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

CASE NO. BC607494

*Assigned for all purposes to the Honorable
Howard Halm*

**OPPOSITION TO PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

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

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION.....	1
II. FACTS	1
A. ZACR Is the Largest Domain Name Registry on the African Continent	1
B. ZACR and DCA Apply for the .Africa gTLD	2
C. The Governments of Africa Support ZACR But Not DCA.....	2
D. The Government Advisory Committee Objects to DCA’s Application	4
E. DCA Seeks Review of ICANN’s Decision	4
F. An Independent Contractor Determines the Requisite Government Support.....	5
1. ZACR Passes Geographic Name Panel Review	5
2. DCA Fails the Geographic Name Panel Review	6
G. Redelegating A gTLD Is An Available Procedure	7
H. ZACR and the People of Africa Are Harmed By The Delay In Delegation of .Africa	7
III. RELEVANT PROCEDURAL HISTORY.....	8
A. The Motion for Preliminary Injunction.....	8
B. Service on ZACR and ZACR’s Motion to Dismiss.....	9
C. ZACR’s Motion to Vacate/ Reconsider	9
D. The Appeal and ZACR’s Motion to Intervene	9
IV. LEGAL STANDARD	10
V. ARGUMENT	11
A. DCA Has No Likelihood of Prevailing On the Merits	11
B. DCA Cannot Show Irreparable Harm, While the Harm to ZACR and the African People Is Substantial	13
1. No Harm to DCA	13
2. The Harm to ZACR	14
3. The Harm to the People of Africa.....	14
C. Alternatively, DCA Should Be Forced to Post A Bond.....	15
VI. CONCLUSION	15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

ABBA Rubber Co. v. Seaquist,
235 Cal. App. 3d 1 (1991) 15

Cohen v. Board of Supervisors,
40 Cal. 3d 277 (1985) 10

Continental Banking Co. v. Katz,
68 Cal. 2d 512 (1968) 10

Gleaves v. Waters,
175 Cal. App. 3d 413 (1985) 10

Loma Portal Civic Club v. American Airlines, Inc.,
61 Cal. 2d 582 (1964) 14

Metro Traffic Control, Inc. v. Shadow Traffic Network,
22 Cal. App. 4th 853 (1994) 13

O’Connell v. Superior Court,
141 Cal. App. 4th 1452 (2006) 10

Pacific Design Sciences Corp. v. Superior Court,
121 Cal. App. 4th 1100 (2004) 13, 14

Scates v. Rydingsword,
229 Cal. App. 3d 1085 (1991) 13

Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.,
255 Cal. App. 2d 300 (1967) 13, 14

Top Cat Productions, Inc. v. Michael’s Los Feliz,
102 Cal. App. 4th 474 (2002) 15

Vo v. City of Garden Grove,
115 Cal. App. 4th 425 (2004) 10, 14

White v. Davis,
30 Cal. 4th 528 (2003) 10

Statutes

Cal. Code Civ. P. § 529..... 15

1 **I. INTRODUCTION**

2 This lawsuit involves the award and delegation of the generic top-level domain name
3 (“gTLD”), “.Africa.” In 2012, defendant Internet Corporation for Assigned Names and
4 Numbers (“ICANN”) published application procedures for new gTLD’s, including .Africa. The
5 competition came down to two African-based entities, plaintiff DotConnectAfrica (“DCA”) and
6 intervenor ZA Central Registry, NPC (“ZACR”). A key criteria to be awarded .Africa was for
7 the applicant to demonstrate that at least 60% of the governments in the geographic region
8 (Africa) supported the application, and no more than one government objected. ZACR had the
9 full support of all 53 member states of the African Union Commission (“AUC”) and the support
10 of Morocco. DCA was unable to demonstrate the requisite support. Not surprisingly, ICANN
11 awarded .Africa to ZACR because it had satisfied all of the application criteria, including
12 demonstrating that ZACR had the full backing of the governments of Africa. Dissatisfied with
13 the outcome, DCA filed the instant lawsuit and now seeks to prevent the people of Africa from
14 having access to the .Africa gTLD. DCA’s motion for preliminary injunction should be denied.

