

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 AKRAM ATALLAH
IN SUPPORT OF ICANN'S OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

DATE: December 22, 2016

TIME: 8:30 a.m.

DEPT: 53

Objections to Declaration of Akram Atallah

Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶2: ICANN is a California not-for-profit public benefit corporation. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability, and integrity. As set forth in the version of ICANN’s Bylaws relevant to this dispute (“Bylaws”), ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the DNS. Declaration of Sophia Bekele Eshete (“Bekele Decl.”), Ex. 4 (Bylaws, Art. I, § 1). ICANN’s amended Bylaws became effective October 1, 2016, and DCA does not contend that the amended Bylaws are relevant to this dispute.</p>	<p>1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702) 3. Best Evidence Rule (Evid. Code § 1520)</p>		

Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶3: The essential function of the DNS is to convert numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as “USCOURTS.GOV” and “ICANN.ORG.” The “.GOV” and “.ORG” in these addresses, just like the more well-known “.COM,” are referred to as top-level domains (“TLDs”). ICANN is solely responsible for evaluating potential TLD operators and recommending that TLDs be added to the DNS. No government entity or regulatory scheme governs ICANN’s decisions in that respect.</p>	<p>1. Lacks Foundation (Evid. Code § 403)</p> <p>2. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>3. Improper Opinion Testimony (Evid. Code §720)</p>		
Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶4: Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS in order to promote consumer choice and competition. The New gTLD Program (“Program”), launched in 2012, constitutes ICANN’s most ambitious expansion of the</p>	<p>1. Lacks Foundation (Evid. Code § 403)</p> <p>2. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>3. Improper Opinion Testimony (Evid. Code §702)</p>		

<p>1 Internet’s naming system. The 2 Program’s goals include 3 enhancing competition and 4 consumer choice, and enabling the 5 benefits of innovation via the 6 introduction of new generic TLDs 7 (“gTLDs”), including both new 8 ASCII gTLDs and new non- 9 ASCII, internationalized domain 10 name gTLDs. It resulted in the 11 submission of 1,930 applications 12 for new gTLDs, including DCA’s 13 and ZA Central Registry’s 14 (“ZACR’s”) applications for the 15 .AFRICA gTLD.</p>	<p>4. Speculation (Evid. Code § 702)</p>		
<p>Atallah Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>17 ¶5: A number of “Advisory 18 Committees” advise ICANN’s 19 Board on various topics 20 described in the ICANN Bylaws. 21 The Governmental Advisory 22 Committee (“GAC”) has members 23 composed of national governments 24 and distinct economies as 25 recognized in international fora, 26 including the Unites States, and its 27 purpose is to “consider and 28 provide advice on the activities of</p>	<p>1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702) 3. Speculation (Evid. Code § 702) 4. Best Evidence Rule (Evid. Code § 1520)</p>		

<p>1 ICANN as they relate to concerns 2 of governments, particularly 3 matters where there may be an 4 interaction between ICANN’s 5 policies and various laws and 6 international agreements or where 7 they may affect public policy 8 issues.” Bekele Decl., Ex. 4 9 (Bylaws, Art. XI, § 2.1).</p>			
<p>10 Atallah Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>11 ¶6: ICANN’s Bylaws provide for 12 several accountability mechanisms 13 to ensure that ICANN operates in 14 accordance with its Articles of 15 Incorporation, Bylaws, policies 16 and procedures. <i>See</i> Bekele Decl., 17 Ex. 4 (Bylaws, Arts. IV-V). For 18 example, an aggrieved applicant 19 can file a “request for 20 reconsideration,” which is a 21 mechanism that asks the ICANN 22 Board to reevaluate certain Board 23 or staff actions or inactions that 24 the applicant believes have harmed 25 it. <i>Id.</i> (Bylaws, Art. IV, § 2). In 26 addition, an aggrieved applicant 27 can file a “request for independent 28 review,” a unique process set forth</p>	<p>1. Best Evidence Rule (Evid. Code § 1520) 2. Lacks Foundation (Evid. Code § 403) 3. Lacks Personal Knowledge (Evid. Code § 702) 4. Speculation (Evid. Code § 702) 5. Improper Opinion Testimony (Evid. Code §702)</p>		

1 in ICANN’s Bylaws that asks
 2 independent panelists to evaluate
 3 whether an action of ICANN’s
 4 Board was consistent with
 5 ICANN’s Articles of
 6 Incorporation and Bylaws. *Id.*
 7 (Bylaws, Art. IV, § 3).

Atallah Declaration ¶	DCA Objection	Sustained	Overruled
------------------------------	----------------------	------------------	------------------

<p>9 ¶7: The Bylaws provide for the 10 IRP panel to issue a written 11 determination “declar[ing] 12 whether an action or inaction of 13 the Board was inconsistent with 14 the Articles of Incorporation or 15 Bylaws” and “recommend[ing] 16 that the Board stay any action or 17 decision, or that the Board take 18 any interim action, until such time 19 as the Board reviews and acts 20 upon the opinion of the IRP.” 21 Bekele Decl., Ex. 4 (Bylaws, Art. 22 IV, § 3.11). The ICANN Board 23 then considers and acts on the 24 determination. <i>Id.</i> (Bylaws, Art. 25 IV, § 3.21). 26 27 28</p>	<p>1. Best Evidence Rule (Evid. Code § 1520) 2. Lacks Foundation (Evid. Code § 403) 3. Lacks Personal Knowledge (Evid. Code § 702) 4. Speculation (Evid. Code § 702) 5. Improper Opinion Testimony (Evid. Code §702)</p>		
---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--	--

Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶8: I am informed and believe that prior to the opening of the New gTLD Program application period, only one IRP had resulted in a written determination <i>ICM Registry, LLC v. ICANN</i>. The <i>ICM</i> Panel declared that the determinations of IRP panels were not binding on ICANN’s Board. Attached hereto as Exhibit E is a true and correct copy of an excerpt of the Final Declaration of the <i>ICM</i> Panel.</p>	<ol style="list-style-type: none"> 1. Improper Opinion Testimony (Evid. Code §702) 2. Lacks Foundation (Evid. Code § 403) 3. Lacks Personal Knowledge (Evid. Code § 702) 4. Lack of Completeness (Evid. Code § 356) 5. Best Evidence Rule (Evid. Code § 1520) 		
Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶9: To my knowledge, ICANN has never represented that IRPs are binding. Instead, ICANN has consistently argued that IRP declarations are not binding.</p>	<ol style="list-style-type: none"> 1. Improper Opinion Testimony (Evid. Code §702) 2. Lacks Foundation (Evid. Code § 403) 3. Hearsay (Evid. Code § 1200, et seq.) 		
Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶10: In the case of the <i>DCA</i> IRP, the <i>DCA</i> Panel declared that its decision would be binding on ICANN’s Board. But the question</p>	<ol style="list-style-type: none"> 1. Lacks Foundation (Evid. Code § 403) 2. Best Evidence Rule (Evid. Code § 1520) 		

1	of whether the Panel’s declaration	3. Improper Opinion		
2	was or was not legally binding	Testimony (Evid. Code		
3	became a moot issue once	§702)		
4	ICANN’s Board elected to adopt	4. Hearsay (Evid. Code §		
5	all of the DCA Panel’s	1200, et seq.)		
6	recommendations, contrary to the			
7	representations in Plaintiff’s			
8	Motion for Preliminary Injunction.			
9	Atallah Declaration ¶	DCA Objection	Sustained	Overruled
10	¶11: Specifically, on July 9, 2015,	1. Best Evidence Rule (Evid.		
11	the DCA Panel issued its Final	Code § 1520)		
12	Declaration. Bekele Decl., Ex. 1.	2. Lacks Personal		
13	The DCA Panel determined that	Knowledge (Evid. Code §		
14	ICANN’s Board had violated	720)		
15	ICANN’s Articles of			
16	Incorporation and Bylaws by			
17	accepting the GAC’s consensus			
18	advice that Plaintiff’s application			
19	for .AFRICA (“Application”)			
20	should not proceed. The DCA			
21	Panel therefore recommended that			
22	“ICANN continue to refrain from			
23	delegating the .AFRICA gTLD			
24	and permit [Plaintiff]’s application			
25	to proceed through the remainder			
26	of the new gTLD application			
27	process.” Bekele Decl., Ex. 1 ¶			
28	149.			

Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶12: ICANN’s Board promptly considered and adopted each of the DCA Panel’s recommendations. On July 16, 2015, the Board resolved to “continue to refrain from delegating the .AFRICA gTLD,” “permit [Plaintiff’s] application to proceed through the remainder of the new gTLD application process,” and “reimburse DCA for the costs of the IRP.” Attached hereto as Exhibit F is a true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting the DCA Panel’s recommendations.</p>	<ol style="list-style-type: none"> 1. Improper Opinion Testimony (Evid. Code §702) 2. Lacks Foundation (Evid. Code § 403) 3. Best Evidence Rule (Evid. Code § 1520) 		
Atallah Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶13: In the event ICANN is permitted to delegate the .AFRICA gTLD to ZACR, a transfer or assignment of the gTLD in the future would still be possible, feasible and consistent with ICANN’s previous conduct. In fact, over forty gTLDs have had their registry contracts transferred</p>	<ol style="list-style-type: none"> 1. Improper Opinion Testimony (Evid. Code §702) 2. Lacks Foundation (Evid. Code § 403) 3. Speculation (Evid. Code § 702) 		

<p>1 from one registry operator to a 2 different registry operator, <i>i.e.</i>, 3 transferred for operation by a 4 different registry operator than the 5 operator when the registry contract 6 was initially executed. These 7 transfers have occurred for a 8 number of reasons, and transfers 9 are not limited to situations where 10 a registry’s contract with ICANN 11 was expiring.</p>	<p>4. Lacks Personal Knowledge (Evid. Code § 702)</p>		
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------	--	--

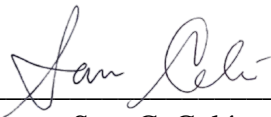
Atallah Declaration ¶	DCA Objection	Sustained	Overruled
------------------------------	----------------------	------------------	------------------

<p>13 ¶14: Nor is there any truth to 14 DCA’s argument in its Motion (at 15 p. 12) that “the U.S. government’s 16 ties with ICANN ceased” and 17 therefore “the current procedure 18 for gTLD redelegation is 19 uncertain.” In fact, nothing about 20 the recent transition of the Internet 21 Assigned Numbers Authority 22 (“IANA”) functions from the 23 United States government to 24 ICANN has any effect whatsoever 25 upon the fact that it is possible to 26 transfer the rights to operate a new 27 gTLD from one registry operator 28 to another, post-delegation.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702) 2. Lacks Foundation (Evid. Code § 403) 3. Speculation (Evid. Code § 702) 4. Lacks Personal Knowledge (Evid. Code § 702) 5. Best Evidence Rule (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

Dated: December 15, 2016

BROWN NERI SMITH & KHAN LLP

By: 
Sara C. Colón

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST