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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  
 20 NUMBERS; a California corporation;  
 21 ZA Central Registry, a South African  
 22 non-profit company; DOES 1 through  
 23 50, inclusive,  
 24 Defendants.

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

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 ZACR’S MOTION TO  
 RECONSIDER AND VACATE  
 PRELIMINARY INJUNCTION  
 RULING**

[Notice of Motion and Motion to  
 Reconsider and Vacate Preliminary  
 Injunction Ruling; Declaration of  
 David W. Kesselman; Declaration of  
 Mkgabudi Lucky Masilela; and  
 [Proposed] Order Filed Concurrently  
 Herewith]

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

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I.

**INTRODUCTION**

On April 12, 2016, the Court granted a preliminary injunction sought by plaintiff DotConnectAfrica Trust (“DCA”). Specifically, the Court ruled that defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) is precluded from delegating the top level domain (“gTLD”) .Africa to defendant ZA Central Registry, NPC (“ZACR”). ZACR, which had not yet entered the case when DCA and ICANN were briefing these issues, respectfully requests that the Court reconsider its ruling and vacate the preliminary injunction.

First, the preliminary injunction ruling is predicated upon a key factual error that mandates reconsideration. The preliminary injunction ruling states that “[b]ecause ICANN found DCA’s application passed the geographic names evaluation in the July 2013 initial evaluation report, the Court finds serious questions in DCA’s favor as to whether DCA’s application should have proceeded to the delegation stage following the IRP decision.” (Order at 6.) This statement is in error. DCA never passed the geographic names evaluation. DCA itself acknowledges in the materials cited by the Court that ZACR – not DCA – passed the geographic names evaluation. This factual error is critically important. Based upon the record, it is clear that ICANN fully abided the Independent Review Process (“IRP”) panel’s recommendation. DCA’s application was placed right back where it was supposed to be – in the geographic names evaluation process. Because DCA could not (and still cannot) meet the fundamental requirement that it demonstrate 60% support from countries within Africa, ICANN necessarily rejected DCA’s application for the gTLD .Africa. Accordingly, based upon the

1 actual state of the record, DCA has no likelihood of success and the preliminary  
2 injunction should be vacated.<sup>1</sup>

3 Second, reconsideration is also warranted because the Court, relying upon  
4 inaccurate assertions in DCA’s moving papers, ruled that DCA would suffer  
5 “irreparable harm” if ICANN were to delegate the gTLD .Africa to ZACR before  
6 this case can be decided on the merits. (Order at 7.) DCA claims that the gTLD  
7 “.Africa can be delegated only once.” This is wrong. There is no technological  
8 barrier that would prevent the transfer of the gTLD from ZACR to DCA in the  
9 future. Indeed, in 2013, ICANN prepared a manual specifically addressing the  
10 redelegation of a gTLD – and all industry participants are well aware that this  
11 process can be implemented. While ZACR contends that DCA will never actually  
12 receive such relief because its lawsuit is entirely without merit, the transfer of the  
13 gTLD .Africa can be achieved. Therefore, DCA cannot demonstrate that it will  
14 suffer irreparable harm if ICANN proceeds with the delegation of .Africa to  
15 ZACR. On that basis alone the Court’s preliminary injunction ruling should be  
16 vacated.

17 Third, reconsideration is proper because the Court’s analysis of the balance  
18 of equities did not take into account the significant harm to ZACR. In light of the  
19 evidence now presented by ZACR, the balance of equities clearly weighs against  
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21 <sup>1</sup> The Court also made a factual error in stating that DCA submitted its  
22 application in March 2012 but ZACR only entered the process in February 2014.  
23 (Order at 2.) In fact, ZACR and DCA both submitted their respective applications  
24 to ICANN in 2012. (The Court’s reference to February 2014 appears to derive  
25 from Exhibit 20 attached to the Declaration of Sophia Bekele Eshete (“Eshete  
26 Decl.”). However, that was in reference to the “download” date and not ZACR’s  
27 original submission date.) This is important to the extent that this error may have  
28 improperly contributed to the Court’s view that ICANN favored ZACR over  
DCA. In fact, both DCA and ZACR had their respective applications reviewed by  
ICANN on the exact same timeline and by the same process.

