Nos. 16-55693, 16-55894

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

**DOTCONNECTAFRICA TRUST,**

*Plaintiff/Appellee,*

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al.***

*Defendant/Appellant.*

---

**DOTCONNECTAFRICA TRUST,**

*Plaintiff/Appellee,*

v.

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al.***

*Defendant/Appellant.*

and

**ZA CENTRAL REGISTRY, NPC.**

*Appellant.*

---

On Appeal from the United States District Court for the Central District of California, No. 2:16-CV-00862-RGK, The Honorable R. Gary Klausner

---

# APPELLANTS' MEMORANDUM REGARDING THE DISTRICT COURT'S LACK OF JURISDICTION

---

Craig E. Stewart
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939

Jeffrey A. LeVee
Rachel T. Gezerseh
Charlotte S. Wasserstein
JONES DAY
555 South Flower St., 50th Floor
Los Angeles, CA 90071.2300
Telephone: (213) 489-3939

Attorneys for Defendant/Appellant *Internet Corporation For Assigned Names And Numbers*

[Attorneys for Appellant ZA Central Registry, NPC listed on signature page]

Appellants Internet Corporation for Assigned Names and Numbers ("ICANN") and ZA Central Registry, NPC ("ZACR") file this memorandum to advise the Court that, on October 20, 2016, the district court in this case entered an order concluding that it lacks subject matter jurisdiction and remanding the case to state court. A copy of the district court's order is attached as Exhibit A.

The district court's order means that the district court's preliminary injunction order is void and a nullity, and this appeal from that order is moot. Appellants accordingly request that the Court dismiss this appeal, reflecting that the preliminary injunction order is void and the appeal is moot.

## BACKGROUND

Plaintiff DotConnectAfrica Trust ("DCA") filed this suit against ICANN on January 20, 2016, in Los Angeles County Superior Court. 7 ER 1569. ICANN timely removed the case to the court below, invoking the court's diversity jurisdiction. 7 ER 1568-1656. DCA thereafter filed a First Amended Complaint, adding ZACR as a defendant along with ICANN. 7 ER 1538-67. The gist of DCA's claims is that ICANN improperly entered into a registry agreement with ZACR, rather than DCA, to be the operator of a new generic top-level domain name known as .AFRICA.

On April 12, 2016, the district court granted DCA's motion for a preliminary injunction, preventing ICANN from delegating .AFRICA for operation by ZACR

during the pendency of the litigation.[1] 1 ER 40-47. ICANN timely appealed from that preliminary injunction on May 11, 2016. 1 ER 4-39. Both ICANN and ZACR timely sought reconsideration of the preliminary injunction order, which the district court denied on June 20, 2016. 1 ER 21-24. ICANN amended its notice of appeal on June 27, 2016, to include the district court's denial of reconsideration. 1 ER 2. ZACR filed its separate notice of appeal from the preliminary injunction and from the denial of reconsideration on June 24, 2016. ER 1675.

On April 26, 2016, ZACR moved to dismiss the complaint as to ZACR for failure to state a claim. On June 14, 2016, the court granted ZACR's motion. 2 ER 48-52. Despite that dismissal of DCA's affirmative claims against it, however, ZACR continued to maintain an interest in DCA's claims against ICANN because, among other things, DCA seeks to invalidate ZACR's registry agreement with ICANN, and the preliminary injunction prevented ICANN from proceeding to delegate .AFRICA for operation by ZACR. ZACR accordingly moved, on August 1, 2016, to intervene in the case below.

On October 20, 2016, the district court granted ZACR's motion to intervene. *See* Exhibit A, hereto. The court concluded that ZACR is entitled to intervene as

---

[1] ZACR was a named defendant as of that date, and it had been served with the summons and the First Amended Complaint, although ZACR had not yet filed its response to the First Amended Complaint. Further, DCA served the summons and First Amended Complaint on DCA in South Africa after ICANN and DCA had submitted their briefing on DCA's preliminary injunction motion.

of right as to DCA's Tenth Cause of Action, which seeks a declaration that ZACR's registry agreement with ICANN is null and void. *Id.* at 3-4. However, because ZACR and DCA are both citizens of a foreign country, ZACR's intervention would destroy diversity. The district court accordingly proceeded to consider whether ZACR must be treated as an "indispensable" party, whose existence requires that the case be dismissed for lack of subject matter jurisdiction. *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1013–14 (9th Cir. 2006); *Takeda v. Nw. Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985). Applying the factors set out in Federal Rule of Civil Procedure 19(b), the district court concluded that, because DCA is seeking to void a contract to which ZACR is a party, ZACR is an indispensable party and the case must be dismissed for lack of subject matter jurisdiction. The court accordingly remanded the case to state court.

