| 1 2 3 4 5 6 7 8 | David W. Kesselman (SBN 203838) dkesselman@kbslaw.com Amy T. Brantly (SBN 210893) abrantly@kbslaw.com Kara D. McDonald (SBN 225540) kmcdonald@kbslaw.com KESSELMAN BRANTLY STOCKINGER LI 1230 Rosecrans Ave., Suite 690 Manhattan Beach, CA 90266 Telephone: (310) 307-4555 Facsimile: (310) 307-4570 Attorneys for Intervenor | .P | |
|--------------------------------------|--|--------------------------|---|
| 9 | ZA Central Registry, NPC | | |
| 10 | SUPERIOR COURT OF T | HE STATE O | F CALIFORNIA |
| 11 | COUNTY OF LOS A | ANGELES - C | CENTRAL |
| 12 | DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust, | CASE NO. B | C607494 |
| 13 | Plaintiff, | Assigned to the Dept. 53 | he Hon. Howard L. Halm, |
| 14 | v. | | AT DECISTDY NDC/S |
| 15 16 | INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; a California corporation; ZA Central Registry, | RESPONSE EVIDENTIA | AL REGISTRY, NPC'S TO PLAINTIFF'S ARY OBJECTIONS TO TION OF MOKGABUDI |
| 17 | a South African non-profit company; DOES 1 through 50, inclusive, | LUCKY MA | SILELA |
| 18 | Defendants. | | |
| 19 | | Date: Time: | December 22, 2016 8:29 a.m. |
| 20 | | Dept.: | 53 |
| 21 | | | |
| 22 | | | |
| 23 | | | |
| 24 | | | |
| 25 | | | |
| 26 | | | |
| 27 | | | |
| 28 | | | |
| | 7ACD DECDONGE TO DOA'S EVID ODIS | TO MOVO A P | HDLLHOVV MACH ELA DECI |
| | ZACR RESPONSE TO DCA'S EVID. OBJS. | 10 MOKGAB | UDI LUCK I MASILELA DECL. |

Defendant ZA Central Registry, NPC ("ZACR") submits its responses to the evidentiary objections to the Declaration of Mokgabudi Lucky Masilela ("Masilela Declaration") filed by Plaintiff DOTCONNECTAFRICA Trust ("DCA"). As an initial matter, DCA objects to the entire Masilela Declaration arguing that his declaration is misleading in that it fails to state that ZACR agreed to grant the African Union Commission ("AUC") any rights to the gTLD . Africa and that the AUC is effectively itself an applicant for the . Africa gTLD. Plaintiff's objection that Mr. Masilela's testimony is "misleading" is argumentative and not a proper objection under § 352 of the California Evidence Code. Plaintiff's improper arguments in the guise of evidentiary objections should be disregarded. Moreover, whether ZACR agreed to grant any rights to the gTLD . Africa to the AUC or not is immaterial for purposes of this motion. ICANN does not prohibit such assignments. *See* Brantly Decl. Ex. 2 (Willett Tr. at 48:9-49:19); Ex. 3 (Attallah Tr. at 129:2-130:2).

| Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|------------------------|----------------------|------------------------|----------------|
| ¶ 3: Due to its well- | 1. Lacks personal | Mr. Masilela is the | |
| known reputation for | knowledge (Evid. | Chief Executive | |
| independence and | Code § 702) | Officer of ZACR and | |
| neutrality, as well as | 2. Lacks foundation, | has personal | |
| technical competence | irrelevant (Evid. | knowledge of | |
| and operational | Code § 403) | ZACR's reputation | |
| excellence, ZACR is | | and operations. Mr. | |
| the single largest | | Masilela's testimony | |
| domain name registry | | is relevant to show | |
| on the African | | that ZACR was an | |
| continent. | | experienced | |
| | | applicant for .Africa. | |
| | | | |
| | | | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|---------|-------------------------|----------------------|------------------------|----------------|
| 2 | ¶ 4: After Internet | 1. Irrelevant (Evid. | Mr. Masilela's | |
| 3 | Corporation For | Code § 350) | testimony is relevant | |
| 4 | Assigned Names and | | to show that ZACR | |
| 5 | Numbers ("ICANN") | | was an experienced | |
| 6 | formally launched | | applicant for .Africa. | |
| 7 | the "New gTLD | | | |
| 8 | Program," ZACR | | | |
| 9 | submitted an | | | |
| 10 | application for the | | | |
| 11 | .Africa gTLD. I am | | | |
| 12 | aware that both | | | |
| 13 | ZACR and DCA | | | |
| 14 | submitted their | | | |
| 15 | respective | | | |
| 16 | applications for the | | | |
| 17 | .Africa gTLD in the | | | |
| 18 | Spring/ Summer of | | | |
| 19 | 2012. At the same | | | |
| 20 | time, ZACR also | | | |
| 21 | applied for, and | | | |
| 22 | obtained, the | | | |
| 23 | .CapeTown, .Joburg | | | |
| 24 | and .Durban gTLDs, | | | |
| 25 | and these gTLDs | | | |
| 26 | have been launched | | | |
| 27 | to the Internet public. | | | |
| <u></u> | | | | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|----|------------------------|----------------------|------------------------|----------------|
| 2 | ¶ 5: I am familiar | 1. The Application | The Court may refer | |
| 3 | with the ICANN | Guidebook is the | to the Guidebook | |
| 4 | selection criteria for | best evidence of the | which, in addition to | |
| 5 | the gTLD. ICANN | document. (Evid. | being accessible | |
| 6 | set forth selection | Code § 1520) | online, is part of the | |
| 7 | criteria in an | 2. Lacks foundation | record. (Declaration | |
| 8 | Applicant | (Evid. Code § 403) | of Sophia Bekele | |
| 9 | Guidebook. Among | 3. Lacks personal | Eshete, Ex. 3) | |
| 10 | other things, ICANN | knowledge. (Evid. | | |
| 11 | made clear that | Code §702) | Additionally, Mr. | |
| 12 | because the .Africa | | Masilela is the Chief | |
| 13 | gTLD represented | | Executive Officer of | |
| 14 | the name of a | | ZACR and has | |
| 15 | geographic region, an | | personal knowledge | |
| 16 | applicant would need | | of the process for the | |
| 17 | to provide | | delegation of the | |
| 18 | documentation | | .Africa gLTD. | |
| 19 | showing support | | | |
| 20 | from at least 60% of | | | |
| 21 | the governments in | | | |
| 22 | the region. Further, | | | |
| 23 | ICANN criteria | | | |
| 24 | provided that no | | | |
| 25 | more than one | | | |
| 26 | objection from a | | | |
| 27 | government or public | | | |
| 28 | | | | |

