1 2 3 4 5 6 7 8	Jeffrey A. LeVee (State Bar No. 125863) Erin L. Burke (State Bar No. 186660) Rachel T. Gezerseh (State Bar No. 251299) Amanda Pushinsky (State Bar No. 267950) JONES DAY 555 South Flower Street Fiftieth Floor Los Angeles, CA 90071.2300 Telephone: +1.213.489.3939 Facsimile: +1.213.243.2539 Attorneys for Defendant INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS	
9		HE STATE OF CALIFORNIA
10	COUNTY OF LOS ANGE	LES, CENTRAL DISTRICT
11		
12	DOTCONNECTAFRICA TRUST,	CASE NO. BC607494
13	Plaintiff,	Assigned for all purposes to Hon. Howard L. Halm
14	V.	ICANN'S RESPONSES TO DCA'S
15 16	INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.,	EVIDENTIARY OBJECTIONS TO THE DECLARATION OF MARK McFADDEN
17	Defendant.	
18		DATE: February 2, 2017 TIME: 8:30 a.m.
19		DEPT: 53
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ICANN'S RESPONSES TO DCA'S OBJECTIONS TO THE DECLARATION OF M. McFADDEN

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby responds to Plaintiff DotConnectAfrica Trust's ("DCA") evidentiary objections to the Declaration of Mark McFadden ("McFadden Decl."), filed in support of ICANN's Opposition to Plaintiff's Motion for Preliminary Injunction.

	McFadden Declaration	DCA Objection	ICANN's Response	Ruling
T	2: In 2011, ICANN and the	1. Best evidence	Best Evidence. Mr.	
Id	CC entered into a contract	rule. (Evid. Code §	McFadden's statement is	
	ursuant to which the ICC	1520)	not offered to prove the	
	greed to provide certain		contents of a writing. Mr.	
II 4 -	ervices to ICANN in		McFadden's testimony is	
II I	onjunction with ICANN's		based on his personal	
II I	New gTLD Program. The		knowledge of the contract	
	ontract was amended at		entered into between	i
II I	arious times, including in		ICANN and the ICC	
11 1	March 2012. As relevant to		pursuant to which the ICC	
	his litigation, the ICC agreed		agreed to serve as one of	
11 1	n the contract to be one of		the two Geographic Names	
II 1	he two Geographic Names		Evaluation Panels.	
	Evaluation Panels pursuant			
D 1	o Module 2 of the Applicant			
	Guidebook ("Guidebook")		'	
11 1	hat ICANN had adopted for			
# 1	he New Gtld Program.			
	CANN also engaged the			
II I	Economist Intelligence Unit			
	"EIU") to perform Geographic Names			
	Evaluation services.			1
╟╧	McFadden Declaration	DCA Objection		Court's
	With adden Declaration		ICANN's Response	Ruling
	3: The Geographic Names	1. Best evidence	Best Evidence. Mr.	
II I	Evaluation Panels were	rule. (Evid. Code §	McFadden's statement is	
11 1	asked with reviewing all	1520.)	not offered to prove the	
11 1	pplied for gTLD strings to		contents of a writing. Mr.	ļ
11 1	letermine whether each		McFadden's testimony is	
	tring is a geographic name.		based on his personal	
II I	n addition, the Geographic		knowledge of the protocols	
ŧП	Names Evaluation Panels	2 Looks	and standards adopted by	
11 1	were responsible for	2. Lacks	the Geographic Names Evaluation Panels. A true	
	verifying the relevance and	foundation and	and correct copy of the	
	uthenticity of all supporting	personal knowledge. (Evid.	Guidebook is in the record	
11 1 "	locumentation that each	Code § 403.)	(Bekele Decl., Ex. 3)	
11 1	applicant submitted pursuant	Code 8 403.)	(Bokoto Boot., DA. 3)	
$\ \Box^{0}$	o the requirements of	2		L .— —

- 1				
1	Section 2.2.1.4 and Section		Foundation/Personal	
	2.3.1 of the Guidebook.		Knowledge. Mr. McFadden laid the	
2	Ultimately, ICANN received over 1,900 applications, and		foundation for his	
3	the ICC and EIU conducted a		testimony. McFadden	
ا ا	geographic names review for		testified that he is the	
4	each of the strings, with the		Principal IP and DNS	
ا ہ	ICC conducting roughly one-		Specialist at ICC, and that	
5	third of the reviews, and the		the ICC was designated by	
6	EIU conducting the other		ICANN to evaluate	
	two-thirds. The ICC and EIU		the .AFRICA applications.	