1 maintaining the preliminary injunction. The delay in the delegation of the gTLD  
2 .Africa – which could last years unless the Court’s ruling is vacated – is causing  
3 significant economic harm to ZACR. ZACR has now spent years and invested  
4 heavily – especially after it signed the Registry Agreement with ICANN in 2014 –  
5 to begin operations for the .Africa gTLD. ZACR estimates that the recent  
6 historical average of the hard costs associated with delaying delegation is running  
7 at approximately \$20,000 per month, and the total estimated lost opportunity costs  
8 through May 1, 2016, exceed \$15 million (a significant portion of those revenues  
9 would have supported a charity for the public interest in Africa). In addition, the  
10 preliminary injunction necessarily deprives the African people of a very important  
11 opportunity for expanded internet domain name capabilities. Thus, the balance of  
12 hardships, including the impact on the African people, should be reconsidered in  
13 light of the corrected factual record, and the evidence proffered by ZACR.

14 Finally, reconsideration is warranted because, at a minimum, DCA should  
15 be required to post a significant bond. Consideration of a bond is mandatory  
16 under Fed.R.Civ.P. 65(c), and it is especially important here given the negative  
17 impact of the injunction on ZACR and the African people. DCA does not appear  
18 to have significant assets and it is a foreign company – making a bond all the more  
19 important to secure some form of security in this case.

## 20 II.

### 21 **RELEVANT PROCEDURAL HISTORY**

22 DCA filed its initial Complaint in the Los Angeles Superior Court on  
23 January 20, 2016. In that initial Complaint, DCA only named ICANN as a  
24 defendant. ICANN removed the initial Complaint to this Court on February 8,  
25 2016. On February 26, 2016, DCA filed a First Amended Complaint and named  
26 both ICANN and ZACR as defendants. On March 1, 2016, DCA filed a motion  
27 for preliminary injunction. On March 9, 2016, DCA filed a motion requesting  
28

1 permission to serve ZACR via a special mail service in South Africa. This Court  
 2 granted that request on March 10, 2016. On March 14, 2016, ICANN filed its  
 3 opposition to DCA’s motion for preliminary injunction. On March 21, 2016,  
 4 DCA filed its reply in support of the motion for preliminary injunction. On March  
 5 22, 2016, ZACR was served in South Africa. On April 12, 2016, this Court issued  
 6 its ruling on DCA’s motion for preliminary injunction.

### 7 III.

#### 8 RELEVANT FACTS<sup>2</sup>

##### 9 A. ZACR Is the Largest Domain Name Registry on the African 10 Continent

11 ZACR is a South African non-profit company with its principal place of  
 12 business in Midrand, South Africa. Declaration of Mokgabudi Lucky Masilela  
 13 (“Masilela Decl.”) ¶ 2. ZACR was originally formed in 1988 under the name  
 14 UniForum S.A. *Id.* ¶ 3. The purpose of the company was to promote open  
 15 standards and systems in computer hardware and software. *Id.* In 1995, the  
 16 company was assigned the administration rights for the South African domain  
 17 name, “co.za”. *Id.* Today ZACR has registered over 1 million co.za domain  
 18 name registrations – or about 95% of the total registrations for “.za”. *Id.* Due to  
 19 its well-known reputation for independence and neutrality, as well as technical  
 20 competence and operational excellence, ZACR is the single largest domain name  
 21 registry on the African continent. *Id.*

22  
 23  
 24 <sup>2</sup> In proffering relevant facts in support of this motion, ZACR has sought as  
 25 much as possible to avoid repeating the facts set forth in ICANN’s opposition to  
 26 DCA’s motion for preliminary injunction. Rather, ZACR has attempted to  
 27 include additional facts about ZACR and/or highlight aspects of the application  
 28 process that were not previously addressed or, in some instances, appeared in error  
 in the Court’s preliminary injunction ruling.



1           **B. ZACR’s 2012 Application for the .Africa gTLD**

2           After ICANN formally launched the “New gTLD Program,” ZACR filed an  
3 application for the .Africa gTLD. *Id.* ¶ 4. Indeed, both ZACR and DCA  
4 submitted their respective applications for the .Africa gTLD in Spring/ Summer  
5 2012.<sup>3</sup> *Id.* The ICANN selection criteria – which ICANN set forth in an  
6 Applicant Guidebook (“Guidebook”) – made clear that because the .Africa gTLD  
7 represented the name of a geographic region, an applicant would need to provide  
8 documentation showing support from at least 60% of the governments in the  
9 region. *Id.* ¶ 5; *See* Declaration of Sophia Bekele Eshete (“Eshete Decl.”) Ex. 3  
10 (Guidebook) at 2-18, ¶ 2.2.1.4.2.4. Further, the criteria made clear that no more  
11 than one objection from a government or public entity associated with the  
12 geographic area would be permitted. Masilela Decl. ¶ 5; Eshete Decl. Ex. 3.