| 1 | entity associated with | | | |
|--|---|---|--|----------------|
| 2 | the geographic | | | |
| 3 | region would be | | | |
| 4 | permitted. These | | | |
| 5 | criteria are set forth | | | |
| 6 | in ICANN | | | |
| 7 | Application | | | |
| 8 | Guidebook Module | | | |
| 9 | 2, and available | | | |
| 10 | online at: | | | |
| 11 | http://newgtlds.icann. | | | |
| 12 | org/en/applicants/agb | | | |
| 13 | par 2.2.1.4.2.4. | | | |
| 14 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| | | | | |
| 15 | ¶ 6: ZACR | 1. The letters are the | The Court may refer | |
| 15 16 | ¶ 6: ZACR submitted its | 1. The letters are the best evidence of the | The Court may refer to the letters, which | |
| | | | - | |
| 16 | submitted its | best evidence of the | to the letters, which | |
| 16 17 | submitted its application to | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the | |
| 16 17 18 | submitted its application to ICANN with the full | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration | |
| 16 17 18 19 | submitted its application to ICANN with the full support of African | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration | |
| 16 17 18 19 20 | submitted its application to ICANN with the full support of African Union member states | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. | |
| 16 17 18 19 20 21 | submitted its application to ICANN with the full support of African Union member states via the African | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. Mr. Masilela is the | |
| 16 17 18 19 20 21 22 | submitted its application to ICANN with the full support of African Union member states via the African Union Commission | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. Mr. Masilela is the Chief Executive | |
| 16 17 18 19 20 21 22 23 | submitted its application to ICANN with the full support of African Union member states via the African Union Commission ("AUC") | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. Mr. Masilela is the Chief Executive Officer of ZACR and | |
| 16 17 18 19 20 21 22 23 24 | submitted its application to ICANN with the full support of African Union member states via the African Union Commission ("AUC") endorsement. | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. Mr. Masilela is the Chief Executive Officer of ZACR and has personal | |
| 16 17 18 19 20 21 22 23 24 25 | submitted its application to ICANN with the full support of African Union member states via the African Union Commission ("AUC") endorsement. Specifically, the | best evidence of the letters. (Evid. Code § | to the letters, which are attached to the Masilela Declaration as Exhibits A and B. Mr. Masilela is the Chief Executive Officer of ZACR and has personal knowledge of | |

| 1 | 1 the African Union, | |
|----|------------------------------|--|
| 2 | 2 provided a letter | |
| 3 | 3 supporting ZACR's | |
| 4 | 4 application. ZACR | |
| 5 | 5 submitted a letter of | |
| 6 | 5 support from the | |
| 7 | 7 African Union dated | |
| 8 | 8 July 4, 2012. In | |
| 9 | P response, ICANN's | |
| 10 | O Geographic Names | |
| 11 | 1 Panel provided | |
| 12 | 2 ZACR with | |
| 13 | 3 Clarifying Questions | |
| 14 | 4 relating to | |
| 15 | 5 deficiencies in the | |
| 16 | 6 AUC letter of | |
| 17 | 7 support. Attached | |
| 18 | 8 hereto as Exhibit A | |
| 19 | 9 is a true and correct | |
| 20 | O copy of the | |
| 21 | 1 Geographic Names | |
| 22 | 2 Panel Clarifying | |
| 23 | 3 Questions. ZACR | |
| 24 | 4 addressed the | |
| 25 | 5 deficiencies and | |
| 26 | 5 submitted an updated | |
| 27 | 7 letter of support on | |
| 28 | 8 or about July 2, | |
| | II | |

| 1 | | | | |
|--|---|--|---|----------------|
| 1 | 2013. A true and | | | |
| 2 | correct copy of the | | | |
| 3 | July 2, 2013 AUC | | | |
| 4 | letter is attached as | | | |
| 5 | Exhibit B. In | | | |
| 6 | addition, the only | | | |
| 7 | nonmember, | | | |
| 8 | Morocco, separately | | | |
| 9 | provided a letter | | | |
| 10 | supporting ZACR's | | | |
| 11 | application. A true | | | |
| 12 | and correct copy of | | | |
| 13 | the March 28, 2012 | | | |
| 14 | Moroccan letter of | | | |
| | | | | |
| 15 | support is attached as | | | |
| | support is attached as Exhibit C . | | | |
| 15 | | DCA's Objection | ZACR's Response | Court's Ruling |
| 15 16 | Exhibit C. | DCA's Objection 1. Lacks personal | ZACR's Response The Court may refer | Court's Ruling |
| 15 16 17 | Exhibit C. Masilela Decl. | | _ | Court's Ruling |
| 15 16 17 18 | Exhibit C. Masilela Decl. ¶ 7: ZACR received | 1. Lacks personal | The Court may refer | Court's Ruling |
| 15 16 17 18 19 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the | Lacks personal knowledge (Evid. | The Court may refer to the letter, which is | Court's Ruling |
| 15 16 17 18 19 20 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only | 1. Lacks personal knowledge (Evid. Code § 702) | The Court may refer to the letter, which is attached to the | Court's Ruling |
| 15 16 17 18 19 20 21 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only after the AUC | Lacks personal knowledge (Evid. Code § 702) Lacks foundation | The Court may refer to the letter, which is attached to the Masilela Declaration | Court's Ruling |
| 15 16 17 18 19 20 21 22 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only after the AUC publicized a request | Lacks personal knowledge (Evid. Code § 702) Lacks foundation | The Court may refer to the letter, which is attached to the Masilela Declaration | Court's Ruling |
| 15 16 17 18 19 20 21 22 23 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only after the AUC publicized a request for proposal | Lacks personal knowledge (Evid. Code § 702) Lacks foundation | The Court may refer to the letter, which is attached to the Masilela Declaration as Exhibit D. | Court's Ruling |
| 15 16 17 18 19 20 21 22 23 24 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only after the AUC publicized a request for proposal ("RFP"). This was an | Lacks personal knowledge (Evid. Code § 702) Lacks foundation | The Court may refer to the letter, which is attached to the Masilela Declaration as Exhibit D. Mr. Masilela is the | Court's Ruling |
| 15 16 17 18 19 20 21 22 23 24 25 | Exhibit C. Masilela Decl. ¶ 7: ZACR received the support of the African Union only after the AUC publicized a request for proposal ("RFP"). This was an open bid process. | Lacks personal knowledge (Evid. Code § 702) Lacks foundation | The Court may refer to the letter, which is attached to the Masilela Declaration as Exhibit D. Mr. Masilela is the Chief Executive | Court's Ruling |

| 1 | to support one | knowledge of the |
|----|------------------------|-------------------|
| 2 | applicant. By way of | AUC RFP, which |
| 3 | background, the | ZACR participated |
| 4 | AUC RFP process | in. |
| 5 | began because it was | |
| 6 | well known that | |
| 7 | ICANN was | |
| 8 | considering a new | |
| 9 | gTLD program, | |
| 10 | including .Africa. It | |
| 11 | was in anticipation of | |
| 12 | this new gTLD | |
| 13 | program that the | |
| 14 | AUC decided to hold | |
| 15 | an RFP to support a | |
| 16 | single, qualified | |
| 17 | applicant for the | |
| 18 | African Union. This | |
| 19 | is because the AUC | |
| 20 | was specifically | |
| 21 | mandated by member | |
| 22 | states to set up the | |
| 23 | structures and | |
| 24 | modalities for the | |
| 25 | implementation of | |
| 26 | the dotAfrica | |
| 27 | (.Africa) gTLD. | |
| 28 | Details of the process | |
| | İ | |

| 1 | are set forth in the | | | |
|----|------------------------------|-----------------------|------------------------|----------------|
| 2 | September 29, 2015 | | | |
| 3 | AUC letter, a true | | | |
| 4 | and correct copy of | | | |
| 5 | which is attached | | | |
| 6 | hereto as Exhibit D . | | | |
| 7 | This letter is also | | | |
| 8 | available at: | | | |
| 9 | http://africainonespac | | | |
| 10 | e.org/downloads/GN | | | |
| 11 | P.PDF | | | |
| 12 | | | | |
| 13 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| 14 | ¶ 8: I was informed | 1. Hearsay (Evid. | Mr. Masilela's | |
| 15 | by AUC officials that | Code § 1200, et seq.) | testimony is not | |
| 16 | Plaintiff | | offered for the truth | |
| 17 | DotConnectAfrica | | of the matter asserted | |
| 18 | Trust | | but rather as to what | |
| 19 | ("Plaintiff") chose | | he was informed. It | |
| 20 | not to participate in | | is also undisputed | |
| 21 | the RFP. | | that DCA chose not | |
| 22 | | | to participate in the | |
| 23 | | | RFP. | |
| 24 | | | | |
| 25 | | | | |
| 26 | | | | |
| 27 | | | | |
| 28 | | | | |
| | | | | |
| | | - 8 - | TO MOKGABUDI LUCK | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|----|------------------------|-----------------------|------------------------|----------------|
| 2 | ¶ 9: Attached as | 1. Irrelevant (Evid. | The ICANN | |
| 3 | Exhibit E are true | Code § 350) | Guidebook requires | |
| 4 | and correct copies of | | that the applicant for | |
| 5 | the 17 "Early | | .Africa demonstrate | |
| 6 | Warning Notices" | | support from at least | |
| 7 | from individual | | 60% of the countries | |
| 8 | African countries to | | in Africa. | |
| 9 | Plaintiff's | | Declaration of | |
| 10 | application. These | | Sophia Bekele | |
| 11 | "Early Warning | | Eschete Ex. 3 at 2- | |
| 12 | Notices" are also | | 18. The Early | |
| 13 | available online at: | | Warning Notices are | |
| 14 | http://africainonespac | | thus relevant to show | |
| 15 | e.org/content.php?tag | | that DCA did not | |
| 16 | =13&title=Resources | | have the support of | |
| 17 | | | the governments in | |
| 18 | | | Africa. | |
| 19 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| 20 | ¶ 10: The Registry | 1. Lacks personal | Mr. Masilela is the | |
| 21 | Agreement between | knowledge (Evid. | Chief Executive | |
| 22 | ICANN and ZACR | Code §702) | Officer of ZACR and | |
| 23 | was effective on | 2. Lacks foundation | has personal | |
| 24 | March 24, 2014 and | (Evid. Code § 403) | knowledge of the | |
| 25 | runs for ten years. | 3. Speculative (Evid. | Registry Agreement | |
| 26 | Yet, over two years | Code §702) | between ZACR and | |
| 27 | into the Agreement, | 4. Conclusory. | ICANN, as well as | |
| 28 | | | | |