7	adopted the same protocols		(McFadden Decl. ¶ 1.) As	
8	and standards for conducting		such, he has personal knowledge of the protocols	
	the geographic names review, which were		and standards adopted by	
9	published on ICANN's		the Geographic Names	
10	website.		Evaluation Panels.	
10				
11	Elizabeth de la companya de la comp			Court's
	McFadden Declaration	DCA Objection	ICANN's Response	Ruling
12		1. Best evidence	Best Evidence. Mr.	Ruing
13	¶ 4: In order to obtain a gTLD that constituted the	rule. (Evid. Code §	McFadden's statement is	
_	name of a geographic region,	1520.)	not offered to prove the	
14	pursuant to Section 2.2.1.4.2		contents of a writing. Mr.	
15	of the Guidebook, an		McFadden's testimony is	
	applicant was required to		based on his personal	
16	have the support of sixty (60)		knowledge of the	
17	percent of the governments		Guidebook requirements	
1'	in that region. ICANN	2. Lacks foundation and	for obtaining a gTLD that constituted the name of a	
18	received many gTLD	personal	geographic region and	
19	applications that constituted geographic regions or	knowledge. (Evid.	protocols and standards	
19	geographic names, and the	Code § 403.)	adopted by the Geographic	
20	ICC and EIU were tasked	,	Names Evaluation Panels.	
2.	with determining if the		A true and correct copy of	
21	applications had the requisite		the Guidebook is attached	
22	support.		as exhibit three to the	
			Declaration of Sophia	
23			Bekele ("Bekele Decl.").	
24			Foundation/Personal	
			Knowledge. Mr.	
25			McFadden laid the	
26			foundation for his	
			testimony. McFadden	
27			testified that he is the	
28			Principal IP and DNS	
20			Specialist at ICC, and that	
		•	O THE DECLARATION OF M	S.C. D.L. D.DEN

1			the ICC was designated by	
			ICANN to evaluate	
2			the .AFRICA applications. (McFadden Decl. ¶ 1.) As	
,			such, he has personal	
3			knowledge of the	
4			Guidebook requirements	
			for obtaining a gTLD that	
5			constituted the name of a	
			geographic region and	
6			protocols and standards	
7			adopted by the Geographic	
İ			Names Evaluation Panels.	
8	McFadden Declaration	DCA Objection		Court's
			ICANN's Response	Ruling
9	¶ 5: ICANN received two	1. Lacks	Foundation/Personal	
10	applications for the	foundation and	Knowledge. Mr.	
	string .AFRICA, one	personal	McFadden laid the	
11	submitted by DCA and the	knowledge. (Evid.	foundation for his	1
12	other submitted by the entity	Code § 403.)	testimony. McFadden	
12	now known as ZACR.1 The		testified that he is the	
13	ICC was designated by		Principal IP and DNS	
	ICANN as the Geographic		Specialist at ICC, and that	
14	Names Evaluation Panel to		the ICC was designated by	
1.5	evaluate the .AFRICA		ICANN to evaluate	
15	applications. Because there	:	the .AFRICA applications.	
16	are 54 countries in Africa,		(McFadden Decl. ¶¶ 1,5.) As such, he has personal	
	any application for .AFRICA		knowledge of the	
17	required the support of at least 33 countries in Africa,		Guidebook requirements,	
10	1		DCA and ZACR's	
18	or the support of an organization that represented		applications for .AFRICA,	
19	at least 33 countries in		and the ICC's evaluation	
Į	Africa. Each of the two		of DCA and ZACR's	
20	applicants for .AFRICA		applications for .AFRICA.	
21	submitted various purported			
21	letters of support from	n.1:	Relevance. Testimony	
22	various countries in Africa as	1. Irrelevant.	regarding DCA's	
	well as from the African	(Evid. Code §	application for the	
23	Union Commission	350.)	string .DOTAFRICA is	
24	("AUC"), and DCA also		relevant to provide an	
24	submitted a purported letter		accurate and full context	
25	of support from the United		for the history of DCA's	
	Nations Economic		application for .Africa, and	
26	Commission for Africa		to refute DCA's allegations	
27	("UNECA"). (ZACR did not		that the application process	
۷1	submit a letter from		was a "sham," and that	
28	UNECA.) However, the ICC		ZACR was predetermined	I
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1	determined in October 2012		to prevail. In fact, ICANN	
	that nearly all of the letters of		provided DCA multiple	
2	support for both applications		opportunities to submit a qualifying application to	
3	were insufficient – including the two AUC letters and the		compete for .Africa,	
٦	UNECA letter submitted by		including initially by	
4	DCA – because they did not		allowing it to change its	
_	include the specific language		application from .dotafrica	
5	that was required in the		to .africa.	
