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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; a California corporation; ZA Central Registry, a South African non-profit company; DOES 1 through 50, inclusive,

Defendants.

CASE NO. 2:16-cv-00862 RGK (JCx)

Assigned for all purposes to the Honorable R. Gary Klausner

ZA CENTRAL REGISTRY, NPC'S REPLY IN SUPPORT OF MOTION TO RECONSIDER AND VACATE PRELIMINARY INJUNCTION

[Filed concurrently: Supplemental Declaration of Mokgabudi Lucky Masilela ISO Motion; Consolidated Evidentiary Objections to Declaration of Sophia Bekele Eshete; Consolidated Evidentiary Objections to Declaration of Sarah Colón; Response to Plaintiff's Evidentiary Objections to Declaration of Mokgabudi Lucky Masilela; and Declaration of Akram Atallah ISO of Motion]

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

I. INTRODUCTION

The opposition filed by plaintiff DotConnectAfrica Trust ("DCA") only confirms that the Court's order granting DCA's preliminary injunction should be vacated. DCA admits, as it must, that the injunction ruling contains a key factual error – that DCA passed ICANN's geographic names evaluation process. The Court relied on this erroneous fact to make its finding that DCA had a likelihood of success on the merits. Order at 6. DCA's response – that the error is not material because it "should have passed" the geographic names evaluation process – is false and entirely devoid of evidentiary support.

DCA could not (and cannot) meet the express requirement that it demonstrate 60% support from countries within Africa. The record is undisputed that the African Union Commission ("AUC") and the United Nations Economic Commission for Africa ("UNECA") do not support DCA's application. And, contrary to DCA's suggestion about what the IRP panel "must have intended," the record shows that the IRP panel declined DCA's express request that its application be advanced to the delegation stage. On a corrected factual record, DCA does not have the support of a majority of the governments in Africa, and therefore has no possibility of meeting the 60% requirement. For this reason alone, the preliminary injunction ruling should be vacated.

DCA further acknowledges that it incorrectly advised the Court that ".Africa can be delegated only once." This was not, as DCA suggests, a "technical" mistake. The erroneous assertion formed the backbone of DCA's irreparable harm argument – which the Court expressly adopted. Order at 7. Now DCA suggests that the error does not warrant reconsideration because redelegation of a gTLD is supposedly not practical and "has never actually been accomplished." Opp. Brief at 4. Again, DCA's assertion is wrong. As ICANN's President makes clear in his concurrently filed declaration, the transfer of a gTLD is feasible and has occurred on numerous occasions. DCA could have determined this from a cursory internet

search. Indeed, ICANN created a manual in 2013 addressing the steps needed for redelegation. Thus, DCA can proffer no basis for asserting irreparable harm.

The Court similarly relied on DCA's incorrect assertion that gTLD rights cannot be redelegated in ruling that the balance of equities favors DCA. Order at 7. On a corrected record, the balance of equities strongly favors ZACR. ZACR has invested significant resources into the process and, as the applicant with actual support of the African continent, will continue to do so during the litigation. Moreover, the lost opportunity cost to ZACR as a result of the injunction – which DCA does not challenge – is at least $15 million, of which $5.5 million would go to a charity to support online development in Africa. The harm to ZACR and the African public by the delay of the delegation of .Africa far outweighs any alleged harm to DCA, much of which has been of its own making.

Alternatively, in the event that the Court does not vacate the preliminary injunction, DCA should be required to post a bond to cover ZACR's estimated lost profits during the litigation. The bond will provide a needed safeguard since DCA now admits that its financial situation is precarious.

Finally, no doubt recognizing the serious issues raised by ZACR's motion, DCA suggests that the Court should limit its review to the geographic names evaluation error, because the other arguments might have been raised earlier. DCA's position does not withstand scrutiny. The timing issue that DCA complains about was one of its own making. DCA served ZACR in South Africa on March 22 – the day after all briefing was complete on the preliminary injunction motion.