| 1 | the .Africa gTLD has | (Evinger v. | the business and | |
|----|------------------------|------------------------|------------------------|--|
| 2 | still not been | MacDougall (1938) | economic | |
| 3 | delegated to ZACR. | 28 Cal.App.2d 175.) | consequences of the | |
| 4 | In effect, 20% of the | 5. Biased and | delayed | |
| 5 | period of the | misleading in that it | implementation of | |
| 6 | Agreement has | was entered into after | that agreement. | |
| 7 | already lapsed | the initiation of the | | |
| 8 | without any benefit | IRP process by DCA, | Plaintiff's objections | |
| 9 | to ZACR. This delay | the day after DCA | that Mr. Masilela's | |
| 10 | has resulted in | requested ICANN | testimony is | |
| 11 | unforeseen and | refrain from | "[b]iased" and | |
| 12 | mounting costs, as | delegating the .Africa | "misleading" are | |
| 13 | well as lost | domain based on the | argumentative and | |
| 14 | opportunities, for the | IRP proceeding | not proper objections | |
| 15 | .Africa project. | pending, and on the | under the California | |
| 16 | | grounds that the IRP | Evidence Code. | |
| 17 | | ordered ICANN to | Plaintiff's improper | |
| 18 | | refrain from further | arguments in the | |
| 19 | | processing ZACR's | guise of evidentiary | |
| 20 | | application until the | objections should be | |
| 21 | | IRP proceeding | disregarded. | |
| 22 | | concluded. See | | |
| 23 | | (Bekele Decl. ¶10, | | |
| 24 | | Ex. 1, pp. 4, ¶¶ 16- | | |
| 25 | | 20) | | |
| 26 | | | | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|---------------|-----------------------|-----------------------|-----------------------|----------------|
| $2 \parallel$ | ¶ 11: ZACR has | 1. Lacks foundation | Mr. Masilela is the | |
| 3 | incurred considerable | (Evid. Code § 403) | Chief Executive | |
| 4 | expenses both prior | 2. Lacks personal | Officer of ZACR and | |
| 5 | to and after entering | knowledge (Evid. | has personal | |
| 6 | into the Registry | Code §702) | knowledge of | |
| 7 | Agreement. The | 3. Speculative (Evid. | ZACR's expenses in | |
| 8 | current and | Code § 1200, et seq.) | connection with the | |
| 9 | continuing cost due | 4. Conclusory | Registry Agreement. | |
| 10 | to the delay in the | (Evinger v. | | |
| 11 | delegation is running | MacDougall (1938) | Mr. Masilela further | |
| 12 | at approximately | 28 Cal.App.2d 175.) | testified that his | |
| 13 | \$16,632 per month. | | estimate of monthly | |
| 14 | In May of 2016, | | expenses was based | |
| 15 | ZACR previously | | on a review of actual | |
| 16 | estimated its average | | costs incurred by | |
| 17 | monthly costs at | | ZACR. The | |
| 18 | approximately | | calculations | |
| 19 | \$18,386. Cost | | underlying | |
| 20 | saving measures | | Mr. Masilela's | |
| 21 | implemented by | | estimates are set | |
| 22 | ZACR have brought | | forth in Exhibit F. | |
| 23 | the average amount | | Costs incurred by | |
| 24 | of ZACR's costs | | ZACR as a result of | |
| 25 | down. A true and | | the delay in the | |
| 26 | correct copy of a | | delegation of the | |
| 27 | summary of average | | .Africa gLTD are | |

