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11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST, a
15 Mauritius Charitable Trust;

16 Plaintiff,

17 v.

18
19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS,
21 a California corporation; ZA Central
22 Registry, a South African non-profit
23 company; and DOES 1 through 50,
24 inclusive;

25 Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**PLAINTIFF’S SUPPLEMENTAL
BRIEF REGARDING DEFENDANT
ZA CENTRAL REGISTRY, NPC’S
MOTION TO INTERVENE
PURSUANT TO RULE 24**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff DotConnectAfrica Trust (“DCA”) requests that the Court determine
4 that ZA Central Registry (“ZACR”) is not a “necessary” or “indispensable” party,
5 pursuant to Federal Rule of Civil Procedure 19, to DCA’s tenth cause of action for
6 declaratory relief. The Court can allow ZACR to intervene as a non-indispensable
7 party without destroying its jurisdiction over the case. ZACR’s stake in this case is
8 as an interested applicant for the .Africa gTLD, nothing more. DCA agrees that on
9 this basis, and this basis alone, it should be allowed to intervene in the case.
10 However, ZACR is not a necessary, required or indispensable party under Rules
11 19(a) and 19(b), for the reasons set forth in greater detail below.

12 **II. ZACR IS NOT A NECESSARY OR INDISPENSIBLE PARTY TO**
13 **PLAINTIFF’S TENTH CAUSE OF ACTION.**

14 DCA’s Tenth Cause of Action “seeks a judicial declaration that the registry
15 agreement between ZACR and ICANN be declared null and void and that ZACR’s
16 application does not meet ICANN’s standards.” FAC ¶132.

17 **A. ZACR Is Not a Necessary Party Pursuant to Rule 19(a)**

18 Rule 19(a) states that a required or necessary¹ party is a person whose absence
19 means that “the court cannot accord complete relief among existing parties” and that
20 “person claims an interest relating to the subject of the action and is so situated that
21 disposing of the action in the person’s absence may: (i) as a practical matter impair
22 or impede the person’s ability to protect the interest; or (ii) leave an existing party
23 subject to a substantial risk of incurring double, multiple, or otherwise inconsistent
24 obligations because of the interest.” Fed. R. Civ. Pro. 19(a).

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26
27 ¹ Although Rule 19 no longer uses the terms “necessary” or “indispensable,” courts
28 use the terms as shorthand to describe the analysis under rule 19(a) and (b),
respectively. See *E.E.O.C. v. Peabody Western Coal Co.* (9th Cir. 2010) 610 F. 3d
1070, 1078, fn. 1.

1 As an initial matter, ZACR is not a necessary party under Rule 19(a). The
2 court can afford complete relief among the existing parties without ZACR's
3 presence. Determining whether the registry agreement is null and void merely
4 requires a determination of whether ICANN's actions or inactions in processing
5 DCA's application render it so. Had ICANN passed DCA's application and failed
6 ZACR's application, as DCA argues it should have, ZACR would not have been
7 entitled to the registry agreement. Even if ICANN had passed both applicants,
8 ICANN would have had to hold an auction before awarding the registry agreement.
9 (Dkt. No. 17-3 §1.1.2.10). Moreover, the Court can make a declaration regarding
10 the adequacy of ZACR's application by reviewing ICANN's rules and ICANN's
11 processing of ZACR's application. Therefore, no evidence or input from ZACR is
12 required for the Court to make a determination with regard to the tenth cause of
13 action.

14 With regard to the second factor, ZACR does not have to be absent from the
15 case because the Court can allow it to intervene as a non-indispensable party, which
16 it has requested and DCA does not oppose. Furthermore, neither ICANN nor DCA
17 will be at substantial risk of incurring multiple or inconsistent obligations if ZACR
18 intervenes as a non-indispensable party. If ZACR intervenes, any claims it might
19 seek against ICANN would be issue precluded to the extent that they overlapped
20 with the issues here. *See Ross v. Alaska*, 189 F. 3d 1107, 1110 - 1114 (9th Cir. 1999)
21 (issue preclusion applied to party in subsequent action where the party voluntarily
22 intervened in a prior action); *see also Arizona v. California*, 460 U.S. 605, 615
23 (1983).