13           ZACR submitted its application to ICANN with the full support of the  
14 African Union member states via the AUC endorsement. Specifically, the AUC,  
15 which serves as the Secretariat of the African Union, provided a letter supporting  
16 ZACR’s application. Masilela Decl, ¶ 6, Ex. A. The African Union represents all  
17 but one of the countries in Africa; the only nonmember, Morocco, separately  
18 provided a letter supporting ZACR’s application. *Id.* ¶ 6, Ex. B; *see also*  
19 Declaration of Moctar Yedaly In Support of ICANN’s Opposition to Plaintiff’s  
20 Motion for Preliminary Injunction (“Yedaly Decl.”) ¶ 3.

21           Importantly, ZACR received the support of the African Union only after the  
22 AUC publicized a request for proposal (“RFP”) in 2011.<sup>4</sup> Masilela Decl. ¶ 7,

23 \_\_\_\_\_  
24 <sup>3</sup> ZACR submitted its application for .Africa on June 13, 2012. At that same  
25 time, ZACR also applied for the .CapeTown, .Joburg and .Durban gTLDs. ZACR  
26 was ultimately awarded the rights to these gTLDs and the gTLDs have launched  
to the Internet public. Masilela Decl. ¶ 4.

27 <sup>4</sup> It had been well known that ICANN was considering a new gTLD program,  
including .Africa. It was in anticipation of this new gTLD program that the AUC  
28

1 Ex. C; Eshete Decl., Ex. 21. This was an open bid process and the AUC made  
2 clear that it was only going to support one applicant. Masilela Decl. ¶ 7. ZACR  
3 is informed that DCA chose not to participate in the RFP. *Id.* ¶ 8. Ultimately,  
4 ZACR prevailed in the RFP process and received the support of the AUC in its  
5 application for the .Africa gTLD. *Id.*

6 **C. Contrary to the Court’s Finding, The Facts Are Undisputed**  
7 **That DCA Never Passed the Geographic Names Panel**

8 As fully set forth in ICANN’s papers, DCA’s application was before the  
9 Geographic Names Panel when ICANN halted the processing of DCA’s  
10 application. *See* Declaration of Christine Willett In Support of Defendant  
11 ICANN’s Opposition to Plaintiff’s Motion For Preliminary Injunction (“Willett  
12 Decl.”) ¶ 9. ICANN did so because ICANN’s Government Advisory Committee  
13 (“GAC”) issued “consensus advice” that DCA’s application should not be  
14 approved. *Id.* Thereafter, DCA challenged ICANN’s decision to halt the  
15 processing of its application, and ultimately DCA filed a request for review by an  
16 Independent Review Process (“IRP”) panel. The IRP panel recommended that the  
17 ICANN “refrain from delegating the .Africa gTLD and permit DCA’s application  
18 to proceed through the remainder of the new gTLD application process.”<sup>5</sup> *See*  
19 Eshete Decl., Ex. 1 (IRP Panel Declaration at 63 (¶ 133)).

20  
21  
22 decided to hold an RFP to support a qualified applicant as a result of a mandate  
23 from African ICT Ministers to set up structures and modalities for the  
implementation of .Africa. Masilela Decl. ¶ 7.

24 <sup>5</sup> It should be noted that notwithstanding DCA’s request that the IRP panel  
25 make findings of wrongdoing between ICANN and ZACR, the IRP panel  
26 expressly declined to make any such findings. *See* Eshete Decl., Ex. 1 at 60 (IRP  
27 Panel Declaration ¶ 117). This is not surprising as ZACR, which was not allowed  
28 to participate in the IRP panel proceedings due to DCA’s formal objection, has  
always comported itself properly in its application for the .Africa gTLD.

1 After ICANN adopted the IRP panel’s recommendations, ICANN placed  
2 DCA’s application back with the Geographic Names Panel for review and  
3 processing.<sup>6</sup> Willett Decl. ¶ 10. Contrary to this Court’s ruling (Order at 6), the  
4 record is clear that DCA had not previously passed the Geographic Names Panel.  
5 *Id.* ¶ 9. Accordingly, ICANN properly placed DCA back in the same position it  
6 had been before ICANN halted the processing of its application. *Id.* ¶ 10.

