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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  
17 Plaintiff,

18 v.

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

24 Defendants.

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

**EVIDENTIARY OBJECTIONS TO  
DECLARATION OF KEVIN  
ESPINOLA**

Date: April 4, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Reply In Support  
of Motion for Preliminary Injunction;  
Supplemental Declaration of Sophia  
Bekele Eshete; Declaration of Sara C.  
Colón; and Evidentiary Objections to  
Declarations of Jeffrey LeVee,  
Christine Willet, Moctar Yedaly, and  
Akram Atallah]

1 Plaintiff DOTCONNECTAFRICA TRUST (“DCA”) respectfully submits  
 2 the following evidentiary objections to the Declaration of Kevin Espinola  
 3 (“Espinola Declaration”) relied upon by Defendant Internet Corporation for  
 4 Assigned Names and Numbers (“ICANN”) in support of its opposition to DCA’s  
 5 Motion for a Preliminary Injunction.

6 **PLAINTIFF’S EVIDENTIARY OBJECTIONS**

Espinola Declaration ¶	DCA Objection	Sustained	Overruled
<p>8 ¶3: “The Generic Names                  9 Supporting Organization                  10 (“GNSO”) – one of the                  11 supporting organizations that                  12 develops global Internet policy                  13 within ICANN – was                  14 responsible for policy                  15 development work on the                  16 introduction of new generic top-                  17 level domains (“gTLDs”) and                  18 approved a set of 19 policy                  19 recommendations. The GNSO’s                  20 work involved representatives                  21 from a wide variety of                  22 stakeholder groups –                  23 governments, individuals, civil                  24 society, business and intellectual                  25 property constituencies, the                  26 technology community, and                  27 others – engaging in discussions                  28 on policy questions regarding</p>	<p>Lacks personal                  knowledge and lacks                  foundation [Fed. R.                  Evid. 602].</p>		

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<p>new gTLDs, including the application criteria and the contractual conditions that should be required for new gTLD registries going forward. An overview of the GNSO’s policy work and its outcomes is available at <a href="http://gnso.icann.org/issues/new-gtlds">http://gnso.icann.org/issues/new-gtlds</a>. The culmination of the GNSO’s policy development work was a June 2008 decision by the ICANN Board of Directors to adopt the GNSO-developed new gTLD policy.</p>			
<p><b>Espinola Declaration ¶</b></p>	<p><b>DCA Objection</b></p>	<p><b>Sustained</b></p>	<p><b>Overruled</b></p>
<p>¶4: Following this decision, ICANN and its community began the process of developing the New gTLD Applicant Guidebook (“Guidebook”), which implemented the recommendations made by the GNSO and set forth the requirements and the criteria by which new gTLD applications are evaluated. The Guidebook</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602].</p>		

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<p>was developed as part of a years-long, bottom-up multistakeholder process during which numerous versions were published by ICANN for public comment and revised, in part based on comments received. In total, six complete versions of the Guidebook were published for public comment.</p>			
<p><b>Espinola Declaration ¶</b></p>	<p><b>DCA Objection</b></p>	<p><b>Sustained</b></p>	<p><b>Overruled</b></p>
<p>¶5: “On December 13, 2010, as part of this process, Plaintiff submitted a written public comment regarding the November 12, 2010 version of the Guidebook (“November 2010 Guidebook”), noting its support for the New gTLD Program and for a .AFRICA gTLD. Attached hereto as Exhibit A is a true and correct copy of Plaintiff’s comment. Attached hereto as Exhibit B is a true and correct copy of an excerpt of the “New gTLDs Proposed Final Applicant Guidebook Public Comment</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)); <i>See also Bank Melli Iran v. Pahlavi</i>, 58 F.3d 1406, 1412-1413 (9th Cir. 1995) (Holding “the Bank’s response to Pahlavi’s evidence was</p>		

