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11 DOTCONNECTAFRICA TRUST

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

13 **COUNTY OF LOS ANGELES – CENTRAL**

14 DOTCONNECTAFRICA TRUST, a Mauritius
15 Charitable Trust;

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS, a
20 California corporation;

21 Defendants.

Case No. BC607494

Assigned for all purposes to the Honorable
Howard L. Halm

**EVIDENTIARY OBJECTIONS
DECLARATION OF MOKGABUDI
LUCKY MASILELA IN SUPPORT OF
ZACR'S OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: December 22, 2016

TIME: 8:30 a.m.

DEPT: 53

Evidentiary Objections to Declaration of Mokgabudi Lucky Masilela

DCA objects to the entire Masilela Declaration pursuant to Evid. Code § 352 on the grounds that his declaration is misleading as it fails to state that Defendant ZA Central Registry (“ZACR”) agreed to grant the AUC (“African Union Commission”) any rights to the gTLD .Africa that ZACR obtains and is therefore effectively itself an applicant for the .Africa gTLD. (Bekele Declaration, ¶33 Ex. 18, ¶22(7) [“It should be noted that the AUC shall retain all rights relating to the dotAfrica TLD”]). M. Lucky Masilela is the Chief Executive Officer of ZACR.

Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 3: Due to its well-known reputation for independence and neutrality, as well as technical competence and operational excellence, ZACR is the single largest domain name registry on the African continent.</p>	<p>1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation, irrelevant (Evid. Code § 403)</p>		
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 4: After Internet Corporation For Assigned Names and Numbers (“ICANN”) formally launched the “New gTLD Program,” ZACR submitted an application for the .Africa gTLD. I am aware that both ZACR and DCA submitted their respective applications for the .Africa gTLD in the Spring/ Summer of 2012. At the same time, ZACR also applied for, and obtained, the .CapeTown, .Joburg and .Durban gTLDs, and these gTLDs have been launched to the Internet public.</p>	<p>1. Irrelevant (Evid. Code § 350)</p>		

Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 5: I am familiar with the ICANN selection criteria for the gTLD. ICANN set forth selection criteria in an Applicant Guidebook. Among other things, ICANN made clear that because the .Africa gTLD represented the name of a geographic region, an applicant would need to provide documentation showing support from at least 60% of the governments in the region. Further, ICANN criteria provided that no more than one objection from a government or public entity associated with the geographic region would be permitted. These criteria are set forth in ICANN Application Guidebook Module 2, and available online at: http://newgtlds.icann.org/en/applicants/agb par 2.2.1.4.2.4.</p>	<p>1. The Application Guidebook is the best evidence of the document. (Evid. Code § 1520)</p> <p>2. Lacks foundation (Evid. Code § 403)</p> <p>3. Lacks personal knowledge. (Evid. Code §702)</p>		
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 6: ZACR submitted its application to ICANN with the full support of African Union member states via the African Union Commission (“AUC”) endorsement. Specifically, the AUC, which serves as the Secretariat of the African Union, provided a letter supporting ZACR’s application. ZACR submitted a letter of support from</p>	<p>1. The letters are the best evidence of the letters. (Evid. Code § 1520)</p>		

<p>1 the African Union dated July 4, 2012. In 2 response, ICANN’s Geographic Names 3 Panel provided ZACR with Clarifying 4 Questions relating to deficiencies in the 5 AUC letter of support. Attached hereto as 6 Exhibit A is a true and correct copy of the 7 Geographic Names Panel Clarifying 8 Questions. ZACR addressed the 9 deficiencies and submitted an updated 10 letter of support on or about July 2, 2013. 11 A true and correct copy of the July 2, 2013 12 AUC letter is attached as Exhibit B. In 13 addition, the only nonmember, Morocco, 14 separately provided a letter supporting 15 ZACR’s application. A true and correct 16 copy of the March 28, 2012 Moroccan 17 letter of support is attached as Exhibit C.</p>			
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>19 ¶ 7: ZACR received the support of the 20 African Union only after the AUC 21 publicized a request for proposal (“RFP”). 22 This was an open bid process. The AUC 23 made clear that it was only going to 24 support one applicant. By way of 25 background, the AUC RFP process began 26 because it was well known that ICANN 27 was considering a new gTLD program, 28 including .Africa. It was in anticipation of</p>	<p>1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation (Evid. Code § 403)</p>		