6	Guidebook (discussed			
	below).			
7	1201			
8	n.1 DCA's original			
	application actually was for the string .DOTAFRICA, but			
9	ICANN allowed DCA to			
10	change the application			
10	to .AFRICA.			
11	McFadden Declaration	DCA Objection	ICANN's Response	Court's
12			-	Ruling
12	¶ 6: ICANN initially took	1. Lacks	Foundation/Personal	
13	the position that letters of	foundation and	Knowledge. Mr.	
	support from the AUC and	personal	McFadden laid the foundation for his	
14	UNECA should not even	knowledge. (Evid. Code § 403.)	testimony. McFadden	
15	count toward the 60 percent requirement. The ICC	Code § 403.)	testified that he is the	
.	conducted further research		Principal IP and DNS	
16	on the AUC and UNECA,		Specialist at ICC, and that	
17	and we expressed our view to		the ICC was designated by	
17	ICANN in March 2013 that		ICANN to evaluate	
18	both the AUC and UNECA		the .AFRICA applications.	
10	were qualified to speak on		(McFadden Decl. ¶ 1.) As	
19	behalf of the countries they		such, he has personal knowledge of DCA and	
20	represented and, thus,		ZACR's applications	
	verified letters of support from those entities should		for .AFRICA, the ICC's	
21	count toward the 60 percent		evaluation of DCA and	
22	requirement. Following our		ZACR's applications	
	recommendation, ICANN		for .AFRICA, including	
23	agreed that verified letters of		the ICC's communications	
24	support from the AUC and		with ICANN relating to	
۷.	UNECA should count toward		those applications.	
25	the 60 percent requirement,			
26	but only if those letters			
20	contained the language			
	required in the Guidebook			
27	required in the Guidebook. McFadden Declaration	DCA Objection		Court's
27 28	required in the Guidebook. McFadden Declaration	DCA Objection	ICANN's Response	Court's Ruling

1	¶ 7: Accompanying its	1. Best Evidence	Best Evidence. Mr.	
	application, DCA submitted	Rule (Evid. Code	McFadden's statement is	
2	a letter of support from the	§ 1520.)	not offered to prove the	
۱ ,	AUC dated August 27, 2009.		contents of a writing. Mr.	
3	Accompanying its		McFadden's testimony is	
4	application, ZACR submitted		based on his personal knowledge of the ICC's	'
Ì	a letter of support from the		evaluation of DCA and	
5	AUC dated April 4, 2012. I am now aware that the AUC		ZACR's applications	
	also wrote a letter to DCA in		for .AFRICA, and the	
6	April 2010 purporting to		ICC's lack of awareness	
7	withdraw its August 2009		and consideration of the	
′	endorsement of DCA. My	2. Irrelevant.	2010 letter from the AUC	
8	understanding is that DCA	(Evid. Code §350.)	withdrawing its support for	
	did not submit the actual	(Livia. Code 3550.)	DCA's application	
9	April 2010 letter to ICANN		for Africa. A true and	
10	with its gTLD application,		correct copy of the 2010	
10	and this letter was not		AUC letter is attached as	
11	brought to my attention until		Exhibit 7 to the Bekele	
	recently. The ICC was not		Declaration.	
12	aware of the AUC's			
12	purported withdrawal letter		Relevance. Testimony	
13	and did not consider the		regarding ICC's knowledge	
14	letter in its evaluation of	3. Prejudicial.	of the 2010 letter from the	
	DCA's application.	(Evid. Code §	AUC withdrawing its	
15		352.)	support for DCA's	
	n.2 The AUC submitted		application for .Africa is	
16	additional letters of support		relevant to show that ICC's	
17	for ZACR on July 3, 2013,		determination that DCA's	
1'	and September 29, 2015.		2009 AUC letter did not	
18			meet Guidebook	
			requirements was formed	
19			based solely on the	1
20			contents of the 2009 letter,	
20			and independent of any	
21			knowledge of the 2010	
			withdrawal letter, since	
22		4 1043737	ICC was not aware this	
23		4. ICANN was	letter existed until recently.]
