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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 MARK MCFADDEN
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 Mark McFadden

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 2: In 2011, ICANN and the ICC entered into a contract pursuant to which the ICC agreed to provide certain services to ICANN in conjunction with ICANN’s New gTLD Program. The contract was amended at various times, including in March 2012. As relevant to this litigation, the ICC agreed in the contract to be one of the two Geographic Names Evaluation Panels pursuant to Module 2 of the Applicant Guidebook (“Guidebook”) that ICANN had adopted for the New Gtld Program. ICANN also engaged the Economist Intelligence Unit (“EIU”) to perform Geographic Names Evaluation services.</p>	<p>1. Best evidence rule. (Evid. Code § 1520)</p>		
McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 3: The Geographic Names Evaluation Panels were tasked with reviewing all applied for gTLD strings to determine whether each string is a geographic name. In addition, the Geographic Names Evaluation Panels were responsible for verifying the relevance and authenticity of all supporting</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>2. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p>		

documentation that each applicant submitted pursuant to the requirements of Section 2.2.1.4 and Section 2.3.1 of the Guidebook. Ultimately, ICANN received over 1,900 applications, and the ICC and EIU conducted a geographic names review for each of the strings, with the ICC conducting roughly one-third of the reviews, and the EIU conducting the other two-thirds. The ICC and EIU adopted the same protocols and standards for conducting the geographic names review, which were published on ICANN’s website.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 4: In order to obtain a gTLD that constituted the name of a geographic region, pursuant to Section 2.2.1.4.2 of the Guidebook, an applicant was required to have the support of sixty (60) percent of the governments in that region. ICANN received many gTLD applications that constituted geographic regions or geographic names, and the ICC and EIU were tasked with determining if the applications had the requisite support.</p>	<ol style="list-style-type: none"> 1. Best evidence rule. (Evid. Code § 1520.) 2. Lacks foundation and personal knowledge. (Evid. Code § 403.) 		

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 5: ICANN received two applications for the string .AFRICA, one submitted by DCA and the other submitted by the entity now known as ZACR.¹ The ICC was designated by ICANN as the Geographic Names Evaluation Panel to evaluate the .AFRICA applications. Because there are 54 countries in Africa, any application for .AFRICA required the support of at least 33 countries in Africa, or the support of an organization that represented at least 33 countries in Africa. Each of the two applicants for .AFRICA submitted various purported letters of support from various countries in Africa as well as from the African Union Commission (“AUC”), and DCA also submitted a purported letter of support from the United Nations Economic Commission for Africa (“UNECA”). (ZACR did not submit a letter from UNECA.) However, the ICC determined in October 2012 that nearly all of the letters of support for both applications were insufficient – including the two AUC letters and the</p>	<p>1. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p> <p>n.1: 1. Irrelevant. (Evid. Code § 350.)</p>		

<p>1 UNECA letter submitted by DCA – 2 because they did not include the 3 specific language that was required in 4 the Guidebook (discussed below).</p> <p>5 n.1 DCA’s original application 6 actually was for the string 7 .DOTAFRICA, but ICANN allowed 8 DCA to change the application to 9 .AFRICA.</p>			
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McFadden Declaration ¶¶	DCA Objection	Sustained	Overruled
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<p>11 ¶ 6: ICANN initially took the 12 position that letters of support from 13 the AUC and UNECA should not 14 even count toward the 60 percent 15 requirement. The ICC conducted 16 further research on the AUC and 17 UNECA, and we expressed our view 18 to ICANN in March 2013 that both 19 the AUC and UNECA were qualified 20 to speak on behalf of the countries 21 they represented and, thus, verified 22 letters of support from those entities 23 should count toward the 60 percent 24 requirement. Following our 25 recommendation, ICANN agreed that 26 verified letters of support from the 27 AUC and UNECA should count 28 toward the 60 percent requirement,</p>	<p>1. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p>		
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1	but only if those letters contained the			
2	language required in the Guidebook.			
3	McFadden Declaration ¶	DCA Objection	Sustained	Overruled
4	¶ 7: Accompanying its application,	1. Best Evidence Rule (Evid.		
5	DCA submitted a letter of support	Code § 1520.)		
6	from the AUC dated August 27,	2. Irrelevant. (Evid. Code		
7	2009. Accompanying its application,	§350.)		
8	ZACR submitted a letter of support	3. Prejudicial. (Evid. Code §		
9	from the AUC dated April 4, 2012. ² I	352.)		
10	am now aware that the AUC also	4. ICANN was copied on the		
11	wrote a letter to DCA in April 2010	purported withdrawal letter		
12	purporting to withdraw its August	from the AUC. Bekele Decl.,		
13	2009 endorsement of DCA. My	Ex. 7,		
14	understanding is that DCA did not			
15	submit the actual April 2010 letter to			
16	ICANN with its gTLD application,			
17	and this letter was not brought to my			
18	attention until recently. The ICC was			
19	not aware of the AUC's purported			
20	withdrawal letter and did not consider			
21	the letter in its evaluation of DCA's			
22	application.			
23	n.2 The AUC submitted additional			
24	letters of support for ZACR on July 3,			
25	2013, and September 29, 2015.			
26	McFadden Declaration ¶	DCA Objection	Sustained	Overruled
27	¶ 8: Pursuant to section 2.2.1.4.3 of	1. Best Evidence Rule (Evid.		
28	the Guidebook, a government may	Code § 1520.)		
	withdraw its support for a gTLD			
	application at any time in the			