II. ARGUMENT

A. On a Corrected Record, DCA Has No Likelihood of Success

DCA acknowledgs that the Court erred in finding that it had passed the geographic names evaluation. Opp. Brief at 2. This alone should mandate vacating the preliminary injunction because this finding was the foundation for the

Court's ruling on likelihood of success. Order at 6. DCA's rejoinder is that the Court's factual error is "not determinative" as DCA "should have" passed the geographic names evaluation "because its endorsements were equal to or better than ZACR's . . . ." Opp. Brief at 10. DCA's assertion is false.

The purpose of ICANN's geographic names evaluation process – which is conducted by a third party – is to make certain that a recipient of a gTLD like .Africa has the support of the governments within that geographic region. *See* Declaration of Sophia Bekele Eshete ("Bekele Decl."), [Dkt. No. 17] Ex. 3 (Guidebook) at 2-18, ¶ 2.2.1.4.2.4.[1] The record is undisputed that DCA never had the support of 60% of African countries at any time during the actual application process for the .Africa gTLD. The AUC, which represents every African country but one in the African Union, expressly withdrew its earlier "endorsement" of DCA in April 2010 – almost two years ***before*** ICANN opened the application process for the gTLD.[2] *See* Bekele Decl. Ex. 7; Declaration of Mokgabudi Lucky Masilela [Dkt. 85-3] ("Masilela Decl.") ¶ 4.

Indeed, DCA itself acknowledged during the IRP proceeding that it lacked the required support of African governments. In paragraph 119 of the IRP Final Declaration, the Panel noted that DCA expressly requested a finding that DCA "be granted a period of no less than 18 months to obtain Government support as set out in the [Guidebook] and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA." Bekele Decl. Ex. 1 ¶ 119. The only reason DCA would make this request is because it knew that it did not have the required government support. The IRP panel chose not to grant DCA's request.[3] *See id.* ¶¶ 148-151.

[1] To avoid confusion, ZACR will use the same naming conventions for the Bekele Declarations that DCA used in its opposition brief.

[2] The AUC had every right to withdraw its support. The "endorsement" was issued and withdrawn before the Guidebook was even issued.

[3] DCA's application was stopped in 2013 because the Government Advisory

Instead, and contrary to what DCA now implies, the IRP panel was quite deliberate in recommending only that ICANN allow DCA's application to proceed back through the process. Bekele Decl. Ex. 1 ¶ 149. That is precisely what ICANN did. Willett Decl. ¶ 10. But of course DCA could not make it through that process because, as DCA fully knew, it lacked 60% support of African governments. Nevertheless, DCA suggests that the decision to decline DCA's application was somehow the result of a procedural impropriety because it had at least the "same" support from the AUC as ZACR. The undisputed record shows otherwise.[4] After expressly repudiating any support for DCA in 2010, the AUC, in a letter dated September 29, 2015, again reiterated that the governments of Africa do not support DCA's application:

> To be clear, the application submitted by ZA Central Registry (ZACR) . . . is the only application officially endorsed and supported by the AUC and hence African member states. The AUC officially endorsed the ZACR application in our letter dated 4 April 2012, which was followed by our letter of support dated 2 July 2013.
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> * * *
>
> Any reliance by DCA in its application . . . proclaiming support or endorsement by the AUC, must be dismissed. The AUC does not support the DCA application and, if any such support was initially provided, it has subsequently been withdrawn with the full knowledge of DCA even prior to

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Council ("GAC") raised concerns to ICANN. Declaration of Christine Willet [Dkt. 39] ("Willet Decl.") ¶ 9. The IRP panel found that the GAC process was not sufficiently transparent in stating the basis for its concerns. Bekele Decl. Ex. 1 at ¶¶ 92-115. Importantly, however, DCA's application was not rejected at the geographic names evaluation panel until 2016 – after the IRP proceeding.

[4] Both ZACR and DCA were asked during the geographic names evaluation to modify their letters of support to comport with Guidebook requirements. Supplemental Declaration of Mokgabudi Lucky Masilela ("Masilela Supp. Decl.") ¶ 7, Ex. D; Bekele Decl. Exs. 15, 17. ZACR, which had the support of the AUC, was able to modify its letter. Masilela Decl. Ex. A. DCA, relying on an outdated letter and without the AUC's backing, was unable to comply. Bekele Decl. Ex. 18. There was no procedural unfairness.

the commencement of ICANN's new gTLD application process.