| | | , , , , , , , , , , , , , , , , , , , |
|----|-------------------------------|---------------------------------------|
| 1 | costs from July 2015 | directly relevant to |
| 2 | to October 2016 is | hardship ZACR will |
| 3 | included as Exhibit | suffer if the |
| 4 | F . This is based upon | preliminary |
| 5 | a review of the | injunction is granted. |
| 6 | monthly costs | |
| 7 | incurred from July | |
| 8 | 2015 to October | |
| 9 | 2016 for the .Africa | |
| 10 | project, including the | |
| 11 | ongoing costs related | |
| 12 | to consultants, | |
| 13 | marketing, | |
| 14 | sponsorships and | |
| 15 | related expenses. In | |
| 16 | determining these | |
| 17 | figures, we averaged | |
| 18 | the monthly expenses | |
| 19 | for the .Africa | |
| 20 | project and where | |
| 21 | necessary converted | |
| 22 | expenditures from | |
| 23 | South African Rand | |
| 24 | to U.S. dollars. These | |
| 25 | figures were | |
| 26 | configured by | |
| 27 | ZACR's finance | |
| 28 | section based on | |
| 1 | İ | |

| 1 | ZACR's financial |
|----|------------------------|
| 2 | records. The |
| 3 | summary of costs |
| 4 | listed in Exhibit F |
| 5 | does not include any |
| 6 | fees due to ICANN |
| 7 | under the Registry |
| 8 | Agreement or legal |
| 9 | fees that ZACR had |
| 10 | previously incurred. |
| 11 | If we were to include |
| 12 | actual and expected |
| 13 | legal fees for this |
| 14 | litigation, the ZACR |
| 15 | finance section |
| 16 | projects the cost |
| 17 | figures would |
| 18 | increase significantly |
| 19 | beyond \$16,632 per |
| 20 | month. The |
| 21 | importance of |
| 22 | maintaining visibility |
| 23 | for the .Africa |
| 24 | project, coupled with |
| 25 | the ongoing need to |
| 26 | interface with |
| 27 | government officials |
| 28 | throughout the |
| | |

| $_{1}\parallel$ | African continent, | | | |
|-----------------|----------------------|------------------------|-----------------------|----------------|
| $_{2}\parallel$ | makes clear that | | | |
| 3 | these ongoing | | | |
| $4 \parallel$ | expenses will | | | |
| 5 | continue during the | | | |
| 6 | course of this | | | |
| 7 | litigation. | | | |
| 8 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| 9 | ¶ 12: The Loss of | 1. Lacks foundation | Mr. Masilela is the | |
| 10 | Net Income after Tax | (Evid. Code § 403) | Chief Executive | |
| 11 | (opportunity costs) | 2. Lacks personal | Officer of ZACR and | |
| 12 | suffered by ZACR | knowledge (Evid. | has personal | |
| 13 | from the date of the | Code §702) | knowledge of the | |
| 14 | planned delegation | 3. Speculative (Evid. | economic | |
| 15 | following the | Code § 1200, et seq.) | consequences of the | |
| 16 | Registry Agreement | 4. Conclusory | delayed delegation of | |
| 17 | through December 1, | (Evinger v. | the .Afica gLTD. | |
| 18 | 2016, are now | MacDougall (1938) | | |
| 19 | estimated to be | 28 | Further, Mr. Masilela | |
| 20 | approximately \$15.5 | Cal.App.2d 175.) | testified that his | |
| 21 | million (U.S. | 5. Biased and | estimate of | |
| 22 | dollars). These | misleading in that it | opportunity costs | |
| 23 | estimates were | was entered into after | was based on a | |
| 24 | configured by | the initiation of the | review of projections | |
| 25 | ZACR's finance | IRP process by DCA, | made in the course of | |
| 26 | section. A true and | the day after DCA | ZACR's application | |
| 27 | correct copy of a | requested ICANN | for the .Africa gTLD, | |
| 28 | | | | |

| 1 | summary of the | refrain from | and that ZACR had |
|----|-----------------------------|------------------------|-------------------------|
| 2 | breakdown of | delegating the .Africa | revised some of its |
| 3 | ZACR's opportunity | domain based on the | projections |
| 4 | costs are included in | IRP proceeding | downward based on |
| 5 | the attached Exhibit | pending, and on the | recent trends. The |
| 6 | F . The estimated | grounds that the IRP | calculations |
| 7 | number of | ordered ICANN to | underlying |
| 8 | registration numbers | refrain from further | Mr. Masilela's |
| 9 | are based on ZACR's | processing ZACR's | estimate of the |
| 10 | responses to | application until the | opportunity costs |
| 11 | ICANN's 2012 | IRP proceeding | suffered by ZACR |
| 12 | application questions | concluded. See | are set forth in |
| 13 | 46 – 50. ZACR | (Bekele Decl. ¶10, | Exhibit F. |
| 14 | researched these | Ex. 1, pp. 4, ¶¶ 16- | Plaintiff's objections |
| 15 | numbers at the time | 20). | that Mr. Masilela's |
| 16 | of application and the | | testimony is |
| 17 | application passed | | "[b]iased" and |
| 18 | ICANN evaluation. | | "misleading" are |
| 19 | To be conservative, | | argumentative and |
| 20 | ZACR revised down | | not proper |
| 21 | some of these | | objections. Plaintiff's |
| 22 | numbers based on | | improper arguments |
| 23 | trends in the launch | | in the guise of |
| 24 | of other new gTLDs. | | evidentiary |
| 25 | Of the \$15.5 million | | objections should be |
| 26 | in lost opportunity | | disregarded. |
| 27 | costs, approximately | | |
| 28 | \$5.8 million would | | |
| | 1 | | |

