

1 David W. Kesselman (SBN 203838)  
dkesselman@kbslaw.com  
2 Amy T. Brantly (SBN 210893)  
abrantly@kbslaw.com  
3 Kara D. McDonald (SBN 225540)  
kmcdonald@kbslaw.com  
4 KESSELMAN BRANTLY STOCKINGER LLP  
5 1230 Rosecrans Ave., Suite 690  
Manhattan Beach, CA 90266  
6 Telephone: (310) 307-4555  
7 Facsimile: (310) 307-4570  
8 *Attorneys for Intervenor*  
**ZA Central Registry, NPC**

9  
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a  
13 Mauritius Charitable Trust,

14  
15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, a  
18 California corporation; ZA Central Registry,  
a South African non-profit company; and  
19 DOES 1 through 50, inclusive,  
20 Defendants.

CASE NO. BC607494

*Assigned for all purposes to the Honorable  
Howard Halm*

**INTERVENOR ZA CENTRAL REGISTRY,  
NPC'S OPPOSITION TO PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

[Filed concurrently: Declarations of  
Mokgabudi Lucky Masilela; Amy T. Brantly;  
Moctar Yedaly; and Declaration II of  
Mokgabudi Lucky Masilela in Support of  
Opposition to Plaintiff's Motion for Preliminary  
Injunction]

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1 **I. INTRODUCTION**

2 This is now plaintiff DotConnectAfrica Trust’s (“DCA”) second request for a  
3 preliminary injunction before this Court. After reviewing extensive written submissions and  
4 allowing almost two hours of oral argument, this Court properly denied DCA’s prior motion.  
5 Not content with the Court’s ruling, DCA again seeks an order preventing defendant Internet  
6 Corporation For Assigned Names and Numbers (“ICANN”) from delegating .Africa to  
7 intervenor ZA Central Registry, NPC (“ZACR”) while this litigation is pending. Yet nothing  
8 has changed. Although DCA now grounds its motion on claims for intentional  
9 misrepresentation (Second Cause of Action) and unfair competition (Fifth Cause of Action), it  
10 still has no likelihood of success because, at bottom, the record is undisputed that DCA never  
11 had the requisite 60% support of African governments during the application process. And  
12 DCA still cannot demonstrate irreparable harm for the very same reasons the first motion was  
13 denied. At the same time, the ongoing harm to ZACR and the African people is manifest. In  
14 short, DCA’s new motion should meet the same fate as DCA’s prior motion: it should be  
15 denied.

16 **II. FACTS**

17 **A. ZACR Is An Experienced Domain Name Registry**

18 ZACR is a South African non-profit company with its principal place of business in  
19 Midrand, South Africa. Declaration of Mokgabudi Lucky Masilela In Support of Opposition to  
20 Motion for Preliminary Injunction, filed concurrently herewith (“Masilela Decl. II”) ¶ 2. ZACR  
21 was originally formed in 1988 under the name UniForum S.A. *Id.* ¶ 3. The company was  
22 formed to promote open standards and systems in computer hardware and software. *Id.* In  
23 1995, the company was assigned the administration rights for the South African domain name,  
24 “co.za.” *Id.* Today ZACR has registered over 1 million co.za domain name registrations – or  
25 about 95% of the total registrations for “.za.” *Id.* Due to its well-known reputation for  
26 independence and neutrality, as well as technical competence and operational excellence, ZACR  
27 is the single largest domain name registry on the African continent and has significant  
28 experience with ICANN protocols. *Id.* ¶ 3.

1           **B.       ZACR and DCA Apply for the .Africa gTLD**

2           In 2012, ICANN opened an application process for internet domain name operators to  
3 apply for new gTLDs, including “.Africa.” The competition for .Africa came down to two  
4 African-based entities, ZACR and DCA. Declaration of Mokgabudi Lucky Masilela in Support  
5 of Opposition to Motion for Preliminary Injunction, filed December 9, 2016 (“Masilela Decl.  
6 I”) ¶ 4. As set forth in ICANN’s Applicant Guidebook (the “Guidebook”) governing this new  
7 gTLD process, a necessary criteria for the award of a geographic name, including .Africa, is that  
8 an applicant demonstrate that at least 60% of the governments in the affected region (Africa)  
9 support the application. Declaration of Sophia Bekele Eschete In Support of Ex Parte  
10 Application For A Temporary Restraining Order, filed January 4, 2017 (“Bekele Decl. I”) Ex. 3  
11 at 2-18; Declaration of Mark McFadden In Support of Opposition to Motion for Preliminary  
12 Injunction (“McFadden Decl.”) ¶ 4. Further, the criteria did not permit more than one objection  
13 from a government or public entity associated with the geographic area. Masilela Decl. I ¶ 5;  
14 Bekele Decl. I Ex. 3 at 2-18.