Masilela Decl. Ex. C.

Similarly, UNECA wrote to ICANN on September 21, 2015 to advise that, contrary to DCA's statements, UNECA could not support DCA's application:

> ECA as a United Nations entity is neither a government nor a public authority and therefore is not qualified to issue a letter of support for a prospective applicant . . . It is ECA's position that the August 2008 letter to Ms. Bekele cannot be properly considered as a "letter of support or endorsement" within the context of ICANN's requirements and cannot be used as such.

Bekele Decl. Ex. 10.

These statements from the AUC and UNECA unequivocally demonstrate why DCA could not get through the geographic names evaluation process – it simply lacked the requisite support of the governments in Africa.[5] DCA acknowledged as much during the IRP proceeding. Accordingly, DCA has no likelihood of success on the merits.

B. <u>On A Corrected Record, DCA Cannot Show Irreparable Harm</u>

In ruling on the likelihood of irreparable harm, this Court relied upon DCA's incorrect statement that ".Africa can be delegated only once." Order at 7. DCA's representation was false. And while acknowledging its misstatement, DCA attempts to downplay its significance by suggesting that even if it was "incorrect *as a technical matter*" (Opp. Brief at 13), redelegation is not feasible and "has never actually been accomplished." Opp. Brief at 4. Once again, DCA's assertions are wrong. ICANN has re-delegated gTLDs over 40 times from one registry operator to another. *See* Declaration of Akram Atallah ("Atallah Decl.") ¶ 4. "A transfer or

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[5] DCA misconstrues the point of referencing the 17 African countries that issued Early Warnings to ICANN. Opp. Brief at 12. Whether formally deemed objections or not under ICANN's criteria, the point is that DCA did not have support among the governments of Africa.

1 assignment of a gTLD such as .AFRICA is possible, feasible and consistent with
2 ICANN's previous conduct." *Id.* ¶ 3. Indeed, ICANN has an entire procedure for
3 redelegating a gTLD (Masilela Decl. Ex. E).

4 DCA's additional arguments similarly fail to withstand scrutiny. First, DCA
5 argues that redelegation must have been "intended to apply to a situation where a
6 registry's contract with ICANN was expiring." *Id.* at 13-14. Once more DCA's
7 assertion is wrong. *See* Atallah Decl. ¶ 4. Indeed, a cursory internet search would
8 have shown that ICANN has transferred gTLD's from one operator to another
9 during the course of a registry agreement. Masilela Supp. Decl. Exs. B & C.
10 Second, DCA speculates that because the U.S. Department of Commerce ("DOC")
11 may stop its oversight of ICANN, redelegation here might be uncertain. But every
12 ICANN delegation or redelegation is presently subject to DOC oversight. Colón
13 Decl. II Ex. 1 at 10 C.2.9.2.d. DCA has proffered no admissible evidence, or even
14 a cogent argument, to suggest that every agreement entered into by ICANN over
15 the last 20 years should now be subject to question after ICANN's contract with
16 the DOC expires. Opp. Brief at 14. Third, the contention that future redelegation
17 might impact existing contracts with end users is an issue that occurs every time a
18 gTLD is transferred from one operator to another. Again, transfers have occurred
19 on dozens of occasions (Atallah Decl. ¶ 4), and ICANN created a manual to
20 address redelegation. Masilela Decl. Ex. E.

21 Finally, DCA's new argument – that it "will likely lose funding and be
22 forced to shut down its business" – is not a proper basis for irreparable harm. Opp.
23 Brief at 13. *See Los Angeles Memorial Coliseum Comm. v. NFL,* 634 F.2d 1197,
24 1202 (9th Cir. 1980) (economic injury not sufficient for irreparable harm); 13-65
25 Moore's Federal Practice ¶ 65.22 n.5.