## DISCUSSION

The district court's ruling that it lacks subject matter jurisdiction means that the preliminary injunction order is nullity and this appeal is moot. "It is well settled that a judgment is void if the court that considered it lacked jurisdiction of the subject matter . . . ." *Watts v. Pinckney*, 752 F.2d 406, 409 (9th Cir. 1985) (internal quotation marks, citations and emphasis omitted); *see also In re Establishment Inspection of Hern Iron Works, Inc.*, 881 F.2d 722, 726–27 (9th Cir. 1989) ("If a court order issues without personal or subject matter jurisdiction, . . .

[the] order is deemed a nullity" and considered "nothing at all."); *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) ("If jurisdiction was lacking, then the court's various orders . . . were nullities.").

Reflecting this settled law, when this Court has determined in appeals from preliminary injunction orders that the district court lacked subject matter jurisdiction, the court has directed that the injunction be vacated and the case dismissed. *See Takeda*, 765 F.2d at 820, 822 (directing district court to vacate its preliminary injunction order after holding that a third party was indispensable and destroyed diversity); *see also Wang Zong Xiao v. Barr*, 979 F.2d 151, 156 (9th Cir. 1992) ("Lacking jurisdiction, the district court erred in entering the preliminary injunction . . . Consequently, the preliminary injunction is VACATED"); *City of San Diego v. Whitman*, 242 F.3d 1097, 1102 (9th Cir. 2001) ("The district court lacked subject matter jurisdiction. . . . The preliminary injunction is vacated and this case is remanded to the district court with instructions to dismiss the City's underlying action.").

In this case, the district court itself has ruled that it lacks jurisdiction and has already remanded the case to state court. The preliminary injunction order thus presents no live issue for this Court's review. Appellants accordingly request that

the Court dismiss this appeal, reflecting that the preliminary injunction order is now void and a nullity and that the appeal is accordingly moot.

Dated: October 21, 2016.

Respectfully submitted,

JONES DAY

By: */s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

Attorneys for Appellant
*Internet Corporation For Assigned Names And Numbers*

David W. Kesselman
Amy T. Brantly
Kara D. McDonald
KESSELMAN BRANTLY STOCKINGER LLP
1230 Rosecrans Ave., Suite 690
Manhattan Beach, CA 90266
Telephone: (310) 307-4555
Facsimile: (310) 307-4570

By: */s/ David W. Kesselman*
David W. Kesselman

Attorneys for Appellant
*ZA Central Registry, NPC*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing REPLY BRIEF OF INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2016. Under said practice, the CM/ECF users were electronically served.

Executed on October 21, 2016, at Los Angeles, California.

By: *s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

Attorneys for Defendant/Appellant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

NAI-1502196780v1

# EXHIBIT A

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| Case No. | CV-16-00862-RGK (JCx) | Date | October 19, 2016 |
|---|---|---|---|
| Title | ***DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*** | | |

| Present: The Honorable | R. GARY KLAUSNER, U.S. DISTRICT JUDGE |
|---|---|

| Sharon L. Williams (Not Present) | Not Reported | N/A |
|---|---|---|
| Deputy Clerk | Court Reporter / Recorder | Tape No. |

| Attorneys Present for Plaintiffs: | Attorneys Present for Defendants: |
|---|---|
| Not Present | Not Present |

