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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**
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12 DOTCONNECTAFRICA TRUST,

13 Plaintiff,

14 v.

15 INTERNET CORPORATION FOR
16 ASSIGNED NAMES AND NUMBERS, et
al.,

17 Defendant.
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CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

**ICANN'S RESPONSES TO DCA'S
EVIDENTIARY OBJECTIONS TO
THE DECLARATION OF C.
WILLETT**

DATE: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

RESERVATION ID: 1611115174199

1 Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby
 2 responds to Plaintiff DotConnectAfrica Trust's ("DCA") evidentiary objections to the Declaration
 3 of Christine Willett ("Willett Decl."), filed in support of ICANN's Opposition to Plaintiff's
 4 Motion for Preliminary Injunction.
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Willet Declaration	DCA Objection	Response	Court's Ruling
<p>7 ¶ 2: In my role as Vice 8 President for Operations, I 9 have been responsible for 10 overseeing the evaluation of 11 the 1,930 gTLD applications 12 ICANN received in 2012 as 13 part of ICANN's New gTLD 14 Program. Those applications 15 are evaluated in accordance 16 with the procedures set forth 17 in the New gTLD Applicant 18 Guidebook ("Guidebook"). A 19 copy of the Guidebook is 20 attached as Exhibit 3 to the 21 declaration of Sophia Bekele 22 Eshete ("Bekele Declaration") 23 24 25 26 27 28</p>	<p>1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation, irrelevant (Evid. Code § 403.)</p>	<p><u>Foundation/Personal Knowledge.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the procedures governing the evaluation of New gTLD applications.</p> <p><u>Relevance:</u> Testimony regarding the evaluation of New gTLD applications in accordance with requirements outlined in the Guidebook is relevant to multiple arguments at issue, including that DCA's application for .Africa would not have met the requirements under the Guidebook, because even prior to its submission in 2012, DCA was unable to obtain documentation of support or non-objection from government authorities that conformed with the requirements of the Guidebook.</p>	

Willet Declaration	DCA Objection	Response	Court's Ruling
<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) 2. Lacks foundation, irrelevant (Evid. Code § 403)</p>	<p><u>Foundation/Personal Knowledge.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the procedures governing the evaluation of New gTLD applications, including DCA and ZACR's applications for .Africa.</p> <p><u>Relevance.</u> Evidence regarding New gTLD applicants' acceptance of the Guidebook, and the release contained therein, is relevant to refute DCA's argument that the release and covenant not to sue in paragraph 6 of Module 6 is unenforceable. Mot. at 10-13.</p>	
Willet Declaration	DCA Objection	Response	Court's Ruling
<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</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>	<p><u>Foundation/Personal Knowledge.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of contents of the Guidebook</p>	

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1 vendor retained by ICANN
2 must verify the relevance and
3 authenticity of an applicant's
4 documentation of support. *Id.*
5 §§ 2.4.2, 2.2.1.4.4. The
6 Geographic Names Panel
7 evaluated the support letters
8 submitted by the applicants
9 pursuant to the criteria set
10 forth in the Guidebook. In
11 particular, section 2.2.1.4.3 of
12 the Guidebook required that
13 letters of support for a
14 geographic name "clearly
15 express the government's or
16 public authority's support for
17 or nonobjection to the
18 applicant's application and
19 demonstrate the government's
20 or public authority's
21 understanding of the string
22 being requested and its
23 intended use." It further
24 requires that a letter of
25 support "should demonstrate
26 the government's or public
27 authority's understanding that
28 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).

and the actions taken by the
Geographic Names Panel.

Relevance. The Guidebook's
requirement that a
geographic gTLD applicant
provide documentation of
support or non-objection
from 60% of the
governments in the region,
the documentation sufficient
to meet that requirement, and
the Geographic Names
Panel's application of that
requirement, is relevant to
support ICANN's argument
that DCA has no likelihood
of success on the merits. As
required by the IRP
Declaration, in 2015 ICANN
returned DCA's application
to the Geographic Names
Review, and gave DCA
several months to provide
support documentation that
met the Guidebook's
requirements. DCA was
unable to do so.
Accordingly, its application
did not pass the Geographic
Names Review.

