

1 Ethan J. Brown (SBN 218814)

2 ethan@bnsklaw.com

3 Sara C. Colón (SBN 281514)

4 sara@bnsklaw.com

5 **BROWN NERI SMITH & KHAN LLP**

6 11766 Wilshire Boulevard, Suite 1670

7 Los Angeles, California 90025

8 Telephone: (310) 593-9890

9 Facsimile: (310) 593-9980

10 *Attorneys for Plaintiff*

11 DOTCONNECTAFRICA TRUST

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

13 **COUNTY OF LOS ANGELES – CENTRAL**

14 DOTCONNECTAFRICA TRUST, a Mauritius
15 Charitable Trust;

16 Plaintiff,

17 v.

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

21 Defendants.

Case No. BC607494

Assigned for all purposes to the Honorable
Howard L. Halm

**EVIDENTIARY OBJECTIONS TO
DECLARATION OF CHRISTINE
WILLETT IN SUPPORT OF ICANN'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: December 22, 2016

TIME: 8:30 a.m.

DEPT: 53

Evidentiary Objections to Declaration of Christine Willett

Willett Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 2: In my role as Vice President for Operations, I have been responsible for overseeing the evaluation of the 1,930 gTLD applications ICANN received in 2012 as part of ICANN’s New gTLD Program. Those applications are evaluated in accordance with the procedures set forth in the New gTLD Applicant Guidebook (“Guidebook”). A copy of the Guidebook is attached as Exhibit 3 to the declaration of Sophia Bekele Eshete (“Bekele Declaration”).</p>	<p>1. Lacks personal knowledge (Evid. Code § 702)</p> <p>2. Lacks foundation, irrelevant (Evid. Code § 403)</p>		
Willett Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 3: In the spring of 2012, Plaintiff DCA and defendant ZA Central Registry (“ZACR”) each submitted applications to operate the .AFRICA gTLD. In doing so, they, like all new gTLD applicants, expressly accepted and acknowledged the Guidebook, including the release and covenant not to sue (“Covenant”) in paragraph 6 of Module 6.</p>	<p>1. Lacks personal knowledge (Evid. Code § 702)</p> <p>2. Lacks foundation, irrelevant (Evid. Code § 403)</p>		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Willett Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 6: In addition, because DCA and ZACR had each applied for a gTLD that represents the name of a geographic region, the Guidebook requires that DCA and ZACR each provide documentation of support or non-objection from at least 60% of the governments in the region. Bekele Decl. Ex. 3 § 2.2.1.4.2. The Guidebook also provides that a Geographic Names Panel operated by a third-party vendor retained by ICANN must verify the relevance and authenticity of an applicant’s documentation of support. <i>Id.</i> §§ 2.4.2, 2.2.1.4.4. The Geographic Names Panel evaluated the support letters submitted by the applicants pursuant to the criteria set forth in the Guidebook. In particular, section 2.2.1.4.3 of the Guidebook required that letters of support for a geographic name “clearly express the government’s or public authority’s support for or nonobjection to the applicant’s application and</p>	<p>1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation, irrelevant (Evid. Code § 403) 3. The Guidebook is the best evidence of the Guidebook. (Evid. Code § 1520)</p>		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>demonstrate the government’s or public authority’s understanding of the string being requested and its intended use.” It further requires that a letter of support “should demonstrate the government’s or public authority’s understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus policies and payment of fees.” The Geographic Names Panel treated both of these requirements as mandatory for all applicants (including DCA and ZACR).</p>			
<p>Willett Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 7: DCA submitted with its application for .AFRICA (“Application”) what it called a letter of support dated in 2009 (three years earlier) from the African Union Commission (“AUC”). A copy of that letter is attached as Exhibit 6 to the Bekele Declaration. I now understand</p>	<p>1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation, irrelevant (Evid. Code § 403)</p>		

<p>1 that, in 2010, DCA had received a 2 letter from the AUC that formally 3 withdrew the AUC’s support for 4 DCA’s Application for the .AFRICA 5 gTLD. A copy of that letter is 6 attached as Exhibit 7 to the Bekele 7 Declaration. DCA did not submit to 8 ICANN with its Application a copy 9 of the AUC’s 2010 letter withdrawing 10 its support for DCA. 11 12 13 14 15 16 17 18 19 20 21</p>	<p>3. The letter is the best evidence of the letter. (Evid. Code § 1520) 4. Prejudicial because the statement is materially misleading because it fails to state that DCA specifically identified the purported withdrawal in its application to ICANN (Evid. Code § 352) 5. Bekele Decl. ¶20, Ex.7 (Unlike the initial letter of support from the AUC the subsequent letter omitted any official stamp, was not signed by the AUC Chairman, and instead was signed by the Deputy Chairperson.</p>		
<p>Willett Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>23 ¶ 8: A copy of that letter is attached 24 as Exhibit 8 to the Bekele 25 Declaration. In September 2015, 26 UNECA wrote in a letter that it was a 27 “United Nations entity [that] is 28 neither a government nor public</p>	<p>1. Irrelevant (Evid. Code § 403) 2. The GNP had already determined that UNECA was a valid endorser. McFadden Decl. ¶6.</p>		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>authority and therefore is not qualified to issue a letter of support for a prospective applicant,” and that its August 2008 letter was “merely an expression of a view in relation to [DCA’s] initiatives and efforts regarding internet governance [and] cannot be properly considered as a ‘letter of support’ within the context of ICANN’s requirements and cannot be used as such.” A true and correct copy of UNECA’s September 2015 letter is attached as Exhibit 10 to the Bekele Declaration.</p>			
<p>Willett Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 9: On June 5, 2013, at the time when ICANN’s Board accepted the Governmental Advisory Committee’s (“GAC’s”) advice objecting to DCA’s Application, DCA had not yet passed the Geographic Names Panel review. At that time, the Geographic Names Panel had been in the midst of its review of DCA’s Application; it had determined that the support documentation submitted by DCA, including the letters from the AUC and UNECA, did not meet the criteria</p>	<p>1. Lacks foundation (Evid. Code § 403)</p>		