| 1 | have been donated to |
|----|-------------------------|
| 2 | the dotAfrica |
| 3 | Foundation for |
| 4 | African online |
| 5 | development. Until |
| 6 | such time as |
| 7 | delegation takes |
| 8 | place, the .Africa |
| 9 | gTLD in effect |
| 10 | stagnates and |
| 11 | generates no income |
| 12 | and no value in the |
| 13 | marketplace. The |
| 14 | ongoing delay is also |
| 15 | prejudicial to the |
| 16 | gTLD itself (no |
| 17 | matter who the |
| 18 | operator is) in that |
| 19 | the initial interest |
| 20 | surrounding the |
| 21 | launch of this |
| 22 | domain name will |
| 23 | have faded, and |
| 24 | persons who may |
| 25 | have sought to |
| 26 | register will have lost |
| 27 | interest. |
| 28 | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|----|-------------------------|------------------------|------------------------|----------------|
| 2 | ¶ 13: Once a gTLD | 1. Lacks foundation | Mr. Masilela is Chief | |
| 3 | is delegated it starts | (Evid. Code § 403) | Executive Officer of | |
| 4 | increasing in value. | 2. Lacks personal | ZACR, the single | |
| 5 | The gTLD is at its | knowledge (Evid. | largest domain name | |
| 6 | lowest value prior to | Code §702) | registry of the | |
| 7 | delegation and | 3. Speculative (Evid. | African continent. As | |
| 8 | increases as the | Code § 1200, et seq.) | such, he has personal | |
| 9 | number of second | 4. Conclusory | knowledge of the | |
| 10 | level domain | (Evinger v. | economics of domain | |
| 11 | delegations (for | MacDougall (1938) | delegations. | |
| 12 | example: xyz.africa) | 28 Cal.App.2d 175.) | | |
| 13 | increases. If Plaintiff | 5. Irrelevant to the | Courts have | |
| 14 | is redelegated the | extent that the | considered whether | |
| 15 | .Africa gTLD, it will | standard at issue is | the plaintiff seeking | |
| 16 | suffer no irreparable | whether DCA would | an injunction would | |
| 17 | harm as it will inherit | be harmed, not | be irreparably | |
| 18 | a more valuable | irreparably harmed. | harmed. See, e.g., | |
| 19 | gTLD without | (Evid. Code § 403) | Vo v. City of Garden | |
| 20 | incurring the cost to | 6. Biased and | Grove, 115 Cal. App. | |
| 21 | develop it. | misleading in that it | 4th 425, 435 (2004) | |
| 22 | | was entered into after | (in evaluating harm | |
| 23 | | the initiation of the | and listing factors, | |
| 24 | | IRP process by DCA, | court must consider | |
| 25 | | the day after DCA | "the degree of | |
| 26 | | requested ICANN | irreparable injury the | |
| 27 | | refrain from | denial of the | |
| 28 | | | | |

| 1 | | delegating the .Africa | injunction will | |
|----|---|------------------------|------------------------|--|
| 2 | | domain based on the | cause"); Gleaves v. | |
| 3 | | IRP proceeding | Waters, 175 Cal. | |
| 4 | | pending, and on the | App. 3d 413, 417 | |
| 5 | | grounds that the IRP | (1985) ("An | |
| 6 | | ordered ICANN to | injunction is an | |
| 7 | | refrain from further | extraordinary remedy | |
| 8 | | processing ZACR's | which requires a | |
| 9 | | application until the | showing of | |
| 10 | | IRP proceeding | threatened | |
| 11 | | concluded. See | irreparable injury and | |
| 12 | | (Bekele Decl. ¶10, | the inadequacy of | |
| 13 | | Ex. 1, pp. 4, ¶¶ 16- | other remedy at | |
| 14 | | 20). | law"); see also Intel | |
| 15 | | | Corp. v. Hamidi, 30 | |
| 16 | | | Cal. 4th 1342, 1352 | |
| 17 | | | (2003) ("Indeed, in | |
| 18 | | | order to obtain | |
| 19 | | | injunctive relief the | |
| 20 | | | plaintiff must | |
| 21 | | | ordinarily show that | |
| 22 | | | the defendant's | |
| 23 | | | wrongful acts | |
| 24 | | | threaten to cause | |
| 25 | | | irreparable injuries, | |
| 26 | | | ones that cannot be | |
| 27 | | | adequately | |
| 28 | | | compensated in | |
| | l | | | |

| 1 | | | damages") (emphasis | |
|----|------------------------------|-----------------------|-------------------------|----------------|
| 2 | | | in original) (citation | |
| 3 | | | omitted). In any | |
| 4 | | | event, Mr. Masilela's | |
| 5 | | | testimony supports | |
| 6 | | | that DCA will not be | |
| 7 | | | harmed. | |
| 8 | | | | |
| 9 | | | Plaintiff's objections | |
| 10 | | | that Mr. Masilela's | |
| 11 | | | testimony is | |
| 12 | | | "[b]iased" and | |
| 13 | | | "misleading" are | |
| 14 | | | argumentative and | |
| 15 | | | not proper | |
| 16 | | | objections. Plaintiff's | |
| 17 | | | improper arguments | |
| 18 | | | in the guise of | |
| 19 | | | evidentiary | |
| 20 | | | objections should be | |
| 21 | | | disregarded. | |
| 22 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| 23 | ¶ 14: Attached hereto | 1. Irrelevant. (Evid. | The print outs of | |
| 24 | as Exhibit G are true | Code § 403) | redelegations are | |
| 25 | and correct copies of | | relevant to show that | |
| 26 | exemplar printouts of | | DCA will not be | |
| 27 | redelegations | | harmed if an | |
| 28 | | | | |