Best Evidence: This
testimony is not offered to
prove the contents of a
writing. Rather, Ms.
Willett's testimony is based
on her personal knowledge
of ICANN's procedures to
evaluate New gTLD
applications, including
ICANN's implementation of
the Guidebook's
requirements in reviewing
New gTLD applications,
including DCA and ZACR's
applications. A true and
correct copy of the

1			Guidebook is attached as exhibit three to the Declaration of Sophia Bekele ("Bekele Decl.").	
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4	Willet Declaration	DCA Objection	Response	Court's Ruling
5	¶ 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 that, in 2010, DCA had received a letter from the AUC that formally withdrew the AUC's support for DCA's Application for the .AFRICA gTLD. A copy of that letter is attached as Exhibit 7 to the Bekele Declaration. DCA did not submit to ICANN with its Application a copy of the AUC's 2010 letter withdrawing its support for DCA.	1. Lacks personal knowledge (Evid. Code § 702) 2. Lacks foundation, irrelevant (Evid. Code § 403) 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 the 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	<u>Foundation/Personal Knowledge.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willet Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including DCA and ZACR's applications for .Africa, the contents of those applications, and their supporting documentation. <u>Relevance.</u> Testimony regarding the 2010 letter from the AUC withdrawing its support for DCA's application for .Africa is relevant to show that DCA would not have been able to obtain an updated letter from the AUC that conformed with the Guidebook's requirements following the IRP Declaration. This evidence supports ICANN's argument that DCA has no likelihood of success on the merits as to its ninth cause of action. <u>Best Evidence.</u> This testimony is not offered to prove the contents of a	
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	Chairperson.	<p>writing. Ms. Willett's testimony is based on her personal knowledge of ICANN's review of DCA's application for .Africa, including information withheld by DCA at the time of its application and subsequent knowledge of the 201 AUC letter withdrawing the 2009 endorsement. A true and correct copy of the 2010 AUC letter is attached as Exhibit 7 to the Bekele Declaration.</p> <p><u>Prejudicial.</u> This testimony is not materially misleading nor prejudicial. Ms. Willett's declaration simply states that DCA did not attach a copy of the 2010 letter with its application, a fact DCA conceded in its deposition. LeVee Decl., Exh. H.</p> <p><u>Objection No. 5.</u> It is unclear what evidentiary objection DCA intended to make with its fifth objection. To the extent DCA is questioning the authenticity of the April 16, 2010 letter, <i>see</i> Declaration of Moctar Yedaly, ¶ 10, which authenticates the letter.</p>	
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Willet Declaration	DCA Objection	Response	Court's Ruling
<p>¶ 8: A copy of that letter is attached as Exhibit 8 to the Bekele Declaration. In September 2015, UNECA wrote in a letter that it was a "United Nations entity [that] is neither a government nor public authority and therefore is not qualified to issue a letter</p>	<p>1. Irrelevant (Evid. Code § 403) 2. The GNP had already determined that UNECA was a valid endorser. McFadden Decl.</p>	<p><u>Relevance:</u> Testimony regarding the 2015 letter from UNECA is relevant to show that DCA would not have been able to obtain an updated letter from UNECA that conformed with the Guidebook's requirements following the IRP</p>	

<p>1 of support for a prospective 2 applicant,” and that its August 3 2008 letter was “merely an 4 expression of a view in 5 relation to [DCA’s] initiatives 6 and efforts regarding internet 7 governance [and] cannot 8 be properly considered as a 9 ‘letter of support’ within the 10 context of ICANN’s 11 requirements and cannot be 12 used as such.” A true and 13 correct copy of UNECA’s 14 September 2015 letter is 15 attached as Exhibit 10 to the 16 Bekele Declaration.</p>	<p>¶6.</p>	<p>Declaration. This evidence supports ICANN’s argument that DCA has no likelihood of success on the merits as to its ninth cause of action.</p> <p><u>Objection No. 2.</u> Again, it is unclear what evidentiary objection DCA intends to make with its second objection. Because the 2008 UNECA letter failed to conform to the Guidebook’s requirements, DCA was required to obtain an updated letter from UNECA if it were to rely on a letter from UNECA to fulfill the 60% requirement of support or non-objection from government authorities. Opp. at 4, fn. 5. Regardless of any determination by the GNP as to whether UNECA qualifies as a valid endorser, the September 2015 UNECA letter shows that DCA would have been unable to do so.</p> <p><i>Id.</i></p>	
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Willet Declaration	DCA Objection	Response	Court’s Ruling
<p>19 ¶ 9: On June 5, 2013, at the 20 time when ICANN’s Board 21 accepted the Governmental 22 Advisory Committee’s 23 (“GAC’s”) advice objecting to 24 DCA’s Application, DCA had 25 not yet passed the Geographic 26 Names Panel review. At that 27 time, the Geographic Names 28 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,</p>	<p>1. Lacks foundation (Evid. Code § 403)</p>	<p><u>Foundation:</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willet Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including DCA and ZACR’s applications, and including ICANN’s and</p>	