<p>1 this new gTLD program that the AUC 2 decided to hold an RFP to support a single, 3 qualified applicant for the African Union. 4 This is because the AUC was specifically 5 mandated by member states to set up the 6 structures and modalities for the 7 implementation of the dotAfrica (.Africa) 8 gTLD. Details of the process are set forth 9 in the September 29, 2015 AUC letter, a 10 true and correct copy of which is attached 11 hereto as Exhibit D. This letter is also 12 available at: http://africainonespace.org/ 13 downloads/GNP.PDF</p>			
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>15 ¶ 8: I was informed by AUC officials that 16 Plaintiff DotConnectAfrica Trust 17 (“Plaintiff”) chose not to participate in the 18 RFP. 19</p>	<p>1. Hearsay (Evid. Code § 1200, et seq.)</p>		
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>21 ¶ 9: Attached as Exhibit E are true and 22 correct copies of the 17 “Early Warning 23 Notices” from individual African countries 24 to Plaintiff’s application. These “Early 25 Warning Notices” are also available online 26 at:http://africainonespace.org/ 27 content.php?tag=13&title=Resources 28</p>	<p>1. Irrelevant (Evid. Code § 350)</p>		

Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 10: The Registry Agreement between ICANN and ZACR was effective on March 24, 2014 and runs for ten years. Yet, over two years into the Agreement, the .Africa gTLD has still not been delegated to ZACR. In effect, 20% of the period of the Agreement has already lapsed without any benefit to ZACR. This delay has resulted in unforeseen and mounting costs, as well as lost opportunities, for the .Africa project.</p>	<ol style="list-style-type: none"> 1. Lacks personal knowledge (Evid. Code §702) 2. Lacks foundation (Evid. Code § 403) 3. Speculative (Evid. Code §702) 4. Conclusory. (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.) 5. Biased and misleading in that it was entered into after the initiation of the IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending, and on the grounds that the IRP ordered ICANN to refrain from further processing 		

<p>1 2 3 4 5</p>	<p>ZACR’s application until the IRP proceeding concluded. <i>See</i> (Bekele Decl. ¶10, Ex. 1, pp. 4, ¶¶ 16-20)</p>		
<p>6</p>	<p>Lucky Masilela Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained Overruled</p>
<p>7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> <p>¶ 11: ZACR has incurred considerable expenses both prior to and after entering into the Registry Agreement. The current and continuing cost due to the delay in the delegation is running at approximately \$16,632 per month. In May of 2016, ZACR previously estimated its average monthly costs at approximately \$18,386. Cost saving measures implemented by ZACR have brought the average amount of ZACR’s costs down. A true and correct copy of a summary of average costs from July 2015 to October 2016 is included as Exhibit F. This is based upon a review of the monthly costs incurred from July 2015 to October 2016 for the .Africa project, including the ongoing costs related to consultants, marketing, sponsorships and related expenses. In determining these figures, we averaged the monthly expenses for the .Africa project and where necessary converted expenditures from South African</p>	<p>1. Lacks foundation (Evid. Code § 403) 2. Lacks personal knowledge (Evid. Code §702) 3. Speculative (Evid. Code § 1200, et seq.) 4. Conclusory (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.)</p>		

<p>1 Rand to U.S. dollars. These figures were 2 configured by ZACR’s finance section 3 based on ZACR’s financial records. The 4 summary of costs listed in Exhibit F does 5 not include any fees due to ICANN under 6 the Registry Agreement or legal fees that 7 ZACR had previously incurred. If we were 8 to include actual and expected legal fees 9 for this litigation, the ZACR finance 10 section projects the cost figures would 11 increase significantly beyond \$16,632 per 12 month. The importance of maintaining 13 visibility for the .Africa project, coupled 14 with the ongoing need to interface with 15 government officials throughout the 16 African continent, makes clear that these 17 ongoing expenses will continue during the 18 course of this litigation.</p>			
<p>19 Lucky Masilela Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>20 ¶ 12: The Loss of Net Income after Tax 21 (opportunity costs) suffered by ZACR 22 from the date of the planned delegation 23 following the Registry Agreement through 24 December 1, 2016, are now estimated to be 25 approximately \$15.5 million (U.S. dollars). 26 These estimates were configured by 27 ZACR’s finance section. A true and correct 28 copy of a summary of the breakdown of</p>	<p>1. Lacks foundation (Evid. Code § 403) 2. Lacks personal knowledge (Evid. Code §702) 3. Speculative (Evid. Code § 1200, et seq.) 4. Conclusory (<i>Evinger v.</i></p>		

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<p>ZACR’s opportunity costs are included in the attached Exhibit F. The estimated number of registration numbers are based on ZACR’s responses to ICANN’s 2012 application questions 46 – 50. ZACR researched these numbers at the time of application and the application passed ICANN evaluation. To be conservative, ZACR revised down some of these numbers based on trends in the launch of other new gTLDs. Of the \$15.5 million in lost opportunity costs, approximately \$5.8 million would have been donated to the dotAfrica Foundation for African online development. Until such time as delegation takes place, the .Africa gTLD in effect stagnates and generates no income and no value in the marketplace. The ongoing delay is also prejudicial to the gTLD itself (no matter who the operator is) in that the initial interest surrounding the launch of this domain name will have faded, and persons who may have sought to register will have lost interest.</p>	<p><i>MacDougall</i> (1938) 28 Cal.App.2d 175.)</p> <p>5. Biased and misleading in that it was entered into after the initiation of the IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending, and on the grounds that the IRP ordered ICANN to refrain from further processing ZACR’s application until the IRP proceeding concluded.</p> <p><i>See</i> (Bekele Decl. ¶10, Ex. 1, pp. 4, ¶¶ 16-20).</p>		
<p>Lucky Masilela Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 13: Once a gTLD is delegated it starts increasing in value. The gTLD is at its lowest value prior to delegation and</p>	<p>1. Lacks foundation (Evid. Code § 403)</p>		