<p>1 application process. The procedure 2 required by ICANN and adopted by 3 the ICC was to disregard any letter of 4 support that was subsequently 5 withdrawn, and no longer accept the 6 letter as part of an applicant's 7 required 60 percent support.³ If the 8 ICC had been aware of the purported 9 withdrawal of the AUC's letter to 10 DCA, even if the August 2009 letter 11 had contained language sufficient 12 under the Guidebook (which it did 13 not), the ICC would have issued 14 clarifying questions to DCA 15 explaining that DCA no longer had 16 the support from the AUC, and 17 requiring DCA to submit an updated 18 letter.</p> <p>19 n.3 The ICC has encountered other 20 situations where letters of support 21 have been withdrawn, and in each 22 instance, the ICC removed the letter 23 as documentation of support and 24 issued clarifying questions to 25 the applicant asking the applicant to 26 provide additional documentation of 27 support.</p>	<p>2. Lacks foundation. (Evid. Code § 403.)</p> <p>3. Speculative and conclusory. (Evid. Code § 403.)</p> <p>n.3</p> <p>1. Lacks foundation. (Evid. Code § 403.)</p> <p>2. Irrelevant. (Evid. Code § 350.)</p>		
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McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 9: Unaware of the AUC’s withdrawal letter to DCA, the ICC followed a documented evaluation process with respect to DCA and ZACR’s letters of support whereby each letter was evaluated for required criteria pursuant to 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 non-objection to the applicant’s application and demonstrate the government’s or public authority’s understanding of the string being requested and its intended use.” It further required that a letter of support “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 ICC determined in early</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>2. Lacks foundation. (Evid. Code § 403.)</p>		

<p>2013 that none of the letters of support submitted by DCA or ZACR from the AUC or UNECA contained language that was sufficient under this section of the Guidebook.</p>			
<p>McFadden Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 10: Specifically, Section 2.2.1.4.3 had very specific requirements for each of the letters of support. Those requirements were part of the policy making process that developed the Guidebook over a course of several years, and they were there to ensure that any letter of support was legitimate, authoritative, and demonstrated that the governmental entity understood precisely what it was supporting. DCA’s letters from the AUC and UNECA failed to show that the governmental entities understood the process of the new gTLD program, and they also failed to show the governmental entity’s understanding that the applicant (DCA) would have to abide by ICANN consensus policy and be responsible for any related fees. Indeed, in our judgment, the letters that DCA submitted from the AUC and UNECA were not even close to</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>2. Lacks foundation, speculative, and conclusory. (Evid. Code § 403.)</p>		

conforming to the very specific requirements in the AGB; indeed, the two letters were drafted before the requirements in the Guidebook were even available to applicants.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
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¶ 11: The ICC adhered to an ICANN policy whereby the ICC was not permitted to contact any governmental authority that had submitted a letter of support for an applicant. Rather, the required procedure for a noncompliant letter was to direct “clarifying questions” to the applicant so that the applicant could contact the governmental authority to obtain an updated letter. Accordingly, the ICC determined that it needed to send clarifying questions to both DCA and ZACR (because the letter that ZACR submitted from the AUC was also deficient under the Guidebook). However, just as the ICC was planning to send clarifying questions to DCA in the Spring of 2013, ICANN’s Board voted to stop processing DCA’s application following receipt by the Board of consensus advice from ICANN’s Governmental Advisory Committee

1. Lacks foundation and conclusory. (Evid. Code § 403.)

2. Directly contradicts the evidence. Colón Decl. Ex. 3, [Email between McFadden and ICANN employee Trang Nguyen drafting support letter for ZACR from AUC.]