15           **C.       The Governments of Africa Support ZACR But Not DCA**

16           ZACR had the full support of all 53 member states of the African Union Commission  
17 (“AUC”) and the support of Morocco throughout the application process.<sup>1</sup> Masilela Decl. I Exs.  
18 B & C; Declaration of Moctar Yedaly In Support of Opposition to Motion for Preliminary  
19 Injunction, filed December 9, 2016 (“Yedaly Decl.”) ¶ 3. This was because the AUC had  
20 previously put out a public request for proposal (“RFP”) and selected ZACR as the applicant it  
21 would support for the .Africa gTLD application. As part of the AUC’s open RFP process, the  
22 AUC required all applicants for AUC endorsement of .Africa to agree that the AUC would be a  
23 partner in the .Africa process. Masilela Decl. II ¶8, Ex. C. DCA chose not to participate in the  
24 AUC’s RFP process. Masilela Decl. I ¶ 7 & Ex. D; Yedaly Decl. ¶¶ 7-11.

25           Instead, DCA pressed forward, based upon two outdated “endorsement” letters that were  
26

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27 <sup>1</sup> The AUC is the secretariat of the African Union entrusted with the union’s executive  
28 functions. Yedaly Decl. ¶2. The AUC plays a central role in the day-to-day management of the  
African Union. *Id.* ¶4. The AUC represents the Union and defends its interests. *Id.*

1 obtained years before the application process began – a 2009 letter from the AUC and a 2008  
2 letter from the United Nations Economic Commission for Africa (“UNECA”). Bekele Decl. I  
3 Exs. 6 & 8; Yedaly Decl. ¶¶ 9, 15. The AUC expressly repudiated its letter in 2010 – two years  
4 before the application process began. Bekele Decl. I Ex. 7; Yedaly Decl. ¶¶ 10-11. A  
5 government may withdraw support to an applicant at any time in the application process.  
6 McFadden Decl. ¶ 8. And, DCA itself acknowledged that the AUC had withdrawn any  
7 previous support in a letter to the AUC on January 26, 2011. Yedaly Decl. ¶ 11, Ex. D.

8           Moreover, even beyond the 2010 withdrawal letter, the AUC made clear throughout the  
9 application process that it did not support DCA’s application, and that ZACR was “the only  
10 application officially endorsed by the AUC and hence African member states. . . . Any reliance  
11 by DCA in its application . . . proclaiming support or endorsement by the AUC must be  
12 dismissed. The AUC does not support the DCA application and, if any such support was  
13 initially provided, it has subsequently been withdrawn with full knowledge of DCA even prior  
14 to the commencement of ICANN’s new gTLD application process.” Masilela Decl. I Ex. D;  
15 Yedaly Decl. ¶14 Ex. I. Similarly, UNECA wrote to ICANN on September 21, 2015 to advise  
16 that it was not qualified to support DCA’s application: “[UN]ECA as a United Nations entity is  
17 neither a government nor a public authority and therefore is not qualified to issue a letter of  
18 support for a prospective applicant . . . .” Bekele Decl. I Ex. 9; Yedaly Decl. ¶15, Ex. J.  
19 Additionally, ICANN received 17 “Early Warning Notices” from individual African countries  
20 raising significant concerns about DCA’s application. Masilela Decl. I ¶ 9, Ex. E; Yedaly Decl.  
21 ¶ 13, Ex. H.

22           Thus, there is no question that DCA’s application did not have support from 60% of the  
23 countries in Africa and could not meet the necessary criteria to be awarded .Africa.

#### 24           **D.       The Government Advisory Committee Objects to DCA’s Application**

25           DCA’s application was halted in 2013 when ICANN’s Government Advisory  
26 Committee (“GAC”), a committee made up of government officials from throughout the world,  
27 issued “consensus advice” that DCA’s application should not proceed. Declaration of Christine  
28 Willett In Support of Opposition to Motion for Preliminary Injunction, filed January 20, 2017

1 (“Willett Decl.”) ¶ 10; Declaration of Akram Atallah In Support of Opposition to Motion for  
2 Preliminary Injunction, filed December 9, 2016 (“Atallah Decl.”) ¶ 5; Bekele Decl. I Ex. 20 at  
3 3. Based upon this GAC advice, ICANN determined that DCA’s application should not  
4 proceed. Willett Decl. ¶ 10.

5 **E. DCA Seeks Review of ICANN’s Decision**

6 Thereafter, DCA challenged ICANN’s decision and filed a request for review by an  
7 Independent Review Process (“IRP”) Panel. Bekele Decl. I Ex. 1. During the IRP process,  
8 DCA argued, among other things, that ICANN’s reliance on the GAC advice was improper  
9 because of supposed undue influence by the AUC. *Id.* at 24-25. At the time that DCA’s  
10 application was halted in 2013, DCA’s application was pending before ICANN’s Geographic  
11 Names Panel which acted independently as a third party contractor to determine whether DCA  
12 had the requisite government support in a region. Willett Decl. ¶ 10; McFadden Decl. ¶ 11. At  
13 the time that DCA’s application was halted, DCA’s application had **not** yet passed the  
14 Geographic Names Panel review. *Id.*; Brantly Decl. Ex. 1 (Bekele Tr. at 206:14-22).

