could have made all of its arguments
25 *before* the Court issued its preliminary injunction because it was aware of the
26 proceeding on March 22, 2016, *at the very latest*. This was 13 days before the
27 hearing was scheduled and 21 days before the order was entered. On a motion for
28 reconsideration, the Court should not consider those arguments that could have been

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

5 ZACR’s motion is not properly construed as a motion to vacate because Rule
6 54 applies to motions based on “new circumstances that have arisen after the district
7 court granted the injunction.” *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.
8 3d 1119, 1124 (9th Cir. 2005). Nothing in ZACR’s motion points to a “new
9 circumstance” that arose “after” the Order. *See Aevoe Corp. v. AE Tech. Co.*, Case
10 No. 2:12-cv-0053-GMN-RJJ, 2012 U.S. Dist. LEXIS 30085 at *5 (D. Nev. March
11 7, 2012).

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

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

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

21 **i. The Court’s factual error is not determinative.**

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

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

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

20 Ultimately, ICANN did not follow its own rules in rejecting DCA's
21 endorsements. Under ICANN's own rules, withdrawal is proper only if there were
22 some conditions between the applicant and the endorser that were not fulfilled.
23 Bekele Decl. ¶7, Ex. 3, p.172. There were no such conditions in either the AUC's
24 or UNECA's endorsement letters to DCA and therefore the withdrawal of support
25

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

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

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

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

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

21 ZACR also argues that 17 early warnings somehow support rejection by the
22 Geographic Names Panel. *See* Motion 13:3-13:5. This is not true⁸. Those early
23 warnings were issued in 2012 as a part of the GAC process that was found invalid
24 by the IRP. *See* Masilela Decl. Ex. D; Bekele Decl. ¶5, Ex. 1, ¶115, p.60; ¶148,
25 p.67. The IRP issued its ruling in 2015. Bekele Decl. ¶5, Ex. 1. ICANN did not
26 reject DCA's application until 2016. Bekele Decl. ¶28, Ex. 18. ICANN never
27

28 _____
⁸ This is also not new evidence proper for the Court's consideration.

1 determined that those early warnings constituted an “objection” or any other basis
2 to deny DCA’s application pursuant to Guidebook Section 2.2.1.4.3. *See* Bekele
3 Decl. ¶28, Ex. 18.

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

8 **C. DCA will suffer irreparable harm if the Preliminary Injunction is**
9 **lifted.**

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

19 ZACR suggests that because ICANN has a re-delegation process⁹, DCA will
20 not be irreparably harmed if ICANN delegates .Africa to ZACR during the pendency
21 of this litigation. Motion at 13:19 – 14:4. Even if DCA’s statement that “.Africa can
22 be delegated only once” is incorrect *as a technical matter*, it is highly unlikely that
23 .Africa could ever be re-delegated to DCA from ZACR. As an initial matter,
24 registrar contracts are long term contracts for 10 year periods. *See* Masilela Decl.
25 ¶10. ICANN’s re-delegation process was clearly intended to apply to a situation
26 where a registry’s contract with ICANN was expiring (a “routine” re-delegation),
27

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

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

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

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

25 **D. The public interest does not favor vacating the Preliminary**
26 **Injunction.**

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

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

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

19 **E. The balance of harms weighs in DCA’s favor.**

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

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

9 **F. ZACR is not entitled to a bond.**

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

19 ZACR is not entitled to a bond because it has not been delegated .Africa. Any
 20 costs ZACR is sustaining in acting as though it was already delegated .Africa are the
 21 result of its failure to mitigate, not the preliminary injunction. ZACR claims the
 22 delay in delegation of .Africa has caused damages in the amount of \$20,000 per
 23 month. Masilela Decl. ¶11. ZACR claims that the \$20,000 per month includes costs
 24 for consultants, marketing, sponsorships and related expenses. Masilela Decl. ¶11.
 25 But ZACR is under no obligation to spend this amount.¹⁰ ZACR’s alleged losses
 26

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

1 are the result of ZACR and ICANN’s willful disregard of the IRP proceeding by
2 signing a registry agreement prior to the IRP’s final declaration. Colón Decl. ¶5,
3 Ex. 3. The IRP panel issued its final 63-page declaration in the matter on July 9,
4 2015, finding that ICANN should continue to refrain from delegating the .Africa
5 gTLD. Bekele Decl. ¶5, Ex. 1, p. 24. ZACR continued to spend these funds even
6 after DCA initiated its case against ICANN in state court and added ZACR as a
7 defendant to the case after ICANN removed it to federal court. Moreover, the delay
8 in delegation has been caused by ICANN’s failure to follow its own bylaws and
9 rules. Therefore, these “losses” were caused by ZACR’s voluntary acts in the face
10 of uncertainty and ICANN’s wrongdoing, not the preliminary injunction, and the
11 Court should not base a bond amount on these figures.

12 Moreover, ZACR has not presented sufficient evidence that it will suffer
13 damages as a result of the injunction. In *Nintendo of Am., Inc. v. Lewis Galoob Toys,*
14 *Inc. (Nintendo)*, on which ZACR relies, the court executed a \$15 million bond in
15 favor of Lewis Galoob Toy, Inc., after a meticulous accounting proved the
16 preliminary injunction caused Galoob at least \$15 million in damages. 16 F.3d 1032,
17 1033 (9th Cir. 1994). To determine Galoob’s damages the court considered: 1)
18 Galoob’s received order for over 550,000 Game Genie units; 2) the “Canadian
19 multiplier method”, which showed that, in general, a product will sell ten to twelve
20 times as well in the United States as in Canada; and 3) multiplied Galoob’s 1.6
21 million unit sales lost by the net wholesale price of \$34.28, times the 27.6 percent
22 profit margin reaching a loss of at least \$15,138,048 in lost profits due to the
23 injunction *Id.* at 1034-1035.

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

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

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

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

21 Finally, ZACR cites *Mead Johnson & Co., v. Abbott Labs* and Moore's
22 Federal Practice §65.50 (a Seventh Circuit case and a treatise) in support of its
23 argument that bond should be set on the "high side" are not precedential. 201 F.3d
24 883, 888 (7th Cir. 2000). *Mead Johnson*, is also distinguishable because the court's
25 reasoning for setting the bond high was to hold businesses' in check from imposing
26 unnecessary costs on their "rivals." *Id.* ["Trademark suits, like much other
27 commercial litigation, often are characterized by firms' desire to heap costs on their
28 rivals, imposing marketplace losses out of proportion to the legal fees. That's why

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

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

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

12 **V. CONCLUSION**

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

15
16 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