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<p>did not meet the criteria 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.</p>		<p>the Geographic Names Panel's handling of the .Africa applications following the GAC advice in 2013.</p>	
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Willet Declaration	DCA Objection	Response	Court's Ruling
<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 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>1. Lacks foundation (Evid. Code § 403)</p>	<p><u>Foundation</u>: Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including ICANN's and the Geographic Names Panel's processing of DCA's application following the IRP Declaration.</p>	
Willet Declaration	DCA Objection	Response	Court's Ruling
<p>¶ 13: Notably, nearly identical clarifying questions were sent to ZACR in 2013 when ZACR's application for AFRICA was undergoing</p>	<p>1. The clarifying questions themselves are the best evidence of the clarifying</p>	<p><u>Best Evidence</u>: Ms. Willett's statement is not offered to prove the contents of a writing, but is based on her personal knowledge of</p>	


<p>1 Geographic Name Review. 2 True and correct copies of the 3 clarifying questions issued to 4 ZACR related to the AUC and 5 UNECA letters are attached 6 hereto as Exhibits B and C. 7 Unlike DCA, ZACR 8 submitted an updated letter 9 from the AUC endorsing 10 ZACR on July 3, 2013. That 11 letter is attached as Exhibit A 12 to Exhibit 2 of the Declaration 13 of Sara Colón (“Colón 14 Decl.”).</p>	<p>questions. (Evid. Code § 1520)</p>	<p>ICANN's processing of DCA and ZACR's applications for .Africa during the Geographic Names Review. True and correct copies of the Clarifying Questions issued to ZACR related to the AUC and UNECA letters are attached to the Willett Declaration as Exhibits B and C.</p>	
Willett Declaration	DCA Objection	Response	Court's Ruling
<p>11 ¶ 16: As described in the 12 concurrently-filed declaration 13 of Akram Atallah, ICANN’s 14 Bylaws provide for several 15 accountability mechanisms to 16 ensure that ICANN operates 17 in accordance with its Articles 18 of Incorporation, Bylaws, 19 policies and procedures. For 20 example, an aggrieved 21 applicant can file a “request 22 for reconsideration,” which is 23 a mechanism that asks the 24 ICANN Board to re-evaluate 25 certain Board or staff actions 26 or inactions that the applicant 27 believes have harmed it. In 28 addition, an aggrieved applicant can file a “request for independent review,” a unique process set forth in ICANN’s Bylaws that asks independent panelists to evaluate whether an action of ICANN’s Board was consistent with ICANN’s Articles of Incorporation and Bylaws. Bekele Decl., Ex. 4 (Bylaws, Art. IV, §§ 2-3). DCA could have filed, but did not file, a reconsideration</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>	<p><u>Best Evidence</u>: This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett's testimony is based on her personal knowledge as the Vice President for Operations of the Global Domains Division of ICANN regarding the mechanisms that ensure ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. A true and correct copy of the ICANN Bylaws can be found at Bekele Decl., Ex. 4 (Bylaws, Art. IV, §§ 2-3).</p>	

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request or a request for an independent review process (“IRP”) related to the clarifying questions issued to it, or to the determination that DCA had failed the Geographic Names Review.			
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Dated: December 21, 2016

Jones Day

By: 
Erin L. Burke

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

1 **PROOF OF SERVICE**

2 I, Diane Sanchez, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On December
6 21, 2016, I served a copy of the within document(s):

7 **ICANN'S RESPONSES TO DCA'S EVIDENTIARY OBJECTIONS TO THE**
8 **DECLARATION OF C. WILLET**

- 9 by placing the document(s) listed above in a sealed envelope with postage thereon
10 fully prepaid, in the United States mail at Los Angeles, California addressed as set
forth below.
- 11 by placing the document(s) listed above in a sealed Federal Express envelope and
12 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery
Service agent for delivery.
- 13 by personally delivering the document(s) listed above to the person(s) at the
14 address(es) set forth below.
- 15 by transmitting via e-mail or electronic transmission the document(s) listed above
16 to the person(s) at the e-mail address(es) set forth below.

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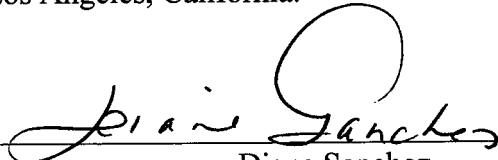
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Via Email & Federal Express

22 *Via Email & Federal Express*

23 I declare that I am employed in the office of a member of the bar of this court at whose
24 direction the service was made.

25 Executed on December 21, 2016, at Los Angeles, California.

26
27 
28 Diane Sanchez