15 In its “Final Declaration” issued on July 9, 2015, the IRP Panel ruled in favor of DCA  
16 on the limited procedural basis that the GAC consensus advice lacked transparency. Bekele  
17 Decl. I Ex. 1 at ¶¶ 105-115. Essentially, the IRP panel expressed concern that ICANN should  
18 have “investigate[d] the matter further” before halting DCA’s application. *Id.* at ¶ 113. The  
19 IRP panel expressly declined to make any findings of wrongdoing between ICANN and ZACR.  
20 *Id.* at ¶ 117. Further, the IRP panel rejected DCA’s request that DCA be deemed to have  
21 demonstrated support from 60% of the countries in Africa. *Id.* at ¶¶ 148-151; Brantly Decl. Ex.  
22 1 (Bekele Tr. at 200:12-201:19). Rather, the IRP panel recommended only that ICANN allow  
23 DCA’s application to proceed through the remainder of the process. Bekele Decl. I Ex. 1 at ¶  
24 149; Brantly Decl. Ex. 1 (Bekele Tr. at 203:4-7). ICANN’s Board adopted the recommendation  
25 and, in July 2015, placed DCA’s application back to the precise point in the process where it  
26 had been halted – the Geographic Names Panel review. Willett Decl. ¶ 11; Brantly Decl. Ex. 2  
27 (Willett Tr. at 62:16-63:3). Ms. Bekele of DCA now admits in deposition, contrary to past  
28 arguments made by DCA’s counsel, that DCA did not pass the Geographic Names Panel review

1 before the GAC advice issued, and had no basis to “skip” this process. Brantly Decl. Ex. 1  
2 (Bekele Tr. at 206:14-22; 203:4-7).

3 **F. An Independent Contractor Determines the Requisite Government Support**

4 ICANN contracted with an independent, third party contractor, InterConnect  
5 Communications (“ICC”), to perform Geographic Names Panel evaluation work. *Id.* at Ex. 2  
6 (Willet Tr. at 18:8-12); McFadden Decl. ¶ 2. ICC was tasked with verifying the relevance and  
7 authenticity of letters of support of a geographic name pursuant to Section 2.2.1.4 and Section  
8 2.3.1 of the Guidebook. McFadden Decl. ¶ 3.

9 **1. ZACR Passes Geographic Name Panel Review**

10 Upon reviewing ZACR’s AUC letter of support, the ICC issued clarifying questions to  
11 ZACR requesting that it fix deficiencies in its letter of support.<sup>2</sup> Masilela Decl. I ¶ 6, Ex. A.  
12 ZACR complied and submitted a new letter in compliance with the Guidebook requirements on  
13 or about July 2, 2013. *Id.* ¶ 6, Ex. B; McFadden Decl. ¶ 12; Brantly Decl. Ex. 2 (Willet Tr. 21-  
14 22); Yedaly Decl. ¶ 12, Ex. E.<sup>3</sup> ZACR was able to obtain a revised AUC letter because it had  
15 the support and cooperation of the AUC.<sup>4</sup> Masilela Decl. I ¶¶ 6-8; Yedaly Decl. ¶ 12. After the  
16 GAC advice issued against DCA’s application, ZACR was the only remaining applicant for  
17 .Africa. Having met all of ICANN’s requirements to operate the .Africa gTLD, ZACR and  
18 ICANN entered into a Registry Agreement on March 24, 2014. Masilela Decl. I ¶ 10.

19 **2. DCA Fails the Geographic Name Panel Review**

20 Not surprisingly, once ICANN instructed ICC to conduct its review of the DCA  
21

22 <sup>2</sup> The ICC’s clarifying questions sent to ZACR in 2013 were virtually identical to those sent to  
23 DCA in 2015. *Compare* Masilela Decl. I Ex. A *with* Bekele Decl. I Ex. 13. In both instances,  
24 the ICC determined that the initial letters of support were deficient.

25 <sup>3</sup> Morocco, the only country in Africa that is not a member of the AUC, separately provided a  
26 letter of support to ZACR. Masilela Decl. I ¶6, Ex. C.

27 <sup>4</sup> DCA’s claim that ICANN “unfairly” assisted ZACR by providing a template and language to  
28 comply with the Guidebook requirements is without basis and immaterial. First, as ICANN  
executives testified, ICANN has assisted other applicants in a similar manner and would have  
assisted DCA if it had bothered to ask. Brantly Decl. Ex. 2 (Willet Tr. at 43:3-13); Brantly  
Decl. Ex. 3 (Atallah Tr. at 133:15-134:10). Second, even if DCA had requested ICANN’s  
assistance in fixing the deficiencies in its letter, the AUC still would not have signed the revised  
letter because it did not support DCA’s application for .Africa. Yedaly Decl. ¶¶ 13-14.