**Proceedings:** **(IN CHAMBERS) Order re: ZA Central Registry's Motion to Intervene (DE 122)**

## I. INTRODUCTION

On February 26, 2016, Plaintiff DotConnectAfrica Trust ("DCA") filed a First Amended Complaint against Defendants Internet Corporation for Assigned Names and Numbers ("ICANN"), and ZA Central Registry ("ZACR"). Plaintiff alleges the following claims: (1) Breach of Contract; (2) Intentional Misrepresentation; (3) Negligent Misrepresentation; (4) Fraud & Conspiracy to Commit Fraud; (5) Unfair Competition (Violation of Cal. Bus. & Prof. Code §17200); (6) Negligence; (7) Intentional Interference with Contract; (8) Confirmation of IRP Award; (9) Declaratory Relief (that ICANN follow the IRP Declaration and allow the DCA application to proceed through the delegation phase of the application process); (10) Declaratory Relief (that the Registry Agreement between ZACR and ICANN be declared null and void and that ZACR's application does not meet ICANN standards); and (11) Declaratory Relief (that the covenant not to sue is unenforceable, unconscionable, procured by fraud and/or void as a matter of law and public policy).

On June 14, 2016, the Court granted ZACR's Motion to Dismiss as to all claims alleged against ZACR in its entirety, thereby extinguishing ZACR as a party to the action.

Currently before the Court is ZACR's Motion to Intervene as a matter of right under Rule 24(a) or permissively under Rule 24(b). For the following reasons, the Court **GRANTS** in part the motion.

## II. FACTUAL BACKGROUND

On February 26, 2016, DCA filed a First Amended Complaint against Defendants. The action arises out of a dispute involving the delegation of rights related to the .Africa top-level domain.

Defendant ICANN is the sole organization worldwide that assigns rights to Generic Top-level Domains ("gTLDs"). In 2011, ICANN approved the expansion of the number of gTLDs available to eligible applicants as part of its 2012 Generic Top-Level Domains Internet Expansion Program. ICANN invited eligible parties to submit applications to obtain the rights to these various gTLDs. In March 2012, DCA submitted an application to ICANN to obtain the rights to the .Africa gTLD. DCA paid ICANN the mandatory application fee of $185,000. On February 17, 2014, ZACR also submitted an application for .Africa.

In October 2012, DCA challenged ICANN's processing of its application and response to an independent review conducted at DCA's request. DCA alleges that instead of allowing DCA's application to proceed through the delegation phase as mandated by the review panel, ICANN restarted DCA's application from the beginning. In February 2016, ICANN denied DCA's application. Shortly thereafter, ICANN began the processing of delegating .Africa to ZACR.

On March 4, 2016, the Court granted DCA's Ex Parte Application for TRO, enjoining ICANN from issuing the .Africa top-level domain until the Court decided DCA's Motion for Preliminary Injunction. On April 12, 2016, the Court granted DCA's Motion for Preliminary Injunction, keeping the injunction in place until resolution of the action.

On April 26, 2016, ZACR filed a Motion to Dismiss on all claims asserted against it. On May 6, 2016, ZACR filed a Motion for Reconsideration regarding the Court's Order re Preliminary Injunction. ICANN joined the motion on May 10, 2016. On June 14, 2016, the Court granted ZACR's Motion to Dismiss in its entirety, thereby extinguishing ZACR as a party to the action. On June 20, 2016, the Court denied as moot ZACR's Motion for Reconsideration, and addressed the motion only as it pertained to ICANN. The Court denied ICANN's Motion for Reconsideration.

## III. JUDICIAL STANDARD

Two types of intervention are available under Rule 24: (a) intervention of right, and (b) permissive intervention. Fed. R. Civ. P. 24(a)–(b). Intervention of right is governed by Rule 24(a), which states that on timely motion, the court must permit anyone to intervene who:

> Claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Permissive intervention under Rule 24(b) gives the Court the discretion to grant intervention if a party has a claim or defense that shares a common question of law or fact with the main action, as long as intervention will not unduly delay or prejudice the existing parties. *See* Fed. R. Civ. P. 24(b).

A court deciding a motion to intervene must accept as true all non-conclusory allegations in the motion. *Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001). Proposed intervenors, however, bear the burden of establishing that the requirements of Rule 24 are satisfied. *Petrol Stops Nw. v. Cont'l Oil Co.*, 647 F.2d 1005, 1010 n.5 (9th Cir. 1981).