15 First, DCA has no possibility of prevailing on the merits. It is undisputed that DCA
16 cannot satisfy the Applicant Guidebook requirement that it demonstrate 60% support of the
17 countries in Africa. Indeed, DCA’s own president has now admitted in deposition that DCA
18 could not “skip” this fundamental requirement. Second, DCA makes no showing of irreparable
19 harm because even if .Africa were delegated to ZACR while this litigation is pending, it is
20 undisputed that ICANN has the power to redelegate .Africa to DCA if it prevails. At the same
21 time, the evidence shows that the substantial harm to ZACR and the people of Africa is ongoing
22 and far outweighs any potential harm to DCA. ZACR and the people of Africa have waited
23 long enough. The motion should be denied.

24 **II. FACTS**

25 **A. ZACR Is the Largest Domain Name Registry on the African Continent**

26 ZACR is a South African non-profit company with its principal place of business in
27 Midrand, South Africa. Declaration of Mokgabudi Lucky Masilela (“Masilela Decl.”) ¶ 2.
28 ZACR was originally formed in 1988 under the name UniForum S.A. *Id.* ¶ 3. The company

1 was formed to promote open standards and systems in computer hardware and software. *Id.* In
2 1995, the company was assigned the administration rights for the South African domain name,
3 “co.za.” *Id.* Today ZACR has registered over 1 million co.za domain name registrations – or
4 about 95% of the total registrations for “.za.” *Id.* Due to its well-known reputation for
5 independence and neutrality, as well as technical competence and operational excellence, ZACR
6 is the single largest domain name registry on the African continent. ¹ *Id.*

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

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

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

19 ZACR had the full support of all 53 member states of the African Union Commission
20 (“AUC”) and the support of Morocco throughout the application process.² Masilela Decl. Exs.
21 B & C; Declaration of Moctar Yedaly (“Yedaly Decl.”) ¶ 3. This was because the AUC had
22 previously put out a public request for proposal (“RFP”) and selected ZACR as the applicant it
23 would support for the .Africa gTLD application; DCA chose not to participate in the AUC’s
24 RFP process. Masilela Decl. ¶ 7 & Ex. D; Bekele Decl. Ex. 19; Yedaly Decl. ¶¶ 7-11.

25
26 ¹ DCA, on the contrary, admits that it has never operated a domain name registry. Declaration
of Amy T. Brantly (“Brantly Decl.”) Ex. 1 (Bekele Tr. at 241:20-22).

27 ² 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 Yet, DCA pressed forward, based upon two outdated “endorsement” letters that were
2 obtained years before the application process began – a 2009 letter from the AUC and a 2008
3 letter from the United Nations Economic Commission for Africa (“UNECA”). Bekele Decl.
4 Exs. 6 & 8; Yedaly Decl. ¶¶ 9, 15. The AUC expressly repudiated its letter in 2010 – two years
5 before the application process began. Bekele Decl. Ex. 7; Yedaly Decl. ¶ 10-11. DCA claims
6 that the AUC 2009 “endorsement” could not be withdrawn because the Guidebook states that a
7 government may only withdraw its support “if the registry operator has deviated from
8 conditions of original support or non-objection.” Bekele Decl. Ex. 3 at § 2.2.1.4.3. But, as
9 ICANN’s Vice President of Operations testified, the Guidebook language only applies to
10 registry operators and not applicants. Brantly Decl. Ex. 2 (Willett Tr. At 71:22-72:10). A
11 government may withdraw support to an applicant at any time in the application process.
12 McFadden Decl. ¶ 8. And, DCA itself acknowledged that the AUC had withdrawn any
13 previous support in a letter to the AUC on January 26, 2011. Yedaly Decl. ¶ 11, Ex. D.

14 Moreover, even beyond the 2010 withdrawal letter, the AUC made clear throughout the
15 application process that it did not support DCA’s application, and that ZACR was “the only
16 application officially endorsed by the AUC and hence African member states. . . . Any reliance
17 by DCA in its application . . . proclaiming support or endorsement by the AUC must be
18 dismissed. The AUC does not support the DCA application and, if any such support was
19 initially provided, it has subsequently been withdrawn with full knowledge of DCA even prior
20 to the commencement of ICANN’s new gTLD application process.” Masilela Decl. Ex. D;
21 Yedaly Decl. ¶14 Ex. I. Similarly, UNECA wrote to ICANN on September 21, 2015 to advise
22 that it was not qualified to support DCA’s application: “[UN]ECA as a United Nations entity is
23 neither a government nor a public authority and therefore is not qualified to issue a letter of
24 support for a prospective applicant” Bekele Decl. Ex. 10; Yedaly Decl. ¶15, Ex. J.
25 Additionally, ICANN received 17 “Early Warning Notices” from individual African countries
26 raising significant concerns about DCA’s application. Masilela Decl. ¶ 9, Ex. E; Yedaly Decl. ¶
27 13, Ex. H.