7 However, when DCA again failed to submit the required documentation  
8 demonstrating that it had 60% support, and further failed to respond to follow-up  
9 questions addressing these issues, ICANN once again stopped processing DCA’s  
10 application. *Id.* ¶¶ 9-13.<sup>7</sup> ICANN stated that the Geographic Names Panel had  
11 determined that DCA failed to provide the demonstrated support for a gTLD – as  
12 mandated by the criteria for a geographic domain name.<sup>8</sup> *See* Willett Decl. ¶¶ 10-  
13 13 and referenced exhibits.

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17 <sup>6</sup> As mandated by ICANN’s Guidebook, the Geographic Names Panel is  
18 operated by a third party vendor retained by ICANN. It verifies the relevance and  
19 authenticity of an applicant’s documentation to meet the requirement that it have  
20 the support of at least 60% of the governments, and no more than one objection by  
21 a government, in a geographic region. *See* Eshete Decl., Ex. 3 at 2-18 (ICANN  
22 Guidebook 2.2.1.4.2.4).

23 <sup>7</sup> *See also* Eshete Decl. Exs. 16 and 17. DCA was specifically advised by  
24 ICANN that the “required documentation of support or non-objection was either  
25 not provided or did not meet the criteria described in Section 2.2.1.4.3 of the  
26 Applicant Guidebook.” Eshete Decl. Ex. 16.

27 <sup>8</sup> In addition to the failure to demonstrate 60% support of the countries in the  
28 region, ICANN had received 17 “Early Warning Notices” from individual African  
countries to DCA’s application. These “Early Warning Notices” are available  
online at: <http://africanonespace.org/content.php?tag=13&title=Resources>. They  
are also attached for the Court’s convenience as an exhibit to the Masilela  
Declaration. Masilela Decl. ¶ 9, Ex. D.

1           **D.     Redelegating A gTLD Is An Available Procedure And DCA’s**  
2           **Assertion to the Contrary is Factually Incorrect**

3           In an effort to assert supposed “irreparable harm” if an injunction were not  
4 granted, DCA suggested in its motion papers, and this Court adopted in its ruling,  
5 that “.Africa can be delegated only once.” (Order at 7.) However, the assertion  
6 proffered by DCA is simply wrong. The industry participants are well aware that  
7 redelegation is technologically feasible. Indeed, in 2013, ICANN published a  
8 manual with step-by-step instructions outlining the process for redelegating a  
9 gTLD like .Africa. That manual, titled “User Documentation on Delegating and  
10 Redelegating a Generic Top Level Domain (gTLD),” provides the requirements  
11 for redelegation. Masilela Decl. ¶ 13; Ex. E. This manual is needed precisely  
12 because ICANN does not delegate gTLD’s in perpetuity. Rather, ICANN builds  
13 in time limits in its registry agreements. *Id.* Thus, it is understood by industry  
14 participants that a redelegation of a gTLD is possible and entirely feasible. *Id.*

15           **E.     Delaying Delegation of .Africa Will Continue to Cause**  
16           **Significant Harm to ZACR and the People of Africa**

17           The Registry Agreement between ICANN and ZACR was effective on  
18 March 24, 2014 and runs for ten years. Masilela Decl. ¶ 10. Yet, over two years  
19 into the Agreement, the .Africa gTLD has still not been delegated to ZACR. In  
20 effect, 20% of the period of the Agreement has already lapsed without any benefit  
21 to ZACR. This delay has resulted in unforeseen and mounting costs, as well as  
22 lost opportunities for the .Africa project. *Id.* ZACR has incurred considerable  
23 expenses both prior to and after entering into the Registry Agreement. *Id.* ¶ 11.  
24 The current and continuing monthly cost due to the delay in the delegation is  
25 running at approximately \$20,000 per month.<sup>9</sup> *Id.* Estimated loss of net income

26 \_\_\_\_\_  
27 <sup>9</sup> In providing this estimate, ZACR reviewed the monthly costs incurred  
28 during the last 10 months for the .Africa project, including the ongoing costs

1 after tax (opportunity costs) suffered by ZACR from the date of planned  
2 delegation following the Registry Agreement up to May 1, 2016 are estimated to  
3 be \$15 million – of which approximately \$5.5 million would have been donated to  
4 the dotAfrica Foundation for African online development. *Id.* ¶ 12. Until such  
5 time as delegation takes place, the .Africa gTLD in effect stagnates and generates  
6 no income and no value in the marketplace. The ongoing delay is also prejudicial  
7 to the gTLD itself (no matter who the operator is) in that the initial interest  
8 surrounding the launch of this domain name will have faded, and persons who  
9 may have sought to register will have lost interest. *Id.*