26 **C. The Balance of Harms Weighs In ZACR's Favor**

27 The Court's Order balancing the equities in DCA's favor similarly relied on
28 DCA's erroneous assertion that .Africa can only be delegated once. Because

DCA's statement is not true, and .Africa can be redelegated, DCA cannot demonstrate harm so as to require a preliminary injunction.

Nevertheless, DCA claims that the balance of harms weighs in its favor because of the need for a transparent gTLD process. Opp. Brief at 15. There was no lack of transparency: DCA's application was rejected in 2016 because DCA could not meet the Guidebook's 60% requirement. Bekele Decl. Exs. 15-18. This requirement was known to all applicants from the outset of the process.[6] *Id.* Ex. 3 at 2.2.1.4.2.4. DCA also complains of the possibility that DCA will go out of business if it is not delegated .Africa. Opp. Brief at 15. But DCA knew at the time the DCA Trust was established, in July of 2010, that it did not have the support of the AUC. Bekele Decl. Ex. 1, ¶ 1, Ex. 7.

Strikingly, in disputing the harm to ZACR, DCA fails to address the lost opportunity costs of $15 million, including the $5.5 million that would be given to charity to benefit online development within Africa. Masilela Decl. ¶12. Instead, DCA argues that the costs that ZACR is incurring is of ZACR's own making. Yet, these ongoing costs are necessary because of the importance of maintaining the visibility for the .Africa project.[7] Masilela Decl. at ¶¶ 11-12. Indeed, payment of these costs are ultimately in DCA's best interests if it prevails – as these efforts are designed to increase the value of the gTLD. *Id.*

D. Alternatively, DCA Should Post a Significant Bond

If the Court is inclined to maintain the injunction, then at a minimum DCA

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[6] DCA misleads by suggesting the IRP panel findings support a lack of transparency here. The panel discussed transparency only with regard to acceptance of GAC advice. Bekele Decl. Ex. 1 at ¶¶ 92-115. The panel did not find that the Geographic Names Panel acted, erred, or lacked transparency – and could not because DCA's application had not completed processing at the time of the IRP.

[7] Contrary to DCA's claim, the IRP Panel did *not* find the Registry Agreement was improvidently entered into. Colón Decl. [Dkt. 92] Ex. 3; Bekele Decl., Ex. 1 at ¶¶ 148-149.

should be required to post a significant bond. DCA now admits that if it does not prevail on the injunction, DCA will likely be forced to stop operating due to a lack of funding. Bekele Supp. Decl. ¶ 5. This assertion raises serious concerns about DCA's ability to pay a cost bill in the event defendants ultimately prevail. On this basis alone a significant bond should be ordered.

Remarkably, DCA claims that the bond amount should be set at zero because ZACR has not been delegated .Africa, and thus, it cannot show any damages caused by the injunction. DCA's argument is completely circular. Were it not for the injunction, ICANN would have delegated .Africa to ZACR, and it would now collect on the $15 million in estimated net profits over the next two years. Masilela Supp. Decl. ¶ 3, Ex. A.

Further, while the Court maintains discretion in setting the bond amount, courts generally excuse a bond only in "exceptional cases."[8] *Frank's GMC Truck Ctr., Inc. v. General Motors Corp.,* 847 F.2d 100, 103 (3d. Cir. 1988) (bond is "almost mandatory"). If DCA does not have confidence in its claims then DCA should withdraw its motion. Otherwise, it should be prepared to post a bond as required by FRCP 65. *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.,* 16 F.3d 1032, 1037 (9th Cir. 1994).

DCA's purported issues with ZACR's request for a $15 million bond are also deficient. ZACR's estimated losses are based on the projected number of likely domain name registrations for the first 2 years after delegation and estimated revenue based on those numbers, minus costs and income tax.[9] *Id.* The estimated

[8] The cases cited by DCA are inapposite because defendants there either provided no evidence of harm or had no right to any recovery. *Diaz v. Brewer,* 656 F.3d 1008, 1013 (9th Cir. 2011) (no evidence of harm where plaintiff sued the state for equal protection violation); *Wells Fargo Bank, N.A. v. Weems,* 2015 U.S. Dist. LEXIS 166466 at *14 (C.D. Cal. Dec. 11, 2015) (no right to funds given IRS levy).