<p>1 increases as the number of second level 2 domain delegations (for example: 3 xyz.africa) increases. If Plaintiff is 4 redelegated the .Africa gTLD, it will suffer 5 no irreparable harm as it will inherit a 6 more valuable gTLD without incurring the 7 cost to develop it.</p>	<p>2. Lacks personal knowledge (Evid. Code §702) 3. Speculative (Evid. Code § 1200, et seq.) 4. Conclusory (<i>Evinger v.</i> <i>MacDougall</i> (1938) 28 Cal.App.2d 175.) 5. Irrelevant to the extent that the standard at issue is whether DCA would be harmed, not irreparably harmed. (Evid. Code § 403) 6. Biased and misleading in that it was entered into after the initiation of the IRP process by DCA, the day after DCA requested ICANN refrain from delegating the .Africa domain based on the IRP proceeding pending,</p>		
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	and on the grounds that the IRP ordered ICANN to refrain from further processing ZACR’s application until the IRP proceeding concluded. <i>See</i> (Bekele Decl. ¶10, Ex. 1, pp. 4, ¶¶ 16-20).		
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
¶ 14: Attached hereto as Exhibit G are true and correct copies of exemplar printouts of redelegations including gTLDs, from the Internet Assigned Numbers Authority (“IANA”) website, https://www.iana.org/reports . Additional examples can be found on the website.	1. Irrelevant. (Evid. Code § 403)		
Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
¶ 15: Attached hereto as Exhibit H are true and correct copies of printouts from the following websites which discuss redelegation of gTLDs: http://domaincite.com/18849-youmight-be-surprised-how-many-new-gtlds-have-changed-hands-already ; http://domaincite.com/	1. Irrelevant. (Evid. Code § 403)		


1	20235-minds-machines-dumps-back-end-			
2	and-registrar-in-nominet-uniregistry-deals;			
3	http://www.afilias.			
4	info/news/2003/01/02/public-interest-			
5	registry-assumes-control-			
6	org-domain-name-registry.			
7	Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
8	¶ 16: I am aware that ICANN builds in	1. The manual itself is		
9	time limits in its gTLD registry	the best evidence of		
10	agreements. I am further informed, based	the manual. (Evid.		
11	upon my experience in the industry and	Code § 1520)		
12	discussions with technical personnel within			
13	ZACR, that a re-delegation of a gTLD is			
14	entirely feasible. In fact, ICANN has			
15	prepared for this precise eventuality and			
16	issued a manual in 2013 providing step-by-			
17	step instructions for how to redelegate a			
18	gTLD. The manual, titled “User			
19	Documentation on Delegating and			
20	Redelegating a Generic Top Level Domain			
21	(gTLD),” makes clear that the process is			
22	available and feasible if necessary. A true			
23	and correct copy of the manual is attached			
24	hereto as Exhibit I . It is also available on			
25	ICANN’s website:			
26	https://www.icann.org/en/			
27	system/files/files/gtld-drd-ui-10sep13-			
28	en.pdf			

Lucky Masilela Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 17: In my role as ZACR’s CEO, and based upon my numerous and ongoing discussions with political, business and civic leaders from throughout the African Union, it is my firm understanding and belief that the ongoing delay in the delegation of .Africa is depriving the people of the Africa continent of an important opportunity to expand internet domain name capabilities. The .Africa domain name would add brand value to the continent and would provide a platform that connects products, businesses and individuals that have interests in Africa. The African people are further harmed because the agreement between ZACR and the AUC required that a foundation be created upon delegation and that a significant portion of the revenues received from second level domain delegations (for example: xyz.africa) be directed to the “dotAfrica Foundation.” The Foundation would use the revenues to fund various African domain name and Internet related developmental projects which are now delayed as a result of the preliminary injunction.</p>	<ol style="list-style-type: none"> 1. Lacks foundation (Evid. Code § 403) 2. Lacks personal knowledge (Evid. Code §702) 3. Speculative (Evid. Code § 1200, et seq.) 4. Conclusory (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.) 5. Hearsay (Evid. Code § 1200, et seq.) 		

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Dated: December 15, 2016

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By: 
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DOTCONNECTAFRICA TRUST