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

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

4 DCA’s application was halted in 2013 when ICANN’s Government Advisory
5 Committee (“GAC”), a committee made up of government officials from throughout the world,
6 issued “consensus advice” that DCA’s application should not proceed. Declaration of Christine
7 Willett (“Willett Decl.”) ¶ 9; Declaration of Akram Atallah (“Atallah Decl.”) ¶ 5; Bekele Decl.
8 Ex. 24 at 3. Based upon this GAC advice, ICANN determined that DCA’s application should
9 not proceed. Willett Decl. ¶ 9.

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

11 Thereafter, DCA challenged ICANN’s decision and filed a request for review by an
12 Independent Review Process (“IRP”) Panel.³ Bekele Decl. Ex. 1. During the IRP process,
13 DCA argued, among other things, that ICANN’s reliance on the GAC advice was improper
14 because of supposed undue influence by the AUC. *Id.* at 24-25. At the time that DCA’s
15 application was halted in 2013, DCA’s application was pending before ICANN’s Geographic
16 Names Panel which acted independently as a third party contractor to determine whether DCA
17 had the requisite government support in a region. Willett Decl. ¶ 9; McFadden Decl. ¶ 11. At
18 the time that DCA’s application was halted, DCA’s application had **not** yet passed the
19 Geographic Names Panel review. *Id.*; Brantly Decl. Ex. 1 (Bekele Tr. at 206:14-22).

20 In its “Final Declaration” issued on July 9, 2015, the IRP Panel ruled in favor of DCA
21 on the limited procedural basis that the GAC consensus advice lacked transparency. Bekele
22 Decl. Ex. 1 at ¶¶ 105-115. Essentially, the IRP panel expressed concern that ICANN should
23 have “investigate[d] the matter further” before halting DCA’s application. *Id.* at ¶ 113. The
24 IRP panel expressly declined to make any findings of wrongdoing between ICANN and ZACR.
25 *Id.* at ¶ 117. Further, the IRP panel rejected DCA’s request that DCA be deemed to have
26 demonstrated support from 60% of the countries in Africa. *Id.* at ¶¶ 148-151; Brantly Decl. Ex.

27 _____
28 ³ The IRP is a form of alternative dispute resolution provided for by the ICANN Bylaws.
Atallah Decl. ¶¶ 6-7.

1 1 (Bekele Tr. at 200:12-201:19). Rather, the IRP panel recommended only that ICANN allow
2 DCA’s application to proceed through the remainder of the process. Bekele Decl. Ex. 1 at ¶
3 149; Brantly Decl. Ex. 1 (Bekele Tr. at 203:4-7). ICANN’s Board adopted the recommendation
4 and, in July 2015, placed DCA’s application back to the precise point in the process where it
5 had been halted – the Geographic Names Panel review. Willett Decl. ¶ 10; Brantly Decl. Ex. 2
6 (Willett Tr. at 62:16-63:3). Ms. Bekele of DCA now admits in deposition, contrary to what
7 counsel argues in its motion, that DCA did not pass the Geographic Names Panel review before
8 the GAC advice issued, and had no basis to “skip” this process . Brantly Decl. Ex. 1 (Bekele
9 Tr. at 206:14-22; 203:4-7).