1 application, ICC determined that DCA failed to submit the required documentation  
2 demonstrating that it had 60% support of the African countries. Willett Decl. ¶¶ 11-12;  
3 McFadden Decl. ¶ 13-15. When confronted with clarifying questions to address this  
4 fundamental deficiency, DCA was unable to comply because it unquestionably did not have the  
5 support of AUC or UNECA. Yedaly Decl. ¶ 13-15, Exs. H, I, J. DCA did not even attempt to  
6 fix the deficiencies in its letter of support or request more time to do so (which ICANN would  
7 have granted), because it knew full well that the AUC and UNECA did not support its  
8 application. Brantly Ex. 2 (Willett Tr. 68:15-20; 66:12-67:4). Instead, DCA took the position  
9 that its documentation was sufficient and made no attempt to get a revised letter from the AUC  
10 or UNECA. McFadden Decl. ¶ 15; Willett Decl. ¶¶ 11, 13; Brantly Decl. Ex. 1 (Bekele Tr. at  
11 179:18-22). As a consequence of the deficiencies found by ICC, on October 13, 2015, ICANN  
12 issued an Initial Evaluation Report advising DCA that its application had not passed the  
13 Geographic Names Review, but that DCA was eligible for an “Extended Evaluation” as  
14 provided for in the Guidebook. Willett Decl. ¶ 12.

15 The Extended Evaluation only highlighted the same problem. DCA was again unable to  
16 fix the deficiencies in its letter because it did not have the support of the AUC. Yedaly Decl. ¶¶  
17 13-15, Exs. H, I, J. DCA again took the position that its documentation was sufficient.  
18 McFadden Decl. ¶15; Willett Decl. ¶ 13. Accordingly, on February 17, 2016, upon ICC’s  
19 recommendation, ICANN notified DCA that its application would not proceed. Willett Decl. ¶  
20 15; McFadden Decl. ¶14; Bekele Decl. Ex. 14.

### 21 **G. Redelegating A gTLD Is An Available Procedure**

22 ICANN has the power to redelegate a gTLD from one operator to another, and has done  
23 so on dozens of occasions. Atallah Decl. ¶ 13; Masilela Decl. I ¶¶ 14-16, Exs. G, H, I. Indeed,  
24 in 2013, ICANN published a manual with step-by-step instructions outlining the process for  
25 re delegating a gTLD like .Africa. Masilela Decl. I ¶ 16; Ex. I. This manual is needed precisely  
26 because ICANN does not delegate gTLD’s in perpetuity. The transfer of a gTLD to a new  
27 registry operator is entirely “possible, feasible and consistent with ICANN’s prior conduct.”  
28 Atallah Decl. ¶ 13.

1           **H.       ZACR and the People of Africa Are Harmed By The Delay In Delegation**  
2                               **of .Africa**

3           The Registry Agreement between ICANN and ZACR was effective on March 24, 2014  
4 and runs for ten years. Masilela Decl. I ¶ 10. Yet, over two years into the Agreement, the  
5 .Africa gTLD has still not been delegated to ZACR. *Id.* In effect, 20% of the period of the  
6 Agreement has already lapsed without any benefit to ZACR. *Id.* This delay has resulted in  
7 unforeseen and mounting costs, as well as lost opportunities for the .Africa project. *Id.* ZACR  
8 has incurred considerable expenses both prior to and after entering into the Registry Agreement.  
9 *Id.* ¶ 11. The current and continuing monthly cost due to the delay in the delegation is running  
10 at approximately \$16,632 per month. *Id.* Estimated loss of net income after tax (opportunity  
11 costs) suffered by ZACR from the date of planned delegation following the Registry Agreement  
12 up to December 1, 2016 are estimated to be \$15.5 million – of which approximately \$5.8  
13 million would have been donated to the dotAfrica Foundation for African online development.  
14 *Id.* ¶ 12. Until such time as delegation takes place, the .Africa gTLD in effect stagnates and  
15 generates no income and no value in the marketplace. The ongoing delay is also prejudicial to  
16 the gTLD itself (no matter who the operator is) in that the initial interest surrounding the launch  
17 of this domain name will have faded, and persons who may have sought to register will have  
18 lost interest. *Id.*

19           The African people are also harmed by the delay in the delegation. *Id.* ¶ 17; Yedaly  
20 Decl. ¶¶ 6, 17-18. Political, business and civic leaders from throughout the African Union have  
21 expressed concern about the delay in delegating .Africa. Yedaly Decl. ¶ 18. The ongoing delay  
22 is depriving the people of the African continent of an important opportunity to expand internet  
23 domain capabilities. *Id.* The .Africa domain name would add brand value to the continent and  
24 would provide a platform that connects products, businesses and individuals that have interests  
25 in Africa. Masilela Decl. I ¶ 17. As the Head of Information Society Division within the AUC  
26 stated: “The launch of the .Africa domain is of historic significance to the African continent”  
27 and “will provide secure, world-class technical infrastructure to leverage the continent’s socio-  
28 economic capacity and potential.” Yedaly Decl. ¶ 6. And, African citizens do not understand

1 why .Africa is not operational when other continents have their own unique gTLDs, i.e.  
2 “.ASIA” and “.EU”, that have been available for years. *Id.* ¶18.