23		copied on the	Draindicial This tastiman	
24		purported	Prejudicial. This testimony	!
		withdrawal letter from the AUC.	is not materially misleading nor prejudicial.	
25		Bekele Decl., Ex.	Mr. McFadden's	
26		7.	declaration simply states	
∠0		' '	that the ICC was not aware	
27	'		of the AUC's purported	
	'		withdrawal letter and did	
28	L		1	

,			not consider the letter in its	
1			evaluation.	
2				
-		:	Objection No. 4. It is	
3			unclear what evidentiary	
			objection DCA intended to	
4			make with its fourth	
_			objection. DCA did not	
5			submit to ICANN with its	
6			Application a copy of the	
			AUC's 2010 letter	
7			withdrawing its support for	
_			DCA, and thus the ICC	
8			was not aware of the	
9			AUC's purported	
"			withdrawal letter and did	
10			not consider the letter in its	
1			evaluation.	
11	McFadden Declaration	DCA Objection	ICANN's Response	Court's
10		14.	**************************************	Ruling
12	¶ 8: Pursuant to section	1. Best Evidence	Best Evidence. Mr.	
13	2.2.1.4.3 of the Guidebook, a	Rule (Evid. Code	McFadden's statement is	
	government may withdraw	§ 1520.)	not offered to prove the	!
14	its support for a gTLD		contents of a writing. Mr.	
	application at any time in the		McFadden's testimony is	
15	application process. The		based on his personal	
16	procedure required by		knowledge of the	
10	ICANN and adopted by the	_	Guidebook requirements	
17	ICC was to disregard any	2. Lacks	and procedures regarding	
	letter of support that was	foundation. (Evid.	subsequently withdrawn	
18	subsequently withdrawn, and	Code § 403.)	letters of support. A true	
10	no longer accept the letter as		and correct copy of the	
19	part of an applicant's		Guidebook is in the record	
20	required 60 percent support.		(Bekele Decl., Ex. 3).	
_	If the ICC had been aware of		Farm detien Ma	
21	the purported withdrawal of		Foundation. Mr. McFadden laid the	
	the AUC's letter to DCA,		foundation for his	
22	even if the August 2009		testimony. Mr. McFadden	
23	letter had contained language		testified that he is the	
23	sufficient under the		Principal IP and DNS	
24	Guidebook (which it did		Specialist at ICC, and that	
	not), the ICC would have		the ICC was responsible	
25	issued clarifying questions to		for verifying the relevance	
26	DCA explaining that DCA		and authenticity of all	
20	no longer had the support		supporting documentation	
27	from the AUC, and requiring	3. Speculative and	that each applicant	
	DCA to submit an updated	conclusory. (Evid.	submitted pursuant to	
28	letter.	Conclusory. (Evid.	Saomitted pursuant to	
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1	n.3 The ICC has encountered	Code § 403.)	Guidebook requirements. (McFadden Decl. ¶¶ 1, 3.)	
2	other situations where letters		The ICC conducted geographic names review	
3	of support have been withdrawn, and in each		for one-third of the	
4	instance, the ICC removed		applications received by	
	the letter as documentation of support and issued clarifying		ICANN. <i>Id.</i> at ¶ 3. As such, Mr. McFadden has	
5	questions to the applicant		knowledge of Guidebook	
6	asking the applicant to provide additional	n.3 1. Lacks	requirements regarding withdrawing	
7	documentation of support.	foundation. (Evid.	endorsements, and how the	
8		Code § 403.)	ICC applies Guidebook procedures regarding	
9			letters of support that are	
			subsequently withdrawn.	
10			Speculation/Conclusory.	
11			Mr. McFadden's own understanding of the	
12			Guidebook requirements	
13			and procedures regarding letters of support	
14			subsequently withdrawn is	
			not speculative, but a	
15			subject Mr. McFadden has personal knowledge of.	
16		2. Irrelevant.		
17		(Evid. Code § 350.)	Foundation. Mr. McFadden laid the	
18			foundation for his	•
19			testimony. McFadden testified that he is the	
20			Principal IP and DNS	
			Specialist at ICC, and that the ICC was designated by	
21			ICANN to evaluate	
22			the .AFRICA applications. (McFadden Decl. ¶ 1.) As	
23			such, he has knowledge of	
24			past situations where letters of support have	
25			been withdrawn.	