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

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

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

17 Upon reviewing ZACR’s AUC letter of support, the ICC issued clarifying questions to
18 ZACR requesting that it fix deficiencies in its letter of support.⁴ Masilela Decl. ¶ 6, Ex. A.
19 ZACR complied and submitted a new letter in compliance with the Guidebook requirements on
20 or about July 2, 2013. Masilela Decl. ¶ 6, Ex. B; McFadden Decl. ¶ 12; Brantly Decl. Ex. 2
21 (Willet Tr. 21-22); Yedaly Decl. ¶ 12, Ex. E.⁵ ZACR was able to obtain a revised AUC letter
22 because it had the support and cooperation of the AUC.⁶ Masilela Decl. ¶¶ 6-8; Yedaly Decl. ¶

23 _____
24 ⁴ The ICC’s clarifying questions sent to ZACR in 2013 were virtually identical to those sent to
25 DCA in 2015. *Compare* Masilela Ex. A *with* Bekele Decl. Ex. 13. In both instances, the ICC
26 determined that the initial letters of support were deficient.

27 ⁵ Morocco, the only country in Africa that is not a member of the AUC, separately provided a
28 letter of support to ZACR. Masilela Decl. ¶6, Ex. C.

⁶ DCA’s claim that ICANN “unfairly” assisted ZACR by providing a template and language to
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 (Willett Tr. at 43:3-13); Brantly

1 12. After the GAC advice issued against DCA’s application, ZACR was the only remaining
2 applicant for .Africa. Having met all of ICANN’s requirements to operate the .Africa gTLD,
3 ZACR and ICANN entered into a Registry Agreement on March 24, 2014. Masilela Decl. ¶ 10.

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

5 Not surprisingly, once ICANN instructed ICC to conduct its review of the DCA
6 application, ICC determined that DCA failed to submit the required documentation
7 demonstrating that it had 60% support of the African countries. Willett Decl. ¶¶ 10-11;
8 McFadden Decl. ¶ 13-15. When confronted with clarifying questions to address this
9 fundamental deficiency, DCA was unable to comply because it unquestionably did not have the
10 support of AUC or UNECA. Yedaly Decl. ¶ 13-15, Exs. H, I, J. DCA did not even attempt to
11 fix the deficiencies in its letter of support or request more time to do so (which ICANN would
12 have granted), because it knew full well that the AUC and UNECA did not support its
13 application. Brantly Ex. 2 (Willett Tr. 68:15-20; 66:12-67:4). Instead, DCA took the position
14 that its documentation was sufficient and made no attempt to get a revised letter from the AUC
15 or UNECA. McFadden Decl. ¶ 15; Willett Decl. ¶¶ 10, 12; Brantly Decl. Ex. 1 (Bekele Tr. at
16 179:18-22). As a consequence of the deficiencies found by ICC, on October 13, 2015, ICANN
17 issued an Initial Evaluation Report advising DCA that its application had not passed the
18 Geographic Names Review, but that DCA was eligible for an “Extended Evaluation” as
19 provided for in the Guidebook. Willett Decl. ¶ 11.

20 The Extended Evaluation only highlighted the same problem. After sending DCA a
21 letter again advising that the 2009 AUC letter was insufficient to meet the Guidebook
22 requirements, DCA was again unable to fix the deficiencies in its letter because it did not have
23 the support of the AUC. Yedaly Decl. ¶¶ 13-15, Exs. H, I, J. DCA again took the position that
24 its documentation was sufficient. McFadden Decl. ¶15; Willett Decl. ¶ 12. Accordingly, on
25

26
27 Decl. Ex. 3 (Atallah Tr. at 133:15-134:10). Second, even if DCA had requested ICANN’s
28 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 February 17, 2016, upon ICC's recommendation, ICANN notified DCA that its application
2 would not proceed. Willett Decl. ¶ 15; McFadden Decl. ¶14; Bekele Decl. Ex. 16.

3 **G. Redelegating A gTLD Is An Available Procedure**

4 ICANN has the power to to redelegate a gTLD from one operator to another, and has
5 done so on dozens of occasions. Atallah Decl. ¶ 13; Masilela Decl. ¶¶ 14-16, Exs. G, H, I.
6 Indeed, in 2013, ICANN published a manual with step-by-step instructions outlining the process
7 for redelegating a gTLD like .Africa. Masilela Decl. ¶ 16; Ex. I. This manual is needed
8 precisely because ICANN does not delegate gTLD's in perpetuity.