3 The African people are further harmed because the agreement between ZACR and the  
4 AUC required that a foundation be created upon delegation and that a significant portion of the  
5 revenues received from second level domain delegations (for example: xyz.africa) be directed to  
6 the “dotAfrica Foundation.” Masilela Decl. ¶17; Yedaly Decl. ¶ 19. The Foundation would use  
7 the revenues to fund various African domain name and Internet related developmental projects  
8 which are now delayed as a result of DCA’s lawsuit. *Id.*

### 9 **III. BRIEF SUMMARY OF PROCEDURAL POSTURE**<sup>5</sup>

10 On January 20, 2016, DCA filed the instant lawsuit in the Los Angeles Superior Court.  
11 After the Court denied DCA’s motion for a TRO, ICANN removed the case to federal court.  
12 On February 8, 2016, DCA filed the operative First Amended Complaint and added ZACR as a  
13 defendant. On June 20, 2016, the district court granted ZACR’s motion to dismiss. Before  
14 ZACR had been served with the lawsuit in South Africa, DCA filed a motion for preliminary  
15 injunction in the district court. With briefing limited to submissions by DCA and ICANN, the  
16 district court granted DCA’s request for a preliminary injunction. It did so based upon a series  
17 of key factual errors, including a significant mistake in which the court erroneously believed  
18 that DCA had already satisfied the requirement for government support in the region. When  
19 ZACR entered the case, it filed a motion for reconsideration which ICANN joined. The district  
20 court denied the request and ZACR and ICANN filed appeals to the Ninth Circuit (subsequently  
21 consolidated). On October 19, 2016, the federal district court granted ZACR’s motion to  
22 intervene as to DCA’s tenth cause of action, and further held that ZACR is an indispensable  
23 party to that claim. Because the finding on indispensability destroyed the court’s diversity  
24 jurisdiction, the district court remanded the case to this Court.

25 Thereafter, DCA filed a motion for preliminary injunction before this Court. This Court  
26 held a hearing on December 22, 2016, and provided the parties almost 2 hours to extensively  
27

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28 <sup>5</sup> A more complete procedural history can be found in ZACR’s prior opposition brief.

1 address DCA’s motion. Ultimately, this Court issued an order denying DCA’s motion.

2 On January 4, 2017, this Court denied DCA’s an ex parte application for a temporary  
3 restraining order to prevent ICANN from delegating .Africa to ZACR. This Court further  
4 clarified that the prior order denying DCA’s preliminary injunction motion was based upon all  
5 arguments submitted by both ICANN and ZACR. The Court allowed DCA to deem its TRO  
6 papers as a new motion for preliminary injunction.

7 **IV. LEGAL STANDARD**

8 A preliminary injunction is an “extraordinary remedy.” *Gleaves v. Waters*, 175 Cal.  
9 App. 3d 413, 417 (1985). The burden is on the plaintiff to show all elements necessary to  
10 support a preliminary injunction. *O’Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1481  
11 (2006). “In deciding whether to grant a preliminary injunction, the trial court must weigh two  
12 interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the  
13 merits; and (2) the relative harm to the parties from issuance or nonissuance of the injunction.  
14 *Id.* at 1463 (citation omitted). However, a court must “deny a preliminary injunction unless  
15 there is a reasonable probability that plaintiff will be successful in the assertion of his rights.”  
16 *Continental Banking Co. v. Katz*, 68 Cal. 2d 512 (1968); *O’Connell*, 141 Cal. App. 4th at 1463  
17 (trial court cannot grant a preliminary injunction, “regardless of the balance of interim harm,  
18 unless there is some possibility that the plaintiff would ultimately prevail on the merits of the  
19 claim.”) Moreover, in evaluating the interrelated factors, courts will consider “the degree of  
20 adverse effect on the public interest or interests of third parties the granting of the injunction  
21 will cause.” *Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 435 (2004) (citing *Cohen v.*  
22 *Board of Supervisors*, 40 Cal. 3d 277, 286 n.5 (1985)). It is well accepted that intervening  
23 parties are entitled to challenge a preliminary injunction. *See, e.g., White v. Davis*, 30 Cal. 4th  
24 528, 536 & n.2 (2003) (intervening state employees challenged and appealed injunction order).

25 **V. ARGUMENT<sup>6</sup>**

26 **A. DCA Has No Likelihood of Prevailing On the Merits**

27  
28 <sup>6</sup> ZACR joins in and adopts the arguments made in ICANN’s Opposition.

1           The record is undisputed that DCA never had the support of 60% of African  
2 governments at any time during the actual application process for the .Africa gTLD. The AUC  
3 expressly withdrew its earlier “endorsement” of DCA in April 2010 – almost two years *before*  
4 ICANN opened the application process for the new gTLD. *See* Yedaly Decl. ¶¶ 10-11; Bekele  
5 Decl. I Ex. 7.

6           Indeed, DCA itself acknowledged during the IRP proceeding that it lacked the required  
7 support of African governments. In paragraph 119 of the IRP Final Declaration, the Panel noted  
8 that DCA expressly requested a finding that DCA “be granted a period of no less than 18  
9 months to obtain Government support as set out in the [Guidebook] and interpreted by the  
10 Geographic Names Panel, or accept that the requirement is satisfied as a result of the  
11 endorsement of DCA Trust’s application by UNECA.” Bekele Decl. Ex. 1 at ¶ 119. The only  
12 reason DCA would make this request is because it knew that it did not have the required  
13 government support. The IRP panel chose not to grant DCA’s request.