EVIDENTIARY OBJECTIONS TO DECLARATION OF KEVIN ESPINOLA

1	Summary,” summarizing	<b>information and belief</b>		
2	comments received regarding	<b>declarations</b> from their		
3	the November 2010 Guidebook.	counsel. Those were		
4	Plaintiff’s comment is addressed	entitled to no weight		
5	on page 3. I am informed and	because the declarant		
6	believe that Plaintiff did not	did not have personal		
7	submit any comments regarding	knowledge.” [emphasis		
8	Section 6 of Module 6 of the	added)].		
9	Guidebook (“Covenant Not to	Completeness doctrine		
10	Sue”).	[Fed. R. Evid. 106].		
11	<b>Espinola Declaration ¶</b>	<b>DCA Objection</b>	<b>Sustained</b>	<b>Overruled</b>
12	¶7: “It is my belief that this	Lacks personal		
13	addition was principally made in	knowledge and lacks		
14	response to comments from	foundation [Fed. R.		
15	ICANN’s Governmental	Evid. 602; Local Rule		
16	Advisory Committee (“GAC”)	7-7 (Declarations shall		
17	regarding the Covenant Not to	contain only factual,		
18	Sue, as reflected on page 2 of a	evidentiary matter and		
19	February 21, 2011 document	shall conform as far as		
20	responding to those comments.	possible to the		
21	A true and correct copy of that	requirements of		
22	document “ICANN Board-GAC	F.R.Civ.P. 56(c)(4));		
23	Consultation: ‘Legal Recourse’	<i>See also Bank Melli</i>		
24	for New gTLD Registry	<i>Iran v. Pahlavi</i> , 58 F.3d		
25	Applicants,” is attached to this	1406, 1412-1413 (9th		
26	declaration as Exhibit D.”	Cir. 1995) (Holding		
27		“the Bank’s response to		
28		Pahlavi’s evidence was		

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	<p><b>information and belief declarations</b> from their counsel. Those were entitled to no weight because the declarant did not have personal knowledge.” [emphasis added]]).</p>		
	<b>Espinola Declaration ¶</b>	<b>DCA Objection</b>	<b>Sustained Overruled</b>
	<p>¶8: “ICANN’s decision to include the Covenant Not to Sue reflected its reasoned determination regarding the sort of risk, including financial, to which ICANN – a non-profit public benefit corporation – should reasonably subject itself as part of the New gTLD Progam.”</p>	<p>Lacks personal knowledge, lacks foundation, and speculative [Fed. R. Evid. 602]. Irrelevant [Fed. R. Evid. 403].</p>	
	<b>Espinola Declaration ¶</b>	<b>DCA Objection</b>	<b>Sustained Overruled</b>
	<p>¶9: “In response to public comments regarding the Covenant Not to Sue in the February 18, 2009 draft of the Guidebook (“February 2009 Guidebook”), ICANN explained: “Under its Bylaws ICANN’s actions are subject to</p>	<p>The best evidence of the document described is the document itself [Fed. R. Evid. 1002]. Completeness Doctrine [Fed. R. Evid. 106].</p>	

EVIDENTIARY OBJECTIONS TO DECLARATION OF KEVIN ESPINOLA

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<p>numerous transparency, accountability and review safeguards, and are guided by core values including ‘Making decisions by applying documented policies neutrally and objectively, with integrity and fairness[,] but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants.’ Attached hereto as Exhibit E is a true and correct copy of an excerpt of the report of public comments to the February 2009 Guidebook. The relevant language appears on p. 184.”</p>			
<p><b>Espinola Declaration ¶</b></p>	<p><b>DCA Objection</b></p>	<p><b>Sustained</b></p>	<p><b>Overruled</b></p>
<p><b>¶10:</b> “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, most importantly, the question of whether the Panel’s declaration was or was not legally binding became a moot</p>	<p>That ICANN’s board elected to adopt all of the IRP panel’s recommendations is irrelevant to the issue of whether ICANN actually followed the IRP panel’s ruling.</p>		

1 issue once ICANN’s Board 2 elected to adopt all of the <i>DCA</i> 3 Panel’s recommendations, 4 contrary to the representations in 5 Plaintiff’s motion for 6 preliminary injunction and TRO 7 application.”	[Fed. R. Evid. 403].		
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11 Dated: March 21, 2016

**BROWN NERI & SMITH LLP**

12  
13 By:  /s/ Ethan J. Brown  
14 Ethan J. Brown

15 *Attorneys for Plaintiff*  
16 **DOTCONNECTAFRICA TRUST**  
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