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

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

27 The African people are also harmed by the delay in the delegation. *Id.* ¶ 17; Yedaly
28 Decl. ¶¶ 6, 17-18. Political, business and civic leaders from throughout the African Union have

1 expressed concern about the delay in delegating .Africa. Yedaly Decl. ¶ 18. The ongoing delay
2 is depriving the people of the African continent of an important opportunity to expand internet
3 domain capabilities. *Id.* The .Africa domain name would add brand value to the continent and
4 would provide a platform that connects products, businesses and individuals that have interests
5 in Africa. Masilela Decl. ¶ 17. As the Head of Information Society Division within the AUC
6 stated: “The launch of the .Africa domain is of historic significance to the African continent”
7 and “will provide secure, world-class technical infrastructure to leverage the continent’s socio-
8 economic capacity and potential.” Yedaly Decl. ¶ 6. And, African citizens do not understand
9 why .Africa is not operational when other continents have their own unique gTLDs, i.e.
10 “.ASIA” and “.EU”, that have been available for years. *Id.* ¶18.

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

17 **III. RELEVANT PROCEDURAL HISTORY**

18 After filing the lawsuit in Los Angeles Superior Court on January 20, 2016, and after the
19 case was removed to federal court on February 8, 2016, DCA filed a First Amended Complaint
20 adding ZACR as a co-defendant with ICANN.

21 **A. The Motion for Preliminary Injunction**

22 Before ZACR had been served with the lawsuit in South Africa, DCA filed a motion for
23 preliminary injunction to prevent ICANN from delegating .Africa to ZACR. With briefing
24 limited to submissions by DCA and ICANN, the district court granted DCA’s request for a
25 preliminary injunction. Declaration of Ethan J. Brown (“Brown Decl.”), Ex. 2. It did so based
26 upon a series of key factual errors, including a significant mistake in which the court
27 erroneously believed that DCA had already satisfied the requirement for government support in
28

1 the region. This erroneous finding was the predicate for the district court’s conclusion that
2 DCA had demonstrated a likelihood of success on the merits.

3 **B. Service on ZACR and ZACR’s Motion to Dismiss**

4 On March 22, 2016, DCA served ZACR with the operative complaint in South Africa.
5 After ZACR entered the case, it filed a motion to dismiss for failure to state a claim on April 26,
6 2016. On June 14, 2016, the district court granted ZACR’s motion to dismiss.

7 **C. ZACR’s Motion to Vacate/ Reconsider**

8 On May 6, 2016, ZACR filed a motion to vacate/ reconsider the preliminary injunction
9 order which ICANN subsequently joined. ZACR asserted that reconsideration was warranted
10 for several reasons, including that DCA could not show a likelihood of success on the merits
11 because it had not passed the Geographic Names Panel and it could not show irreparable harm
12 because the .Africa gTLD could be transferred to DCA if it prevailed in its lawsuit.

13 On June 20, 2016, the district court, without oral argument, issued its ruling denying the
14 motion to vacate/ reconsider the preliminary injunction order. Brown Decl. Ex. 3. While
15 acknowledging its error in stating that DCA had passed the geographic names process (an error
16 that even DCA conceded), the district court then committed another error by ruling that it was
17 immaterial because it could “infer” that the IRP Panel in 2013 had already determined that DCA
18 had met the 60% government support requirement. In fact, the record supports just the
19 opposite: the IRP Panel refused DCA’s request that DCA be “deemed” to have met the required
20 60% government support. Bekele Decl. Ex. 1 at ¶¶119 and ¶¶ 148-151; Brantly Decl. Ex.1
21 (Bekele Tr. at 200:12-201:19).

22 **D. The Appeal and ZACR’s Motion to Intervene**

23 ICANN and ZACR both filed appeals to the Ninth Circuit (subsequently consolidated)
24 requesting that the district court’s order be reversed and the preliminary injunction be vacated.
25 While the appeal was pending, ZACR filed a motion to intervene in the district court on grounds
26 that it remains a required party to DCA’s claims for declaratory relief because it is a party to the
27 Registry Agreement that DCA seeks to void and rescind. ICANN and DCA did not oppose
28 ZACR’s motion to intervene but DCA opposed any order that would deem ZACR an

1 indispensable party. On October 19, 2016, the district court granted ZACR’s motion to
2 intervene as to DCA’s tenth cause of action, and further held that ZACR is an indispensable
3 party to that claim. Because the finding on indispensability destroyed the court’s diversity
4 jurisdiction, the district court remanded the case to this Court.