14           Instead, and contrary to what DCA now implies, the IRP panel was quite deliberate in  
15 recommending only that ICANN allow DCA’s application to proceed through the remainder of  
16 the process. *Id.* at ¶ 149. That is precisely what ICANN did. Willet Decl. ¶ 11. But of course  
17 DCA could not make it through that process because, as DCA fully knew, it lacked 60% support  
18 of African governments.

19           Nevertheless, DCA now suggests that the ultimate decision to decline DCA’s  
20 application was somehow the result of intentional misrepresentations and unfair business  
21 practices because ICANN promised a fair and transparent process. DCA further claims that it  
22 would not have applied for .Africa, paid the non-refundable fee<sup>7</sup>, or spent years campaigning for  
23 endorsements if it knew ICANN would have favored ZACR throughout the process. Yet, DCA  
24 can proffer no support for its assertions.

25           First, DCA cannot show any harm from its complaints about the GAC procedure or the  
26 IRP process because its challenge to the GAC consensus advice was successful. The IRP Panel

27 \_\_\_\_\_  
28 <sup>7</sup> DCA could have sought a refund at several points in the application process. Bekele Decl. I  
Ex. 3 at 1-40] It chose not to do so.

1 ruled that the GAC advice was not sufficiently transparent and ordered ICANN to place DCA’s  
2 application back where it left off in the application process. There is no dispute among *any* of  
3 the parties that ICANN complied with the IRP’s Panel’s mandate. Willett Decl. ¶ 11; Brantly  
4 Decl. Ex. 2 (Willett Tr. at 62:16-63:3); Brantly Decl. Ex. 1 (Bekele Tr. at 206:14-22; 203:4-7)  
5 (admitting that DCA did not pass the Geographic Names review before GAC advice issued and  
6 that DCA had no basis to “skip” this process).

7 Second, DCA cannot seriously contend that ICANN favored ZACR throughout the  
8 process. *Both* DCA *and* ZACR were asked during the geographic names evaluation to provide  
9 updated and modified letters of support to comport with Guidebook requirements. Masilela  
10 Decl. I ¶ A; Bekele Decl. I ¶¶ 6, 16, Exs. 11, 13. Indeed, both entities received virtually  
11 identical clarifying questions from the ICC. *Id.* ZACR, which had the support of the AUC, was  
12 able to modify its letter. Masilela Decl. I ¶ B. DCA, relying on a repudiated letter, and without  
13 the AUC’s backing, was unable to comply. Bekele Decl. I Ex. 7; Yedaly Decl. ¶¶ 13-15, Exs.  
14 H, I, J. There was no unfairness – DCA simply did not have the requisite support among the  
15 African governments.<sup>8</sup>

16 Moreover, DCA’s suggestion that the clarifying question at issue was discretionary is  
17 flatly contradicted by the record. The prefatory language above the specific clarifying questions  
18 makes clear that “each letter of support . . . *must meet the following criteria* . . . .” *See* Bekele  
19 Decl. I Ex. 11; Masilela Ex. A. It is difficult to imagine a clearer expression of what is  
20 mandatory than using the word “must” in the prefatory sentence. And given the importance of

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21  
22 <sup>8</sup> DCA also represents that the AUC “only ‘selected’ ZACR to apply for .Africa because ZACR  
23 agreed to assign ‘all rights relating to the dotAfrica TLD’ to the AUC. DCA is wrong on this  
24 point, too. As fully set forth in the AUC’s 2011 RFP application – which was available to all  
25 parties including DCA – the AUC made clear that the prevailing entity would become a partner  
26 with the AUC in the .Africa project. Masilela Decl. II, ¶8 Ex. C. DCA could have participated  
27 in the RFP and, if it had prevailed, then it too would have become partners with the AUC in the  
28 .Africa project. DCA chose not to participate. Masilela Decl. I. ¶ 7, Ex. D; Yedaly Decl. ¶¶ 7-  
11. Moreover, ICANN has no prohibition on an assignment of rights and ICANN officials  
noted situations where other operators have done so. *See* Willett Decl. ¶ 18; Brantly Decl. Ex. 2  
(Willett Tr. at 48:9-49:19); Ex. 3 (Atallah Tr. at 129:2-130:2). DCA’s further representation  
that the members of the AUC committee who selected ZACR were also members of ZACR-  
affiliated organizations is also unsubstantiated and without basis. Masilela Decl. II ¶ 7.

1 .Africa to the African governments, it only makes sense that a letter of support “should  
2 demonstrate” a governmental entity’s understanding of the process. *See id.*

3 In short, DCA has no likelihood of success on the merits and its motion for preliminary  
4 injunction should, once again, be denied. *See Metro Traffic Control, Inc. v. Shadow Traffic*  
5 *Network*, 22 Cal. App. 4th 853, 863-64 (1994) (affirming denial of preliminary injunction where  
6 plaintiff was unlikely to prevail on the merits); *Scates v. Rydingsword*, 229 Cal. App. 3d 1085,  
7 1096 (1991) (injunction should be denied if no possibility of success even if plaintiff can show  
8 harm); *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d 300, 305  
9 (1967).