[9] Contrary to DCA's assertions, the bond amounts in both *Nintendo,* 16 F.3d at 1033, 1039 and *Netlist Inc. v. Diablo Techs., Inc.,* No. 13-cv-05962-YGR, 2015

cost figures are fully supported and necessary due to the importance of maintaining visibility for the .Africa project. Masilela Decl. at ¶¶ 11-12.

E. ZACR's Motion Is Proper

To sidestep many of the substantive issues raised by ZACR's motion, DCA argues that the Court should limit its review to the geographic names evaluation error only – due to supposed concerns about the timing of ZACR's filing. DCA's argument should be rejected. As a threshold matter, DCA is wrong in asserting that ZACR's motion cannot be properly construed as a motion to vacate under Rule 54. Opp. Brief at 10. The well-established rule is that "a district judge always has power to modify or to overturn an interlocutory order or decision while it remains interlocutory." *Credit Suisse First Boston Corp. v. Grunwald,* 400 F. 3d 1119, 1124 (9th Cir. 2005) (citation omitted). Moreover, a motion to modify a preliminary injunction is meant to relieve inequities that arise after the original order. *Id.* (citation omitted). Here, the equities are compelling that ZACR, the party directly impacted by the injunction, should have a right to be heard on these issues. *United States v. Bd. Of School Commrs. Of City of Indianapolis,* 128 F.3d 507, 511 (7th Cir. 1997). Even if the Court construes the motion as one for reconsideration, ZACR timely filed, and raised factual errors and proffered evidence that were not previously before the Court. C.D. Local Rule 7-18.

Further, DCA created the timing issue it complains about. When DCA chose to name ZACR in the First Amended Complaint, DCA knew that ZACR was a South African non-profit company, knew (or should have known) that South Africa was not a signatory to the Hague Convention, and knew that service of process would take time. Yet, prior to starting formal service of process on ZACR, DCA, which had already protected its rights by securing a TRO, pressed forward with an ambitious briefing schedule on the preliminary injunction motion.

U.S. Dist. LEXIS 3285, at *39-40 (N.D. Cal. Jan. 12, 2015), were based on estimated lost profits.

This Court issued an order on March 10, 2016 allowing for special service on ZACR in South Africa. Dkt. No. 34. DCA nevertheless failed to serve ZACR until March 22, 2016 – the day after briefing was complete on the preliminary injunction motion. It was DCA that set the schedule.[10] Dkt. No. 55.

It is also disingenuous for DCA to imply that it was somehow improper for ZACR, a foreign entity with no business operations in California, to have spent time evaluating whether it should challenge personal jurisdiction. Contrary to the case authority cited by DCA, this was not a situation where ZACR had failed to appear or ignored an order to show cause. *Aevoe Corp. v. AE Tech Co.,* Case No. 2:12-cv-0053-GMN-RJJ, 2012 U.S. Dist. LEXIS 30085 at *3 (D. Nev. Mar. 7, 2012) (for a fuller discussion of procedural history *see* 2012 U.S. Dist. LEXIS 8248 (D. Nev. Jan. 24, 2012)). Moreover, once ZACR reviewed and fully analyzed the Court's ruling, its counsel met and conferred with DCA's counsel by April 29 to advise that it planned to file the instant motion. Declaration of David Kesselman [Dkt. 85-2] ¶ 2.

In the end, DCA should not be heard to complain. Its own misstatements to the Court caused many of the errors the Court is now asked to correct.

III. **CONCLUSION**

For all of the foregoing reasons, ZACR respectfully requests that the Court vacate the preliminary injunction order.

DATED: May 23, 2016 KESSELMAN BRANTLY STOCKINGER LLP

By: /s/ David W. Kesselman
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[10] DCA suggests that it sought to notify ZACR by informal means. The law is clear that knowledge of a lawsuit does not constitute service of process and ZACR had no obligation to enter these proceedings before proper service. *See*, *e.g.*, *Mid-Continent Wood Products, Inc. v. Harris*, 936 F.2d 297, 301 (7th Cir. 1991).