## VI. DISCUSSION

In its Complaint, DCA asserts claims for Declaratory Relief. The Ninth Claim seeks a declaration that ICANN follow the IRP Declaration and allow the DCA application to proceed through the delegation phase of the application process. The Tenth Claim seeks a declaration that the agreement delegating .Africa rights to ZACR is null and void. ZACR moves to intervene as to both of these claims as a matter of right under Rule 24(a), or alternatively, for permissive intervention under Rule 24(b).

### A. Intervention

Based on Rule 24(a), the Ninth Circuit has outlined four requirements for intervention of right. The applicant must: (1) file a timely application, (2) possess a "significantly protectable" interest relating to the property or transaction that is the subject of the action, (3) be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) be inadequately represented by existing parties. *California ex rel. Lockyear v. United States*, 450 F.3d 436, 441 (9th Cir. 2006) (citing *Sierra Club v. E.P.A.*, 995 F.3d 1478, 1481 (9th Cir. 1993)).

As to the first requirement, the Court finds that ZACR's motion to intervene is timely. The case is still in the early stages. Discovery has just begun, and no depositions have been taken. Trial is not scheduled until February 2017. Further, there is no evidence of undue delay. ZACR brought the present motion not long after dismissal from the case and after appealing the Court's preliminary injunction and reconsideration orders in June. In addition, ICANN and DCA do not oppose ZACR's motion to intervene, and there is no indication of prejudice to existing parties.

Regarding the second requirement, a significantly protectable interest exists if "(1) [the proposed intervenor] asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "An applicant generally satisfies [the second] 'relationship' requirement only if the resolution of the [plaintiff's] claims *actually will affect* the applicant." *Id.* at 410 (emphasis added). Here, the allegations show that ZACR and ICANN entered into a ten-year Registry Agreement on March 24, 2014. (ZACR's Mem. P. & A. In Supp. Of Mot. To Intervene 7:14-15, ECF No. 122-1.) DCA's Tenth Claim bears directly on that agreement. As such, the Court finds that ZACR possesses a significant protectable interest in the Tenth claim. As to the Ninth Claim, however, the allegations show that ZACR did not play a role in the independent review decision. The claim involves only a determination of what the IRP decision stated, whether it was mandatory, and if so, whether ICANN complied. These issues do not directly involve ZACR, and the determination of these issues do not necessarily impact ZACR's current status with respect to its application. As such, the Court finds that ZACR does not possess a significant protectable interest as to the Ninth claim, and the inquiry of intervention as a right ends with respect to this claim.

Regarding the third requirement as it applies to the Tenth Claim, ZACR's interest would be impaired or impeded if ZACR is not permitted to intervene. Resolution of the Tenth Claim in favor of DCA would extinguish any purported rights granted to ZACR under the Registry Agreement.

Regarding the final requirement, to determine whether adequate representation exists, courts consider (1) whether the parties will undoubtedly make all of the intervenor's arguments; (2) whether they are capable of and willing to make such arguments; and (3) whether the intervenor would add some necessary element to the suit that would be otherwise neglected. *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

The applicant-intervenor's burden in showing that its interest is not adequately represented is minimal, and "is satisfied if the applicant shows that representation of [its] interest 'may be'

inadequate." *Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972); *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). However, "[w]hen an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. In such a case a compelling showing is required to demonstrate inadequate representation." *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003).

ZACR and ICANN both argue that ICANN engaged in no wrongdoing and properly determined that ZACR is the appropriate party for delegation of .Africa. However, their interests are not directly aligned and they do not have the same ultimate objective. ICANN's interest in the litigation is related to its role as the nonprofit organization responsible for assigning rights to Generic Top-level Domains, and stems from defending the integrity of its application process. In contrast, ZACR's interest is as an applicant and is limited to not disrupting ICANN's delegation of .Africa to ZACR. As such, ZACR need only show that ICANN's representation *may be* inadequate. It has done so. Furthermore, ZACR's perspective as a South African nonprofit company differs materially from that of ICANN, a California nonprofit corporation, as such, ZACR may make new and additional arguments that are specific to ZACR, which ICANN may not be situated to make. The Court finds that ZACR has satisfied its burden of showing that its interest may not be adequately represented by ICANN.

Therefore, ZACR is entitled to intervene as to the Tenth Claim as a matter of right. As to the Ninth Claim, the Court in its discretion denies ZACR's request for permissive intervention.