10 **B. DCA Cannot Show Irreparable Harm, While the Harm to ZACR and the**  
11 **African People Is Substantial**

12 **1. No Harm to DCA**

13 As this Court has already properly ruled, DCA cannot demonstrate irreparable harm.<sup>9</sup>  
14 Brantly Decl. Ex. 4. Nevertheless, DCA again claims that its funding will cease if .Africa is  
15 delegated and it will be destroyed as a business entity. This statement is entirely duplicitous  
16 because, as Ms. Bekele conceded in her deposition, DCA Registry – the entity created to  
17 operate .Africa – has never been an operational entity and has no employees.<sup>10</sup> Brantly Decl.  
18 Ex. 1 (Bekele Dep. at 212:5-25; 244:12-16).

19 DCA also claims that if .Africa is delegated to ZACR, DCA will be denied the premium  
20 domain name “sunrise” registration period. First, DCA misunderstands the purpose of the  
21 “sunrise” registration period. The “sunrise” process is not intended to allocate premium names  
22 to the highest bidder, rather it is a compulsory protection mechanism prescribed by ICANN to

23 \_\_\_\_\_  
24 <sup>9</sup> DCA obtained the initial preliminary injunction order in the district court by asserting that  
25 “.Africa can be delegated only once.” DCA’s representation was false. Atallah Decl. ¶13;  
26 Masilela Decl. I ¶¶ 14-16, Exs. G, H, I. DCA no longer makes this assertion in this Court.

27 <sup>10</sup> In a carefully crafted effort to mislead the Court, DCA tries to sidestep the deposition  
28 testimony of its own principal by stating that “DCA is already operational and making  
contributions to the African people.” Bekele Suppl. Decl. ¶12. DCA knows full well that the  
entity set up to operate .Africa – DCA Registry – remains a shell company and is not  
operational. Ms. Bekele so testified repeatedly under oath. *See Brantly Decl.*, Ex. 1 (Bekele  
Depo at 212:5-24; 24:12-15.)

1 assist trademark owners in obtaining their corresponding domain names. Masilela Decl. II ¶ 6;  
2 Willett Decl. ¶ 20. These trademark owners are given preference during the initial stages of the  
3 domain name launch. *Id.* DCA further contends that if ZACR acts as both registry operator and  
4 registrar, it would not be able to make as lucrative a deal as DCA would be able to make as a  
5 registry operator with a separate registry. DCA cites no support for this representation and cites  
6 no support that acting as both registry operator and registrar is not permitted. In fact, ICANN  
7 has allowed cross-ownership of TLDs since 2010 and has found such arrangements to be pro-  
8 competitive. Masilela Decl. II ¶ 4, Ex. A. The ICANN Registry Agreement compels registry  
9 operators to deal with all registrars in a fair and equitable manner, and ICANN has compliance  
10 mechanisms in place to monitor cross-ownership. *Id.* ¶ 5 Ex. B; Willett Decl. ¶ 21. Thus,  
11 ZACR cannot provide preferential treatment or access to its own vertical registrar. *Id.*  
12 Additionally, any monetary loss that DCA can prove as a result of the delegation of .Africa to  
13 ZACR, can be compensated in the damages phase of the trial.

14           Ultimately, DCA cannot show irreparable harm because if DCA somehow prevails (it  
15 cannot for the reasons addressed above), it is undisputed that ICANN has the power to  
16 redelegate .Africa to DCA. In fact, as attested to by ICANN’s President of Global Domains  
17 Division, ICANN has re-delegated gTLDs over 40 times from one registry operator to another.  
18 *See Atallah Decl. ¶ 13.* Indeed, ICANN has an entire procedure for re-delegating a gTLD as set  
19 forth in a published manual. *See Masilela Decl. I Ex. I.* And DCA itself now concedes that  
20 “ICANN has established procedures for re-delegating a gTLD to a new registry.” Motion at 14.  
21 That should end the inquiry because DCA itself acknowledges that there is no potential for  
22 irreparable harm.<sup>11</sup>

23           Moreover, DCA asserts in the operative complaint that it seeks millions of dollars in  
24 damages. Where a plaintiff has an adequate remedy at law in the form of monetary damages,  
25 “an injunction cannot be granted.” *Thayer Plymouth Center*, 255 Cal. App. 2d at 306; *Pacific*  
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27 <sup>11</sup> DCA argued that redelegation is “uncertain.” Motion at 14. Not surprisingly, DCA cites no  
28 support for this baseless proposition. In comparison, ICANN and ZACR have supplied evidence  
showing that redelegation is feasible and has been done dozens of times. *Atallah Decl. ¶ 13.*



1 *Design Sciences Corp. v. Superior Court*, 121 Cal. App. 4th 1100, 1110 (2004).