10 The African people are also harmed by the delay in the delegation. *Id.* ¶ 14.  
11 The .Africa domain name would add brand value to the continent and would  
12 provide a platform that connects products, businesses and individuals that have  
13 interests in Africa. *Id.* The African people are further harmed because the  
14 agreement between ZACR and the AUC required that a foundation be created  
15 upon delegation and that a significant portion of the revenues received from  
16 second level domain delegations (for example: xyz.africa) be directed to the  
17 “dotAfrica Foundation.” *Id.* The Foundation would use the revenues to fund  
18 various African domain name and Internet related developmental projects which  
19 are now delayed as a result of the preliminary injunction. *Id.*

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23 related to consultants, marketing, sponsorships and related expenses. The  
24 importance of maintaining visibility for the .Africa project, coupled with the  
25 ongoing need to interface with Government officials throughout the African  
26 continent, makes clear that these ongoing expenses will continue during the course  
27 of this litigation. In determining these figures, ZACR necessarily averaged the  
28 monthly expenses for the .Africa project and converted relevant expenditures from  
South African Rand to U.S. dollars. Masilela Decl. ¶ 11.

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IV.

**LEGAL STANDARD**

**A. Standard for Preliminary Injunction**

A preliminary injunction is an “extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must establish: (1) likelihood of success on the merits; (2) likelihood of suffering irreparable harm in the absence of the preliminary relief; (3) the balance of equities between the parties tips in favor of the plaintiff; and (4) the injunction is in the public interest. *Id.* at 20.

The Ninth Circuit also utilizes a “sliding scale” test to address the propriety of a preliminary injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) . Under that formulation, a “preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *Id.* (citation omitted). However, the Ninth Circuit has made clear that all four prongs of the *Winter* test must be met. *Id.* at 1135. Moreover, a plaintiff “must establish that irreparable harm is *likely*, not just possible, in order to obtain a preliminary injunction.” *Id.* at 1131 (citing *Winter*). See also Moore’s Federal Practice 13-65, § 65.22 (explaining that Supreme Court in *Winter* overturned Ninth Circuit’s earlier rule allowing preliminary injunction based solely on possibility of irreparable harm to plaintiff).

**B. Standard for Challenging A Preliminary Injunction Ruling**

Any person or entity affected by a preliminary injunction can seek an order modifying or vacating it, including a party to whom the injunction was not initially directed. *United States v. Board of School Commrs. Of City of*

1 *Indianapolis*, 128 F.3d 507, 511 (7th Cir. 1997); *see also* William W. Schwarzer,  
2 *et al.*, Federal Civil Procedure Before Trial ¶ 13:213, at 13-115.

3 The Ninth Circuit has held that Fed.R.Civ.P. 59(e) governs a motion to  
4 reconsider a preliminary injunction. *Credit Suisse First Boston Corp. v.*  
5 *Grunwald*, 400 F.3d 1119, 1123-24 (9th Cir. 2005). Thus, a motion for  
6 reconsideration of a preliminary injunction must be filed within the 28 days  
7 mandated by Rule 59(e). However, a motion to vacate or dissolve a preliminary  
8 injunction ruling is governed by Fed.R.Civ.P. 54(b). *Credit Suisse*, 400 F.3d at  
9 1124. There is no time limit with respect to the filing of a motion to vacate or  
10 dissolve a preliminary injunction. *Id.*

11 “In determining whether a motion requesting the district court to reconsider  
12 its preliminary injunction should be treated as a motion for reconsideration under  
13 Rule 59 or a motion for dissolution or modification under Rule 54 . . . [the court]  
14 ‘must look beyond the motion’s caption to its substance.’” *Id.* (citation omitted).  
15 In general, a motion that seeks to relitigate the original issue is governed by Rule  
16 59, whereas Rule 54 applies to a motion that “is based upon new circumstances  
17 that have arisen after the district court granted the injunction . . .” *Id.* ZACR’s  
18 motion is timely under either standard.

19 Further, Central District Local Rule 7-18 provides that a motion for  
20 reconsideration is proper if: “(a) a material difference in fact or law from that  
21 presented to the Court before such decision that in the exercise of reasonable  
22 diligence could not have been known to the party moving for reconsideration at  
23 the time of such decision, or (b) the emergence of new material facts or change of  
24 law occurring after the time of such decision, or (c) a manifest showing of a  
25 failure to consider materials facts presented to the Court before such decision. No  
26 motion for reconsideration shall in any manner repeat any oral or written  
27 argument made in support of or in opposition to the original motion.”  
28

V.

