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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 DECLARATION OF MOKGABUDI
27 LUCKY MASILELA**

28 Date: June 6, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Plaintiffs’
Opposition to Defendant ZA Central
Registry, NPC’s Motion to Reconsider
and Vacate; and Declarations of Sophia
Bekele Eshete and Sara C. Colón]

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

6 **PLAINTIFF’S EVIDENTIARY OBJECTIONS**

Masilela Decl. ¶	DCA Objection	Sustained	Overruled
<p>8 ¶3: “Due to its well-known 9 reputation for independence 10 and neutrality, as well as 11 technical competence and 12 operational excellence, 13 ZACR is the single largest 14 domain name registry on 15 the African continent.”</p>	<p>Lacks personal knowledge, lacks foundation [Fed. R. Evid. 602].</p>		
<p>16 ¶5: “I am familiar with the 17 ICANN selection criteria 18 for the gTLD. ICANN set 19 forth selection criteria in an 20 Applicant Guidebook. 21 Among other things, 22 ICANN made clear that 23 because the .Africa gTLD 24 represented the name of a 25 geographic region, an 26 applicant would need to 27 provide documentation 28 showing support from at</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>		

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<p>least 60% of the 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/applicants/agb par.2.2.1.4.2.4.”</p>			
<p>¶6 “ZACR submitted its application to ICANN with the 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</p>	<p>The letters are the best evidence of the documents [Fed. R. Evid 1002].</p>		

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<p>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 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 on applicant. By way of background, the AUC RFP process began because it was well known that ICANN was considering a new gTLD program, including .Africa. It was in anticipation of this new gTLD program that the</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 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</p>		

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<p>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 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>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>¶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</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. 56(c)(4)]. Biased</p>		

<p>1 the Agreement has already 2 lapsed without any benefit 3 to ZACR. This delay has 4 resulted in unforeseen and 5 mounting costs, as well as 6 lost opportunities, for the 7 .Africa project.”</p>	<p>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, ¶¶13-19.</p>		
<p>19 ¶11: “ZACR has incurred 20 considerable expenses both 21 prior to and after entering 22 into the Registry 23 Agreement. The current 24 and continuing cost due to 25 the delay in the delegation 26 is running at approximately 27 \$20,000 per month. This is 28 based upon a review of the</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)].</p>		

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<p>monthly costs incurred during the last 10 months 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 averaged the monthly expenses for the .Africa project and where necessary converted expenditures from South African Rand to U.S. dollars.</p>	<p>Irrelevant and vague [Fed. R. Evid. 403].</p>		
<p>¶12: “The Loss of Net Income after Tax (opportunity costs) suffered</p>	<p>Lacks foundation, lacks personal knowledge, speculative and conclusory</p>		

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<p>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 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 domain name will have faded, and persons who may have sought to register will have lost interest.”</p>	<p>[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 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>		
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<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 gTLD without incurring the cost to develop it.”</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 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. See Dkt. No. 64 - First Amended Complaint, Ex. A, pg. 31-32, ¶¶13-19.</p>		
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<p>¶14: “In my role as ZACR’s CEO, and based upon 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 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</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); <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 no weight because the declarant did not have personal knowledge.” [emphasis added]). Hearsay [Fed. R. Evid. 801].</p>		
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<p>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 use the revenues to fund various African domain name and Internet related developmental projects which are not 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 feasible. In fact, ICANN has prepared for this precise eventuality and issued a</p>	<p>The manual is the best evidence of the document [Fed. R. Evid. 1002]. Hearsay [Fed. R. Evid. 801].</p>		

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<p>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 Exhibit E. It is also available on ICANN’s website: http://www.icann.org/en/system/files/files/gtld-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>1 ¶17: “I have read Plaintiff’s 2 First Amended Complaint, 3 including the allegation 4 against ZACR. Contrary to 5 what is asserted in the First 6 Amended Complaint, there 7 was no fraud or conspiracy 8 between ZACR and 9 ICANN. Nor was there any 10 fraud or conspiracy with the 11 AUC. Similarly, there was 12 no interference with 13 Plaintiff’s application to 14 ICANN. At all times, 15 ZACR competed fairly and 16 abided ICANN’s 17 procedures in seeking the 18 award for the generic top 19 level domain .Africa.</p>	<p>Lacks foundation and conclusory [Fed. R. Evid. 602].</p>	
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22 Dated: May 16, 2016

BROWN NERI & SMITH LLP

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

26 *Attorneys for Plaintiff*
 27 DOTCONNECTAFRICA TRUST