			Relevance. Testimony	
26			regarding past situations	
27			where letters of support have been withdrawn	
28		0	nave been withdrawn	

1				
1			is relevant to show that	
1			ICANN/ICC followed	
2			standard procedures in	
-			evaluating DCA's	
3			application, and DCA	
			would not have been able	
4			to obtain an updated letter	
5			from the AUC that	
			conformed with the	
6			Guidebook's requirements	
			following the IRP	
7			Declaration. This evidence	
			supports ICANN's	
8			argument that DCA has no	
9			likelihood of success on	
-			the merits as to its second	
10			and fifth causes of action.	
	McFadden Declaration	DCA Objection	ICANN's Response	Court's
11		1 D : 11		Ruling
12	¶ 9: Unaware of the AUC's	1. Best evidence	Best Evidence. Mr. McFadden's statement is	
-	withdrawal letter to DCA,	rule. (Evid. Code §		
13	the ICC followed a	1520.)	not offered to prove the contents of a writing. Mr.	
	documented evaluation		McFadden's testimony is	
14	process with respect to DCA		based on his personal	
15	and ZACR's letters of	!	knowledge of the	
13	support whereby each letter		Guidebook requirements	
16	was evaluated for required criteria pursuant to the		and the ICC's evaluation	
			of DCA and ZACR's	
17	Guidebook. In particular, section 2.2.1.4.3 of the		applications for .AFRICA.	
18	Guidebook required that	2. Lacks	A true and correct copy of	
10	letters of support for a	foundation. (Evid.	the Guidebook is in the	
19	geographic name "clearly	Code § 403.)	record (Bekele Decl., Ex.	
-	express the government's or	Code § 405.)	3).	
20	public authority's support for		<i>-</i> 5).	
21	or non- objection to the		Foundation. Mr.	
21	applicant's application and		McFadden laid the	
22	demonstrate the		foundation for his	
	government's or public		testimony. McFadden	
23	authority's understanding of		testified that he is the	
	the string being requested		Principal IP and DNS	
24	and its intended use." It		Specialist at ICC, and that	
25	further required that a letter		the ICC was designated by	
ر کے	of support "demonstrate the		ICANN to evaluate	
26	government's or public		the .AFRICA applications.	
	authority's understanding		(McFadden Decl. ¶ 1.) As	
27	that the string is being sought		such, he has knowledge of	
28	through the gTLD		the Guidebook	
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,	application process and that		requirements and the ICC's	
1	the applicant is willing to		evaluation of DCA and	
2	accept the conditions under		ZACR's applications	
_	which the string will be		for .AFRICA.	
3	available, i.e., entry into a			
,	registry agreement with			
4	ICANN requiring			
5	compliance with consensus			
	policies and payment of			
6	fees." The ICC determined in			
7	early2013 that none of the			
′	letters of support submitted by DCA or ZACR from the			
8	AUC or UNECA contained			
	language that was sufficient			
9	under this section of the			
10	Guidebook.			
10	McFadden Declaration	DCA Objection	ICANDI. D	Court's
11			ICANN's Response	Ruling
10	¶ 10: Specifically, Section	1. Best evidence	Best Evidence. Mr.	
12	2.2.1.4.3 had very specific	rule. (Evid. Code §	McFadden's statement is	
13	requirements for each of the	1520.)	not offered to prove the	
	letters of support. Those		contents of a writing. Mr.	
14	requirements were part of the		McFadden's testimony is based on his personal	
15	policy making process that		knowledge of the	
15	developed the Guidebook over a course of several		Guidebook requirements	
16	years, and they were there to		for letters of support and of	
17	ensure that any letter of		the ICC's evaluation of	
1/	support was legitimate,	2. Lacks	DCA and ZACR's	
18	authoritative, and	foundation,	applications for .AFRICA,	
	demonstrated that the	speculative, and	and is offered to show	
19	governmental entity	conclusory. (Evid.	ICC's basis for evaluating	
20	understood precisely what it	Code § 403.)	letters of support as insufficient. A true and	
	was supporting. DCA's		correct copy of the	
21	letters from the AUC and UNECA failed to show that		Guidebook is in the record	
22	the governmental entities	,	(Bekele Decl., Ex. 3).	