5 **IV. LEGAL STANDARD**

6 A preliminary injunction is an “extraordinary remedy.” *Gleaves v. Waters*, 175 Cal.
7 App. 3d 413, 417 (1985). The burden is on the plaintiff to show all elements necessary to
8 support a preliminary injunction. *O’Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1481
9 (2006). “In deciding whether to grant a preliminary injunction, the trial court must weigh two
10 interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the
11 merits; and (2) the relative harm to the parties from issuance or nonissuance of the injunction.
12 *Id.* at 1463 (citation omitted).

13 However, a court must “deny a preliminary injunction unless there is a reasonable
14 probability that plaintiff will be successful in the assertion of his rights.” *Continental Banking*
15 *Co. v. Katz*, 68 Cal. 2d 512 (1968); *O’Connell*, 141 Cal. App. 4th at 1463 (trial court cannot
16 grant a preliminary injunction, “regardless of the balance of interim harm, unless there is some
17 possibility that the plaintiff would ultimately prevail on the merits of the claim.”)

18 Moreover, in evaluating the interrelated factors, courts will consider “the degree of
19 adverse effect on the public interest or interests of third parties the granting of the injunction
20 will cause.” *Vo v. City of Garden Grove*, 115 Cal. App. 4th 425, 435 (2004) (citing *Cohen v.*
21 *Board of Supervisors*, 40 Cal. 3d 277, 286 n.5 (1985)). It is well accepted that intervening
22 parties are entitled to challenge a preliminary injunction. *See, e.g., White v. Davis*, 30 Cal. 4th
23 528, 536 & n.2 (2003) (noting that intervening state employees impacted by rulings challenged
24 and appealed injunction order).

25 ///

26 ///

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28 ///

1 **V. ARGUMENT⁷**

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

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

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

16 Instead, and contrary to what DCA now implies, the IRP panel was quite deliberate in
17 recommending only that ICANN allow DCA’s application to proceed through the remainder of
18 the process. *Id.* at ¶ 149. That is precisely what ICANN did. Willet Decl. ¶ 10. But of course
19 DCA could not make it through that process because, as DCA fully knew, it lacked 60% support
20 of African governments.

21 Nevertheless, DCA suggests that the ultimate decision to decline DCA’s application was
22 somehow the result of a procedural impropriety because: (1) the ICC’s request that DCA
23 provide an updated letter from supporting governments in the region somehow targeted DCA
24 unfairly as against ZACR; (2) DCA asserts that it had at least the “same” support from the AUC
25 as ZACR; and (3) the requirement for providing the updated government support should have
26

27 _____
28 ⁷ DCA’s suggestion that the district court injunction remains in effect is entirely without merit
as set forth in ICANN’s opposition. ZACR joins in and adopts ICANN’s arguments.

1 been deemed “discretionary” and not mandatory. The undisputed record shows that each of
2 these contentions is completely without merit.

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

12 Second, there is no merit to DCA’s suggestion that it had at least the same support from
13 the AUC as ZACR. After expressly repudiating any support for DCA in 2010, the AUC in a
14 letter dated September 29, 2015, again reiterated that the governments of Africa do not support
15 DCA’s application. Yedaly Decl. ¶ 14, Ex. I (AUC does not support DCA and only supports
16 ZACR’s application). Similarly, UNECA advised that, contrary to DCA’s statements, UNECA
17 could not support DCA’s application. *Id.* ¶ 15, Ex. J (UNECA is not qualified to issue a letter
18 of support). These statements from the AUC and UNECA unequivocally demonstrate why
19 DCA could not get through the geographic names evaluation process – it simply lacked the
20 requisite support of the governments of Africa.

21 Finally, DCA’s suggestion that the clarifying question at issue was discretionary is flatly
22 contradicted by the record. The prefatory language above the specific clarifying questions
23 makes clear that “each letter of support . . . *must meet the following criteria . . .*” *See* Bekele
24 Ex. 13; Masilela Ex. A. It is difficult to imagine a clearer expression of what is mandatory than
25 using the word “must” in the prefatory sentence. And given the importance of Africa to the

26 ⁸ DCA also implies that it could be improper for ZACR to assign certain rights to the AUC.
27 This too is wrong. ICANN has no such prohibition and ICANN officials noted situations where
28 other operators have done so. *See* Brantly Decl. Ex. 2 (Willett Tr. at 48:9-49:19); Ex. 3 (Atallah
Tr. at 129:2-130:2).