**ARGUMENT**

**A. The Court Should Vacate the Injunction Because the Corrected Record Demonstrates That DCA Has No Likelihood of Success on the Merits**

In granting DCA’s motion for preliminary injunction, and specifically evaluating DCA’s likelihood of success on the merits, the Court made a critical factual error. The Court misread DCA’s moving papers to suggest that DCA was contending that it had passed the geographic names evaluation process. Order at 6 (“DCA contends that ICANN violated the IRP Decision by restarting the geographic name evaluation, which it had already passed, rather than permitting the application to resume at the delegation phase.”) Based upon this misreading of the evidence, the Court went on to rule that “[b]ecause ICANN found DCA’s application passed the geographic names evaluation in the July 2013 initial evaluation report, the Court finds serious questions in DCA’s favor as to whether DCA’s application should have proceeded to the delegation stage following the IRP decision.” *Id.*

However, the evidence cited by the Court, specifically Exhibit 27 of the Eschete Declaration, actually shows that ZACR – and *not* DCA – passed the geographic name evaluation process. This factual error underpinning the Court’s ruling, while clearly inadvertent, is critical. The record is, in fact, undisputed that DCA never passed the Geographic Names Panel.<sup>10</sup> Willett Decl. ¶¶ 9-10. As before, DCA could not (and still cannot) meet the mandatory criteria for passing the geographic names process. *Id.* ¶¶ 10-13. DCA cannot demonstrate that it has

<sup>10</sup> ICANN, per the IRP recommendation, properly placed DCA’s application back to the precise point it had been before ICANN stopped processing the application – before the Geographic Names Panel. Willett Decl. ¶ 10.



1 the required minimum 60% support from countries within the Africa Union – an  
2 express criteria for the delegation of any geographic gTLD. *See* Eshete Decl. Ex.  
3 3 (Guidebook at 2-18 (§ 2.2.1.4.2.4)). Additionally, 17 countries issued Early  
4 Warnings in response to DCA’s application – thereby further supporting DCA’s  
5 rejection by the Geographic Names Panel. Masilela Decl. ¶ 9, Ex. D.

6 Because DCA does not have the support of the majority of African  
7 countries, and cannot meet the express requirement of the geographic names  
8 evaluation process, it has no likelihood of success in this litigation. Accordingly,  
9 the Court’s preliminary injunction ruling – which was based upon the incorrect  
10 factual assumption that DCA had already passed the geographic name process –  
11 should be vacated.

12 **B. The Court Should Vacate the Injunction Because There Is No**  
13 **Irreparable Harm To DCA**

14 The Court’s preliminary injunction should also be vacated because this  
15 Court’s finding of “irreparable harm” was based upon a faulty premise. The  
16 Court, relying upon an erroneous submission by DCA, determined that “.Africa  
17 can be delegated only once, and only by ICANN.” Order at 7. While it is  
18 certainly true that only ICANN has the power to delegate a gTLD, it is incorrect  
19 that a gTLD, including .Africa, can never be redelegated.<sup>11</sup> In fact, ICANN has  
20 prepared for this precise eventuality and issued a manual in 2013 providing step-  
21 by-step instructions for how to redelegate a gTLD. Masilela Decl. ¶ 15; Ex. A.  
22 The manual, titled “User Documentation on Delegating and Redelegating a  
23 \_\_\_\_\_

24 <sup>11</sup> DCA improperly suggested in its moving papers that “[t]he rights to .Africa  
25 cannot be issued again.” (DCA opening brief at 13). There is no basis for this  
26 assertion. In the cited Eshete Declaration, she did not actually state that .Africa  
27 cannot be issued again. Rather, she carefully stated that “it would be difficult if  
28 not impossible to unwind that control and provide it to another party.” Eshete  
Decl. ¶ 3. That is simply not true. *See* Masilela Decl. ¶ 15; Ex. E.

1 Generic Top Level Domain (gTLD),” makes abundantly clear that the process is  
2 available if required. This is because, as outlined above, ICANN delegates a  
3 gTLD for a period of years. It necessarily follows that a gTLD can be redelegated  
4 to another entity if necessary.