**B. Subject Matter Jurisdiction**

Finding that ZACR is entitled to intervene as a matter of right, the Court now turns to determining whether there is subject matter jurisdiction over the parties. *See Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004) (stating that "[t]he court has a continuing obligation to assess its own subject-matter jurisdiction, even if the issue is neglected by the parties.")

"Ordinarily, when removal is proper at the outset, federal jurisdiction is not defeated by later changes or developments in the suit. But . . . an exception to this rule [is] when an indispensable party would destroy diversity." *Takeda v. Nw. Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985). This exception applies when a nondiverse indispensable party intervenes as a matter of right under Fed. R. Civ. P. 24(a)(2). *See Mattel, Inc. v. Bryant*, 446 F.3d 1011, 1013– 14 (9th Cir. 2006).

Here, the exception is significant because Plaintiff DCA and Intervenor-Defendant ZACR are both foreign citizens. *See Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (holding "[d]iversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants"); *Faysound, Ltd. v. United Coconut Chems., Inc.*, 878 F.2d 290, 294–95 (9th Cir. 1989) (holding the presence of citizen defendant does not save diversity jurisdiction as to alien co-defendant in action brought by alien plaintiff because diversity must be complete); *Nike, Inc. v. Comercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 991 (9th Cir. 1994). As the Court has already found that ZACR is entitled to intervene as a matter of right, if ZACR is considered an indispensable party, ZACR's presence would destroy complete diversity.

"A party is indispensable if in 'equity and good conscience,' the court should not allow the action to proceed in its absence." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1161 (9th Cir. 2002); *see also Mattel, Inc.*, at 1013. Fed. R. Civ. P. 19(b). In the Ninth Circuit, it is well-established that "in an action to set aside a lease or a *contract*, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)(emphasis added); *see Dawavendewa* at 1157 (reaffirming "the fundamental principle outlined in *Lomayaktewa*: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract"); *Northrop Corp. v. McDonnell Douglas*

*Corp.*, 705 F.2d 1030, 1044 (9th Cir. 1983) (stating that there is a correlative rule that all parties who may be affected by a suit to set aside a contract must be present). Furthermore, when applying the 19(b) factors to the specific facts of this case, the Court finds that the same general rule applies.

Therefore, the Court finds that ZACR is an indispensable party. As a nondiverse, indispensable party, ZACR destroys diversity jurisdiction, and remand of this action to state court is proper.

## VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** ZACR's Motion to Intervene as a matter of right as to the Tenth Claim. The Court denies ZACR's motion as to the Ninth Claim. Because the Court finds that Intervenor-Defendant ZACR is an indispensable party that is not diverse from Plaintiff DCA, the Court **REMANDS** this case for lack of subject matter jurisdiction.

**IT IS SO ORDERED.**

_____ : _____

**Initials of Preparer** _____

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**KIRY K. GRAY**
Clerk of Court

**WESTERN DIVISION**
312 North Spring Street, Room G−8
Los Angeles, CA 90012
Tel: (213) 894−3535

**SOUTHERN DIVISION**
411 West Fourth Street, Suite 1053
Santa Ana, CA 92701−4516
(714) 338−4750

**EASTERN DIVISION**
3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328−4450

October 20, 2016

Los Angeles County Superior Court
312 N. Spring Street
Los Angeles, CA 90012

Re: Case Number: 2:16−cv−00862−RGK−JC
Previously Superior Court Case No. BC607494
Case Name: DOTCONNECTAFRICA TRUST V. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS ET AL

Dear Sir/Madam:

Pursuant to this Court's ORDER OF REMAND issued on 10/19/16, the above−referenced case is hereby remanded to your jurisdiction.

Attached is a certified copy of the ORDER OF REMAND and a copy of the docket sheet from this Court.

Please acknowledge receipt of the above by signing the enclosed copy of this letter and returning it to our office. Thank you for your cooperation.

Respectfully,

Clerk, U.S. District Court

By: */s/ Brent Pacillas*
Deputy Clerk
Brent_Pacillas@cacd.uscourts.gov
Western Division

*cc: Counsel of record*

---

Receipt is acknowledged of the documents described herein.

Clerk, Superior Court

_____
Date

By: _____
Deputy Clerk