24 **B. ZACR Is Not an Indispensable Party Pursuant to Rule 19(b)**

25 Even if the Court were to find that ZACR is a necessary party pursuant to rule
26 19(a), ZACR is not an indispensable party pursuant to Rule 19(b). Rule 19(b) states
27 that if a person required to be joined cannot be joined, the "court must determine
28 whether, in equity and good conscience, the action should proceed among the

1 existing parties or should be dismissed. The factors for the court to consider include:
2 (1) the extent to which a judgment rendered in the person's absence might prejudice
3 that person or the existing parties; (2) the extent to which any prejudice could be
4 lessened or avoided by: (A) protective provisions in the judgment; (B) shaping the
5 relief; or (C) other measures; (3) whether a judgment rendered in the person's
6 absence would be adequate; and (4) whether the plaintiff would have an adequate
7 remedy if the action were dismissed for nonjoinder." Fed. R. Civ. Pro. 19(a). In
8 other words, the Court must determine whether ZACR is an indispensable party.

9 With respect to the first factor under Rule 19(b), ZACR can effectively be
10 made a party through intervention. ZACR can intervene as a non-indispensable
11 party- its interest aligned with defendant ICANN -- and advocate for its positions
12 with regard to the registry agreement and its application, without destroying the
13 Court's jurisdiction. *See Mattel Inc. v. Bryant* (9th Cir. 2006) 446 F. 3d 1011, 1014.
14 Therefore, ZACR does not have to be an "absentee" as the first factor contemplates.
15 1966 Advisory Committee Note to Rule 19.

16 Likewise, with regard to the second factor of Rule 19(b), ZACR can lessen
17 the prejudice to itself by intervening. *See* 1966 Advisory Committee Note to Rule
18 19 ("So also the absentee may sometimes be able to avert prejudice to himself by
19 voluntarily appearing in the action or intervening on an ancillary basis.") (internal
20 citations omitted).

21 The same is true for the third factor. Judgment does not have to be rendered
22 in ZACR's absence because ZACR has requested permission to intervene and can
23 intervene. In any event, adequate judgment could be rendered in ZACR's absence
24 because, as the Court noted in its order dismissing ZACR as a party, "the Court finds
25 Plaintiff's first request against ZACR (*i.e.*, that the Court declare the registry
26 agreement null and void) unnecessary, as a favorable ruling on its claims against
27 ICANN will result in the relief it seeks. As to the second request (*i.e.*, that the Court
28 declare that ZACR's application does not meet ICANN's standards) the Court finds

1 that regardless of the existence of a separate substantive basis for liability, there is
2 an insufficient nexus between the relief requested and the alleged wrongful
3 conduct.” (Dkt. No. 112 at 5).

4 With regard to the fourth factor, if the action were dismissed for lack of
5 jurisdiction due to ZACR’s non-joinder, DCA will not have an adequate alternate
6 remedy. Although DCA could pursue the lawsuit in state court, the enforceability
7 of the preliminary injunction would be in question and DCA would likely have to
8 seek another injunction in state court, allowing ICANN to delegate .Africa to ZACR
9 in the interim. Therefore, dismissal of the action here would be highly prejudicial
10 to DCA and weighs strongly against a finding that ZACR is an indispensable party.

11 **III. CONCLUSION**

12 Accordingly, DCA respectfully requests that the Court determine that ZACR
13 is not a required or indispensable party before allowing it to intervene.²

14
15 Dated: September 27, 2016

BROWN NERI SMITH & KHAN LLP

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17 By: /s/ Ethan J. Brown

Ethan J. Brown

Attorneys for Plaintiff

DOTCONNECTAFRICA TRUST

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26 ² DCA intends shortly hereafter to file a motion for leave to amend to add a Fifth
27 Amendment claim for violation of due process against ICANN as an entity
28 complaint to add this claim, the Court will have federal question jurisdiction over
the matter, mooting the question of ZACR’s indispensability.

CERTIFICATE OF SERVICE

I, Ethan J. Brown, hereby declare under penalty of perjury as follows:

I am a partner at the law firm of Brown, Neri Smith & Khan, LLP, with offices at 11766 Wilshire Blvd., Suite 1670, Los Angeles, California 90025. On September 27, 2016, I caused the foregoing **PLAINTIFF'S SUPPLEMENTAL BRIEF REGARDING DEFENDANT ZA CENTRAL REGISTRY, NPC'S MOTION TO INTERVENE PURSUANT TO RULE 24** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on September 27, 2016

/s/ Ethan J. Brown