5 While ZACR asserts that DCA cannot prevail in this litigation – and has no  
6 entitlement to the .Africa gTLD – DCA’s suggestion that an injunction is required  
7 because .Africa cannot be redelegated is simply false – and not supported by the  
8 now supplemented record before this Court.<sup>12</sup> The injunction must be dissolved  
9 on this basis alone. *Cottrell*, 632 F.3d at 1131 (plaintiff must demonstrate  
10 likelihood of irreparable harm for preliminary injunction to issue) (citing *Winter*,  
11 555 U.S. at 22).

12 **C. Given the Harm to ZACR and the People of Africa, the Balance**  
13 **of Equities Favors Vacating the Injunction**

14 The preliminary injunction should also be vacated because the balance of  
15 equities demonstrates that the harm to ZACR and the people of Africa outweigh  
16 any alleged harm to DCA. *See Los Angeles Memorial Coliseum v. Nat’l Football*  
17 *League*, 634 F.2d 1197, 1203 (9th Cir. 1980) (mandating that in evaluating  
18 preliminary injunction court must evaluate harm to defendant); *see also Federal*  
19 *Civil Procedure Before Trial* 13:72, at 13-46 (“Before a preliminary injunction  
20

21 \_\_\_\_\_  
22 <sup>12</sup> ZACR had not yet been formally served in South Africa at the time the  
23 parties were briefing the preliminary injunction. Indeed, ZACR advised DCA in a  
24 meet and confer that it initially intended to challenge personal jurisdiction. ZACR  
25 has no personnel, no offices, no bank accounts, and maintains no business  
26 operations in California. Masilela Decl. ¶ 16. However, in the course of  
27 preparing the motion to dismiss papers, the Court issued the preliminary  
28 injunction order. ZACR has now determined to forego its personal jurisdiction  
challenge to participate in these proceedings, defend itself against DCA’s baseless  
allegations on the merits, and clarify the record.

1 may issue, the court must identify the harm that a preliminary injunction might  
2 cause the defendant and weigh it against plaintiff’s threatened injury.”).

3           Indeed, the ongoing harm to ZACR from the preliminary injunction  
4 and the delay in the delegation of the .Africa gTLD is substantial. Whereas DCA  
5 could eventually receive the redelegation of .Africa, ZACR is now incurring great  
6 financial costs with no attendant benefits.<sup>13</sup> The costs following the execution of  
7 the Registry Agreement continue to mount – ZACR is now running continuing  
8 expenditures of approximately \$20,000 per month on this project. This amount  
9 excludes future litigation costs. And the lost opportunity costs suffered by ZACR  
10 are even more alarming: as of May 1, 2016, ZACR conservatively estimates these  
11 losses to be \$15,000,000.<sup>14</sup> The monthly expenditures and lost opportunity costs  
12 will only continue during the pendency of the injunction. Masilela Decl. ¶¶ 11-  
13 12.

14           Accordingly, given that the harm to ZACR is so substantial and outweighs  
15 any alleged harm to DCA, the balance of equities further supports vacating the  
16 preliminary injunction. *See MacDonald v. Chicago Park Dist.*, 132 F.3d 355,  
17 361, 363 (7th Cir. 1997) (vacating preliminary injunction because harm to  
18 defendant outweighed impact on plaintiff); *see also Moore’s Federal Practice* §  
19 65.22 n. 40, at 13-65 (“Preliminary injunctive relief must be denied if non-  
20 movant’s harm is greater than movant’s harm.”) (citing cases).

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22 <sup>13</sup>       Once a gTLD is delegated it starts increasing in value. The gTLD is at its  
23 lowest value prior to delegation and increases as the number of second level  
24 domain delegations (xyz.Africa) increases. If DCA is redelegated the .Africa  
25 gTLD, it will suffer no irreparable harm as it will inherit a more valuable gTLD  
without incurring the cost to develop it. Masilela Decl. ¶ 13.

26 <sup>14</sup>       Of the \$15 million in loss of net income after tax, ZACR estimates that  
27 approximately \$5.5 million would have been donated to charity, and specifically  
the dotAfrica Foundation for African online development. Masilela Decl. ¶ 12.

1           **D. The Public Interest Also Favors Vacating the Preliminary**  
2           **Injunction**

3           The public interest also favors vacating the injunction. The delay in the  
4 delegation of the .Africa gTLD continues to deprive the African people of a  
5 domain name that would add brand value to the continent and would provide a  
6 platform that connects products, businesses and individuals that have interests in  
7 Africa. Masilela Decl. ¶ 14. As more fully set forth in ZACR’s application to  
8 ICANN, the implementation of .Africa will add value to the Internet namespace as  
9 a recognizable phrase which focuses on the African identity and captures the  
10 essence of the African community. Eshete Decl. Ex. 20. It is expected that  
11 African institutions, including small and medium size enterprises, will greatly  
12 benefit from .Africa, and use the domain as a platform to promote the economic  
13 growth of Africa. *Id.* Thus, the ongoing delay in delegating the gTLD .Africa is  
14 causing real and negative consequences to the African people – which are now  
15 exacerbated by the preliminary injunction ruling. Indeed, the AUC, on behalf of  
16 its member countries, has expressed its concerns to ICANN about the ongoing  
17 delay in the delegation process and the harm to the African people. Yedaly Decl.,  
18 Ex. D.

19           Accordingly, the public harm to the African people provides an additional  
20 basis for vacating the Court’s order.<sup>15</sup> *See generally Winter*, 555 U.S. at 22-26, 33  
21 (district court’s preliminary injunction did not properly take into account public  
22 interest associated with national security); *see also Tilton v. Capital Cities/ABC*,

23  
24  
25 <sup>15</sup> Allowing ZACR to begin operations for .Africa would also result in the  
26 flow of significant revenues for the public interest directed to the dotAfrica  
27 Foundation. Masilela Decl. ¶ 12; Yedaly Decl. ¶ 13.

1 827 F. Supp. 672, 674 (N.D. Okla. 1993) (public interest favored denying  
2 preliminary injunction that sought to limit free speech rights).

3 **E. At a Minimum, DCA Should Be Forced to Post a Bond As**  
4 **Mandated by Fed.R.Civ.P. 65(c)**

5 Reconsideration of this Court’s ruling is also appropriate because, at a  
6 minimum, DCA should be required to post a bond. Fed.R.Civ.P. 65(c) provides:

7 SECURITY. The court may issue a preliminary injunction or a  
8 temporary restraining order only if the movant gives security in an  
9 amount that the court considers proper to pay the costs and damages  
10 sustained by any party found to have been wrongfully enjoined or  
11 restrained. The United States, its officers, and its agencies are not  
12 required to give security.

13 As set forth in the statute, consideration of security in support of a  
14 preliminary injunction motion is mandatory. *See Pashby v. Delia*, 709 F.3d 307,  
15 332 (4th Cir. 2013) (district court must address security in granting preliminary  
16 injunction).

17 Courts have discretion in setting the bond amount. However, courts hold  
18 that the amount of the bond should be set on the “high side.” *Mead Johnson &*  
19 *Co. v. Abbott Labs.*, 201 F.3d 883, 888 (7th Cir. 2000); *see also Moore’s Federal*  
20 *Practice* at 13-65, § 65.50 (“In setting the amount of security for a preliminary  
21 injunction, the trial court should err on the high side. An error in setting the bond  
22 too high is not serious, because the fee to post bond is usually a fraction of the  
23 amount of the bond and because any recovery on the bond would have to be  
24 supported by proof of actual damages. On the other hand, an error on the low side  
25 may produce irreparable injury, because damages for an enormous preliminary  
26 injunction may not exceed the amount of the bond.”)

1 As set forth above, ZACR contends that the Court’s preliminary injunction  
2 should be vacated. However, if the Court maintains the injunction, then given the  
3 balance of equities and the significant ongoing harm to ZACR, including the  
4 expected lost revenues over the next two years (or more), the amount of security  
5 should be set at more than \$15 million. *See, e.g., Nintendo of Am., Inc. v. Lewis*  
6 *Galoob Toys, Inc.*, 16 F.3d 1032, 1034 (9th Cir. 1994) (affirming award to  
7 defendant of entire bond amount set at \$15 million by district court); *Netlist Inc. v.*  
8 *Diablo Techs. Inc.*, Case No. 13-cv-05962-YGR, 2015 U.S. Dist. LEXIS 3285, at  
9 \*39-40 (N.D. Cal. Jan. 12, 2015) (bond required based upon estimate of lost net  
10 profits due to preliminary injunction).

11 **VI.**

12 **CONCLUSION**

13 For the foregoing reasons, ZACR respectfully requests that this Court  
14 reconsider its earlier ruling and vacate the preliminary injunction prohibiting the  
15 delegation of the .Africa gTLD from ICANN to ZACR. Alternatively, if the  
16 Court is not inclined to vacate the injunction then, at a minimum, ZACR requests  
17 that the Court require DCA to post a significant security.

18  
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Respectfully submitted,

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