set forth in the Guidebook, and was therefore planning to send “clarifying questions” to DCA. Clarifying questions are sent where support documentation does not meet the criteria set forth in the Guidebook, and they are an accommodation to provide applicants an opportunity to explain/supplement their documentation. However, as a result of the ICANN Board’s acceptance of the GAC’s advice, DCA’s Application was removed from processing, and the clarifying questions were not sent at that time.

Willett Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 10: By July 31, 2015, following the ICANN Board’s adoption of the recommendations of the Independent Review Panel in <i>DCA v. ICANN</i> (“IRP Panel”), DCA’s Application was returned to processing as the Board directed. DCA’s Application was returned to precisely the portion of the review that was pending on the date the Application was removed from processing—the Geographic Names Panel review. As the</p>	<p>1. Lacks foundation (Evid. Code § 403)</p>		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>Geographic Names Panel had been preparing to do when DCA’s Application was removed from processing, the Geographic Names Panel issued clarifying questions to DCA on September 2, 2015, regarding the documentation DCA had submitted with its Application. Those clarifying questions are attached as Exhibit 13 to the Bekele Declaration. DCA was given an opportunity to respond to those clarifying questions. Instead of supplementing its documentation, DCA wrote to ICANN on September 28, 2015, taking the position that the documentation that it had submitted with its Application in 2012 was sufficient.</p>			
<p>Willett Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 13: Notably, nearly identical clarifying questions were sent to ZACR in 2013 when ZACR’s application for .AFRICA was undergoing Geographic Name Review. True and correct copies of the clarifying questions issued to ZACR related to the AUC and</p>	<p>1. The clarifying questions themselves are the best evidence of the clarifying questions. (Evid. Code § 1520)</p>		

1 UNECA letters are attached hereto as
 2 **Exhibits B and C.** Unlike DCA,
 3 ZACR submitted an updated letter
 4 from the AUC endorsing ZACR on
 5 July 3, 2013. That letter is attached as
 6 Exhibit A to Exhibit 2 of the
 7 Declaration of Sara Colón (“Colón
 8 Decl.”).

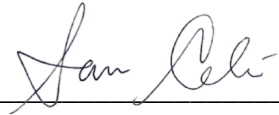
Willett Declaration ¶	DCA Objection	Sustained	Overruled
------------------------------	----------------------	------------------	------------------

<p>9</p> <p>10 ¶ 16: As described in the 11 concurrently-filed declaration of 12 Akram Atallah, ICANN’s Bylaws 13 provide for several accountability 14 mechanisms to ensure that ICANN 15 operates in accordance with its 16 Articles of Incorporation, Bylaws, 17 policies and procedures. For example, 18 an aggrieved applicant can file a 19 “request for reconsideration,” which 20 is a mechanism that asks the ICANN 21 Board to re-evaluate certain Board or 22 staff actions or inactions that the 23 applicant believes have harmed it. In 24 addition, an aggrieved applicant can 25 file a “request for independent 26 review,” a unique process set forth in 27 ICANN’s Bylaws that asks 28 independent panelists to evaluate</p>	<p>1. The declaration of Akram Attalah, the Articles of Incorporation, and the Bylaws, are the best evidence of those documents. Irrelevant. (Evid. Code § 1520)</p>		
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	--

1 whether an action of ICANN’s Board
2 was consistent with ICANN’s
3 Articles of Incorporation and Bylaws.
4 Bekele Decl., Ex. 4 (Bylaws, Art. IV,
5 §§ 2-3). DCA could have filed, but
6 did not file, a reconsideration request
7 or a request for an independent
8 review process (“IRP”) related to the
9 clarifying questions issued to it, or to
10 the determination that DCA had
11 failed the Geographic Names Review.

12
13 Dated: December 15, 2016

BROWN NERI SMITH & KHAN LLP

14
15 By: 
16 Sara C. Colón

17 *Attorneys for Plaintiff*
18 DOTCONNECTAFRICA TRUST
19
20
21
22
23
24
25
26
27
28