| | | , | |
|--|--|---|---|
| including gTLDs, | | injunction does not | |
| from the Internet | | issue. If DCA | |
| Assigned Numbers | | ultimately prevails in | |
| Authority ("IANA") | | the case, .Africa can | |
| website, | | be redelegated to | |
| https://www.iana.org | | DCA. See also | |
| /reports. Additional | | Declaration of | |
| examples can be | | Akram Atallah ¶13. | |
| found on the website. | | | |
| Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| ¶ 15: Attached | 1. Irrelevant. (Evid. | The print outs are | |
| hereto as Exhibit H | Code § 403) | relevant to show that | |
| are true and correct | | DCA will not be | |
| copies of printouts | | harmed if an | |
| from the following | | injunction does not | |
| websites which | | issue. If DCA | |
| discuss redelegation | | ultimately prevails in | |
| of gTLDs: | | the case, .Africa can | |
| http://domaincite.co | | be redelegated to | |
| m/18849-youmight- | | DCA. See also | |
| besurprised-how- | | Declaration of | |
| many-new-gtlds- | | Akram Atallah ¶13. | |
| havechanged-hands- | | | |
| already; | | | |
| | | | |
| http://domaincite.co | | | |
| http://domaincite.co m/20235-minds- | | | |
| | | | |
| | from the Internet Assigned Numbers Authority ("IANA") website, https://www.iana.org /reports. Additional examples can be found on the website. Masilela Decl. ¶ 15: Attached hereto as Exhibit H are true and correct copies of printouts from the following websites which discuss redelegation of gTLDs: http://domaincite.co m/18849-youmight- besurprised-how- many-new-gtlds- havechanged-hands- | from the Internet Assigned Numbers Authority ("IANA") website, https://www.iana.org /reports. Additional examples can be found on the website. Masilela Decl. ¶ 15: Attached hereto as Exhibit H are true and correct copies of printouts from the following websites which discuss redelegation of gTLDs: http://domaincite.co m/18849-youmight- besurprised-how- many-new-gtlds- havechanged-hands- | from the Internet Assigned Numbers Authority ("IANA") website, https://www.iana.org /reports. Additional examples can be found on the website. Masilela Decl. Masilela Decl. DCA's Objection TACR's Response ¶ 15: Attached hereto as Exhibit H are true and correct copies of printouts from the following websites which discuss redelegation of gTLDs: http://domaincite.co m/18849-youmight- besurprised-how- many-new-gtlds- havechanged-hands- |

| 11 | | 1 | , | |
|----|-----------------------|-----------------------|------------------------|----------------|
| 1 | back-endand- | | | |
| 2 | registrar-in-nominet- | | | |
| 3 | uniregistry-deals; | | | |
| 4 | http://www.afilias. | | | |
| 5 | info/news/2003/01/0 | | | |
| 6 | 2/public-interest- | | | |
| 7 | registry-assumes- | | | |
| 8 | controlorg-domain- | | | |
| 9 | name-registry. | | | |
| 10 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
| 11 | ¶ 16: I am aware that | 1. The manual itself | The Court may refer | |
| 12 | ICANN builds in | is the best evidence | to the manual, which | |
| 13 | time limits in its | of the manual. (Evid. | is attached to the | |
| 14 | gTLD registry | Code § 1520) | Masilela Declaration | |
| 15 | agreements. I am | | as Exhibit I. The | |
| 16 | further informed, | | Court can also | |
| 17 | based upon my | | review the manual on | |
| 18 | experience in the | | ICANN's website at | |
| 19 | industry and | | https://www.icann.or | |
| 20 | discussions with | | g/en/system/files/file | |
| 21 | technical personnel | | s/gtld-drd-ui- | |
| 22 | within ZACR, that a | | 10sep13-en.pdf. | |
| 23 | re-delegation of a | | | |
| 24 | gTLD is entirely | | | |
| 25 | feasible. In fact, | | | |
| 26 | ICANN has prepared | | | |
| 27 | for this precise | | | |
| 28 | | | | |

| | | _ |
|----|--|---|
| 1 | eventuality and | |
| 2 | issued a manual in | |
| 3 | 2013 providing step- | |
| 4 | bystep instructions | |
| 5 | for how to redelegate | |
| 6 | a gTLD. The manual, | |
| 7 | titled "User | |
| 8 | Documentation on | |
| 9 | Delegating and | |
| 10 | Redelegating a | |
| 11 | Generic Top Level | |
| 12 | Domain (gTLD)," | |
| 13 | makes clear that the | |
| 14 | process is available | |
| 15 | and feasible if | |
| 16 | necessary. A true and | |
| 17 | correct copy of the | |
| 18 | manual is attached | |
| 19 | hereto as Exhibit I . | |
| 20 | It is also available on | |
| 21 | ICANN's website: | |
| 22 | https://www.icann.or | |
| 23 | g/en/system/files/file | |
| 24 | s/gtld-drd-ui- | |
| 25 | 10sep13-en.pdf | |
| 26 | | |
| 27 | | |
| 28 | | |
| | - 22 - | |
| | ZACR RESPONSE TO DCA'S EVID. OBJS. TO MOKGABUDI LUCKY MASILELA DECL. | |