2 **2. The Harm to ZACR**

3 The preliminary injunction should be denied because the harm to ZACR far outweighs  
4 any alleged harm to DCA. *See Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d  
5 582, 588 (1964) (“in determining the availability of injunctive relief, the court must consider the  
6 interests of third parties and of the general public”); *Vo*, 115 Cal. App. 4th at 435 (courts  
7 consider harm to third parties when evaluating preliminary injunction).

8 Here, the harm to ZACR from the ongoing delay in the delegation of the .Africa gTLD  
9 is substantial. Whereas, DCA could eventually receive the redelgation of .Africa, ZACR is now  
10 incurring great financial costs with no attendant benefits. The costs following the execution of  
11 the Registry Agreement continue to mount – ZACR is now running continuing expenditures of  
12 approximately \$16,632 per month on this project. Masilela Decl. I ¶11. This amount excludes  
13 ongoing litigation costs. And the lost opportunity costs suffered by ZACR are even more  
14 alarming: as of December 1, 2016, ZACR conservatively estimates these losses to be \$15.5  
15 million.<sup>12</sup> *Id.* The monthly expenditures and lost opportunity costs will only continue if the  
16 preliminary injunction is granted.

17 Accordingly, given that the harm to ZACR is so substantial and outweighs any alleged  
18 harm to a non-operational DCA, the court should, once again, deny the requested injunction.

19 **3. The Harm to the People of Africa**

20 The public interest also strongly favors again denying the injunction. *See Loma Portal*  
21 *Civic Club*, 61 Cal. 2d at 588; *Vo*, 115 Cal. App. 4th at 435 (courts consider “the degree of  
22 adverse effect on the public interest or interests of third parties the granting of the injunction  
23 will cause”) (citation omitted). Here, the ongoing delay in the delegation of .Africa is depriving  
24 the people of the African continent of an important opportunity to expand internet domain

25 \_\_\_\_\_  
26 <sup>12</sup> DCA contends that ZACR’s anticipated costs are conclusory and speculative. On the  
27 contrary, ZACR provided a detailed spreadsheet to the Court configured by its finance section  
28 explaining its net costs and lost profits. The lost profits analysis is based on ZACR’s responses  
to ICANN’s 2012 application questions which passed ICANN evaluation. Masilela Decl. I ¶¶  
11-12, Ex. F.

1 capabilities. Yedaly Decl. ¶ 18. There are real opportunities being lost because African  
2 businesses and individuals remain unable to develop and promote a gTLD that would be  
3 uniquely identified with the African continent. *See id*; *see also* Masilela Decl. I ¶ 17. Indeed,  
4 even DCA admits in deposition that the .Africa gTLD is an important right that will benefit the  
5 people of Africa. Brantly Decl. Ex. 1 (Bekele Tr. 125:24-127:25). And, DCA has not and does  
6 not dispute the harm to the people of Africa by the continued delay. Yet, if a preliminary  
7 injunction is sustained, African citizens will continue to be deprived of having their own unique  
8 gTLD when other continents have had unique gTLDs for years. Yedaly Decl. ¶ 18.

9       The ongoing harm caused by the delay in delegating .Africa is further exacerbated  
10 because millions of dollars earmarked for charitable internet-related projects are not flowing to  
11 the people of Africa. Under the agreement between ZACR and the AUC, the “dotAfrica  
12 Foundation” will become operational once ICANN formally delegates .AFRICA to ZACR.  
13 Masilela Decl. I ¶ 17; Yedaly Decl. ¶ 19. That foundation is required to utilize a signification  
14 portion of the surplus revenues from .Africa to fund various African domain name and Internet  
15 related developmental projects. Masilela Decl. I ¶¶ 12-17; Yedaly Decl. ¶ 19. To date, it is  
16 estimated that the ongoing delay has deprived the African people of millions of dollars in  
17 charitable funds. Masilela Decl. I ¶¶ 12, 17.

### 18       **C.       Alternatively, DCA Should Be Forced to Post A Bond**

19       ZACR contends that the Court should deny DCA’s new motion. However, if the Court  
20 enters the injunction, then DCA must be required to post a bond. Cal. Code Civ. P. § 529.  
21 Given the significant ongoing harm to ZACR, including the continued loss of revenues, the  
22 amount of security should be set at more than \$15 million. *See* Masilela Decl. I ¶¶ 11-12, Ex. F.  
23 *See Top Cat Productions, Inc. v. Michael’s Los Feliz*, 102 Cal. App. 4th 474, 478 (2002); *ABBA*  
24 *Rubber Co. v. Seaquist*, 235 Cal. App. 3d 1, 14–5 (1991).

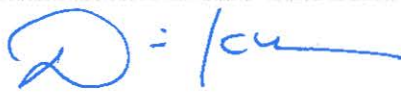
## 25       **VI.       CONCLUSION**

26       For all of the foregoing reasons, ZACR respectfully requests that this Court deny DCA’s  
27 motion for preliminary injunction.  
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KESSELMAN BRANTLY STOCKINGER LLP

By: 

David W. Kesselman

Amy T. Brantly

Attorneys for ZA Central Registry, NPC