(the “GAC”) recommending that DCA’s application should not proceed. As a result, on June 7, 2013, ICANN advised the ICC to discontinue work on DCA’s application.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
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<p>¶ 12: The ICC did send clarifying questions to ZACR, and following that, the AUC submitted a revised endorsement letter for ZACR on July 3, 2013. The ICC determined that the revised letter satisfied all required criteria in the Guidebook. Thus, the ICC concluded that ZACR had passed the Geographic Names Review by obtaining the requisite 60 percent support. The ICC did not rely on any of the other letters of support that ZACR submitted with its application in 2012.</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>3. Prejudicial and contradictory to evidence. Colón Decl. Ex. 3, [Email between McFadden and ICANN employee Trang Nguyen drafting support letter for ZACR from AUC.]</p>		
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McFadden Declaration ¶	DCA Objection	Sustained	Overruled
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<p>¶ 13: I understand that DCA challenged, via an “Independent Review Procedure” under ICANN’s Bylaws, the decision of the ICANN Board to accept the GAC’s consensus advice that DCA’s application should not proceed. After the IRP issued its declaration in DCA’s favor in July</p>	<p>1. Lacks personal knowledge. (Evid. Code § 403.)</p> <p>2. Best Evidence Rule (Evid. Code § 1520.)</p>		
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2015, ICANN directed the ICC to resume processing DCA’s application in order to determine if DCA’s application could pass the Geographic Names review, which is exactly where DCA’s application had been prior to the time the Board voted in 2013 to accept the GAC’s advice. In September 2015, the ICC sent DCA the clarifying questions we had determined in 2013 to be necessary before discontinuing work on DCA’s application. The questions explained that both the AUC and UNECA letters submitted in support of DCA’s application did not comply with section 2.2.1.4.3 of the Guidebook, and we requested updated letters of support.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 14: I am now aware that UNECA wrote a letter dated July 20, 2015 in which UNECA stated that it is neither a government nor a public authority and therefore is not qualified to issue a letter of support under the Guidebook. This letter also was not brought to my attention until very recently. The ICC did not consider this letter in its evaluation of DCA’s</p>	<p>1. UNECA did not submit a July 20, 2015 letter. (Bekele Decl., Ex. 10.)</p> <p>2. Lacks foundation. (Evid. Code § 403.)</p>		

1 application; however, as noted above,
 2 the ICC already had determined that
 3 the original UNECA letter from 2008
 4 – written four years before DCA
 5 submitted its application and before
 6 ICANN had even posted the first
 7 draft of the Guidebook – did not
 8 contain the information required by
 9 the Guidebook, and we required DCA
 to provide an updated letter.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>10 ¶ 15: In response to the clarifying 11 questions that the ICC sent to DCA in 12 September 2015, DCA took the 13 position that its original 14 documentation of support submitted 15 with its application in 2012 was 16 sufficient, and DCA provided no 17 additional or updated letters of 18 support. Because DCA’s existing 19 letters of support were noncompliant, 20 the ICC concluded that DCA had not 21 passed Geographic Names Review. 22 DCA elected to participate in 23 “Extended Evaluation,” which 24 entailed sending clarifying questions 25 again to give DCA additional time to 26 provide the requisite documentation 27 of support. The ICC sent DCA the extended evaluation clarifying</p>	<p>1. Lacks personal knowledge and foundation. (Evid. Code § 403.)</p>		

1 questions on October 30, 2015. In
 2 response, DCA again took the
 3 position that its original application
 4 was sufficient and that it did not need
 5 to submit any additional letters of
 6 support. Thus, the ICC determined
 7 that DCA had failed to provide the
 8 requisite documentation of support or
 9 non-objection for the .AFRICA
 gTLD.

McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>10 ¶ 16: The ICC treated all gTLD 11 applications equally including DCA 12 and ZACR’s applications for 13 .AFRICA. Both applications initially 14 had letters of support from the AUC 15 and/or UNECA. The ICC 16 recommended that both of those 17 entities be viewed as authorized to 18 provide an official endorsement on 19 behalf of the countries in Africa that 20 each represented, and ICANN 21 ultimately agreed. The ICC then 22 evaluated each letter for required 23 criteria pursuant to the Guidebook, 24 and determined that all three of the 25 initial letters (two from the AUC and 26 one from UNECA) were not 27 sufficient under the terms of the Guidebook. The ICC conducted its</p>	<p>1. Conclusory. (Evid. Code § 403.)</p> <p>2. Contradicts earlier testimony in that ZACR did not have support from UNECA. (McFadden Decl., ¶ 5.)</p>		

1 evaluation not knowing whether the
2 AUC or UNECA still endorsed any
3 application and not knowing the
4 views of AUC or UNECA as to
5 whether they were authorized to
6 speak for the countries on the African
7 continent that they purported to
8 represent. ZACR was able to provide
9 an updated letter of support compliant
10 with the Guidebook, and it passed the
11 Geographic Names Review; DCA's
12 application failed the Geographic
Names Review.

13
14 Dated: December 15, 2016

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15
16 By: 

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