| 1 | Masilela Decl. | DCA's Objection | ZACR's Response | Court's Ruling |
|----|----------------------------|-----------------------|-----------------------|----------------|
| 2 | ¶ 17: In my role as | 1. Lacks foundation | Mr. Masilela is Chief | |
| 3 | ZACR's CEO, and | (Evid. Code § 403) | Executive Officer of | |
| 4 | based upon my | 2. Lacks personal | ZACR, the single | |
| 5 | numerous and | knowledge (Evid. | largest domain name | |
| 6 | ongoing discussions | Code §702) | registry of the | |
| 7 | with political, | 3. Speculative (Evid. | African continent. He | |
| 8 | business and civic | Code § 1200, et seq.) | has personal | |
| 9 | leaders from | 4. Conclusory | knowledge of the | |
| 10 | throughout the | (Evinger v. | economics of domain | |
| 11 | African Union, it is | MacDougall (1938) | delegations and the | |
| 12 | my firm | 28 Cal.App.2d 175.) | value of the .Africa | |
| 13 | understanding and | 5. Hearsay (Evid. | domain. | |
| 14 | belief that the | Code § 1200, et seq.) | | |
| 15 | ongoing delay in the | | That Mr. Masilela's | |
| 16 | delegation of .Africa | | understanding was | |
| 17 | is depriving the | | formed in part by | |
| 18 | people of the Africa | | conversations with | |
| 19 | continent of an | | political, business, | |
| 20 | important | | and civic leaders | |
| 21 | opportunity to | | does not make his | |
| 22 | expand internet | | testimony about his | |
| 23 | domain name | | own conclusions | |
| 24 | capabilities. The | | hearsay. | |
| 25 | .Africa domain name | | | |
| 26 | would add brand | | | |
| 27 | value to the continent | | | |
| 28 | | | | |

| 1 | and would provide a |
|----|-----------------------|
| 2 | platform that |
| 3 | connects products, |
| 4 | businesses and |
| 5 | individuals that have |
| 6 | interests in Africa. |
| 7 | The African people |
| 8 | are further harmed |
| 9 | because the |
| 10 | agreement between |
| 11 | ZACR and the AUC |
| 12 | required that a |
| 13 | foundation be created |
| 14 | upon delegation and |
| 15 | that a significant |
| 16 | portion of the |
| 17 | revenues received |
| 18 | from second level |
| 19 | domain delegations |
| 20 | (for example: |
| 21 | xyz.africa) be |
| 22 | directed to the |
| 23 | "dotAfrica |
| 24 | Foundation." The |
| 25 | Foundation would |
| 26 | use the revenues to |
| 27 | fund various African |
| 28 | domain name and |
| | |

| 1 | Internet related |
|----|---|
| 2 | developmental |
| 3 | projects which are |
| 4 | now delayed as a |
| 5 | result of the |
| 6 | preliminary |
| 7 | injunction. |
| 8 | |
| 9 | DATED: December 21, 2016 KESSELMAN BRANTLY STOCKINGER LLP |
| 10 | = 4 |
| 11 | By: |
| 12 | David W. Kesselman Amy T. Brantly |
| 13 | Kara D. McDonald Attorneys for Intervenor |
| 14 | ZA Central Registry, NPC |
| 15 | |
| 16 | |
| 17 | |
| 18 | |
| 19 | |
| 20 | |
| 21 | |
| 22 | |
| 23 | |
| 24 | |
| 25 | |
| 26 | |
| 27 | |
| 28 | |

PROOF OF SERVICE 1 Dotconnectafrica Trust v. ICANN, et al. 2 Los Angeles Superior Court, Central District Case No. BC607494 3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES 4 At the time of service, I was over 18 years of age and not a party to this action. I am 5 employed in the County of Los Angeles, State of California. My business address is 1230 Rosecrans Avenue, Suite 690, Manhattan Beach, California 90266. 6 7 On December 21, 2016, I served true copies of following document(s) described as ZA CENTRAL REGISTRY, NPC'S RESPONSE TO PLAINTIFF'S EVIDENTIARY 8 **OBJECTIONS TO DECLARATION OF MOKGABUDI LUCKY MASILELA** on the interested parties in this action as follows: 9 10 Ethan J. Brown, Esq. Attorneys for Plaintiff Sara C. Colón, Esq. **DOTCONNECTAFRICA TRUST BROWN NERI SMITH & KHAN LLP** 11 11766 Wilshire Blvd., Ste. 1670 Los Angeles, CA 90025 12 Email addresses: ethan@bnsklaw.com 13 sara@bnsklaw.com 14 Jeffrey LeVee, Esq. Attorneys for Defendant INTERNET CORPORATION FOR Rachel Gezerseh, Esq. 15 Charlotte S. Wasserstein, Esq. ASSIGNED NAMES AND Amanda Pushinsky, Esq. **NUMBERS** 16 JONES DAY 555 S. Flower Street, 50th Floor 17 Los Angeles, CA 90071 18 Email addresses: ilevee@jonesday.com rgezerseh@jonesday.com cswasserstein@jonesday.com 19 apushinsky@jonesday.com 20 BY ELECTRONIC SERVICE: Pursuant to agreement of the parties, I caused the 21 document to be sent to the email addresses listed above. 22 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. 23 Executed on December 21, 2016, at Manhattan Beach, California. 24 25 Melinda Quiane 26 27