1 African governments, it only makes sense that a letter of support “should demonstrate” a
2 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 be denied. *See Metro Traffic Control, Inc. v. Shadow Traffic Network*, 22 Cal.
5 App. 4th 853, 863-64 (1994) (affirming denial of preliminary injunction where plaintiff was
6 unlikely to prevail on the merits); *Scates v. Rydingsword*, 229 Cal. App. 3d 1085, 1096 (1991)
7 (injunction should be denied if no possibility of success even if plaintiff can show harm);
8 *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d 300, 305 (1967).

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

11 **1. No Harm to DCA**

12 Here, DCA cannot demonstrate irreparable harm.⁹ If ICANN delegates .Africa to
13 ZACR before the case is resolved on the merits, and DCA somehow prevails (it cannot for the
14 reasons addressed above), it is undisputed that ICANN has the power to redelegate .Africa to
15 DCA. In fact, as attested to by ICANN’s president, ICANN has re-delegated gTLDs over 40
16 times from one registry operator to another. *See Atallah Decl.* ¶ 13. Indeed, ICANN has an
17 entire procedure for re-delegating a gTLD as set forth in a published manual. *See Masilela*
18 *Decl. Ex. I.* And DCA itself now concedes that “ICANN has established procedures for re-
19 delegating a gTLD to a new registry.” Motion at 12. That should end the inquiry because DCA
20 itself acknowledges that there is no potential for irreparable harm.¹⁰

21 Moreover, DCA asserts in the operative complaint that it seeks millions of dollars in
22 damages. Where a plaintiff has an adequate remedy at law in the form of monetary damages,
23

24 ⁹ 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;
Masilela Decl. ¶¶ 14-16, Exs. G, H, I. DCA makes no such assertion in this motion.

26 ¹⁰ DCA makes the throw away argument that because the U.S. Government no longer directly
27 oversees ICANN, re-delegation is “uncertain.” Motion at 12. Not surprisingly, DCA cites no
28 support for this baseless proposition. In fact, nothing about the recent transition of IANA
functions from the United States to ICANN has any effect whatsoever on the right to transfer a
new gTLD from one registry operator to another, post-delegation. *Atallah Decl.* ¶ 14.

1 “an injunction cannot be granted.” *Thayer Plymouth Center*, 255 Cal. App. 2d at 306; *Pacific*
2 *Design Sciences Corp. v. Superior Court*, 121 Cal. App. 4th 1100, 1110 (2004).

3 **2. The Harm to ZACR**

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

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

18 Accordingly, given that the harm to ZACR is so substantial and outweighs any alleged
19 harm to DCA, the court should deny the requested injunction.

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

21 The public interest also strongly favors denying the injunction. *See Loma Portal Civic*
22 *Club*, 61 Cal. 2d at 588; *Vo*, 115 Cal. App. 4th at 435 (courts consider “the degree of adverse
23 effect on the public interest or interests of third parties the granting of the injunction will
24 cause”) (citation omitted). Here, the ongoing delay in the delegation of .Africa is depriving the
25 people of the African continent of an important opportunity to expand internet domain
26 capabilities. Yedaly Decl. ¶ 18. There are real opportunities being lost because African
27 businesses and individuals remain unable to develop and promote a gTLD that would be
28 uniquely identified with the African continent. *See id*; *see also* Masilela Decl. ¶ 17. Indeed,

1 even DCA admits in deposition that the .Africa gTLD is an important right that will benefit the
2 people of Africa. Brantly Decl. Ex. 1 (Bekele Tr. 125:24-127:25). Yet, if a preliminary
3 injunction is sustained, African citizens will continue to be deprived of having their own unique
4 gTLD when other continents have had unique gTLDs for years. Yedaly Decl. ¶ 18.

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

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

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

22 **VI. CONCLUSION**

23 For all of the foregoing reasons, ZACR respectfully requests that this Court deny DCA’s
24 motion for preliminary injunction.

25 DATED: December 9, 2016

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26 By: 

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