22	understood the process of the		True and correct copies of	
23	new gTLD program, and		DCA's 2008 and 2009	
0.4	they also failed to show the		letters of support are also	
24	governmental entity's		in the record (Bekele	
25	understanding that the		Decl., Exs. 6, 8)	
	applicant (DCA) would have			
26	to abide by ICANN		Foundation. Mr.	
27	consensus policy and be		McFadden laid the	
21	responsible for any related		foundation for his	1
28	fees. Indeed, in our		testimony. McFadden	
		10		
	ICANN'S RESPONSES TO I	OCA'S OBJECTIONS T	O THE DECLARATION OF M.	McFADDEN
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1				
.	judgment, the letters that		testified that he is the	
1	DCA submitted from the		Principal IP and DNS	
2	AUC and UNECA were not		Specialist at ICC, and that	
	even close to conforming to		the ICC was designated by	
3	the very specific		ICANN to evaluate	
	requirements in the AGB;		the .AFRICA applications.	
4	indeed, the two letters were		(McFadden Decl. ¶ 1.) As	
_	drafted before the		such, he has knowledge of	
5	requirements in the		the Guidebook	
6	Guidebook were even		requirements for letters of	
۱	available to applicants.		support and of the ICC's	
7	a, allocate to approximate		evaluation of DCA and	
			ZACR's applications	
8			for .AFRICA.	
	1			
9			Speculative/Conclusory.	
10			Mr. McFadden's own	
10			understanding of the	
11			Guidebook requirements	ŀ
			for letters of support and of	
12			the ICC's evaluation of	
13			DCA and ZACR's	
13			applications for .AFRICA	
14			is not speculative, but a	
-			subject Mr. McFadden has	
15			personal knowledge of.	
16	McFadden Declaration	DCA Objection	ICANN's Response	Court's Ruling
	¶ 11: The ICC adhered to an	1. Lacks	Foundation/Conclusory.	
17	ICANN policy whereby the	foundation and	Mr. McFadden laid the	
18	ICC was not permitted to	conclusory. (Evid.	foundation for his	
10	contact any governmental	Code § 403.)	testimony. McFadden	
19	authority that had submitted	3 100.0	testified that he is the	
	a letter of support for an		Principal IP and DNS	
20	applicant. Rather, the		Specialist at ICC, and that	
21	required procedure for a		the ICC was designated by	
21	noncompliant letter was to		ICANN to evaluate	
22	direct "clarifying questions"		the .AFRICA applications.	
	to the applicant so that the		(McFadden Decl. ¶ 1.) As	
23	applicant could contact the		such, he has knowledge of	
_,	governmental authority to		ICANN policy related to	
24	obtain an updated letter.		letters of support, the	
25	Accordingly, the ICC		ICC's evaluation of DCA	
	determined that it needed to		and ZACR's applications	
26	send clarifying questions to		for .AFRICA, and	
	both DCA and ZACR		ICANN's instructions to	
27	(because the letter that		the ICC relating to DCA	
28	ZACR submitted from the		and ZACR's applications	
20		11		

.	AUC was also deficient		for .AFRICA.	, , ,
1	under the Guidebook).			
2	However, just as the ICC was		Objection No. 2. It is	
2	planning to send clarifying		unclear what evidentiary	
3	questions to DCA in the	2. Directly	objection DCA intended to	
	Spring of 2013, ICANN's	contradicts the	make with its second	İ
4	Board voted to stop	evidence. Colón	objection. "Directly	
	processing DCA's	Decl. Ex. 3,	contradicts the evidence" is	
5	application following receipt	[Email between	not an evidentiary	
	by the Board of consensus	McFadden and	objection, but rather	
6	advice from ICANN's	ICANN employee	argument that goes to	
7	1	Trang Nguyen	weight. Further, the	
_ /	Governmental Advisory	drafting support	referenced email does not	
8	Committee (the "GAC")	letter for ZACR	contradict any of the	
	recommending that DCA's	from AUC.]	testimony presented in	
9	application should not	nom Acc.j	paragraph 11.	
	proceed. As a result, on June		paragraph 11.	
10	7, 2013, ICANN advised the ICC to discontinue work on			
11				
11	DCA's application. McFadden Declaration	DCA Objection		Court's
12	McFadden Declaration	DCA Objection	ICANN's Response	Ruling
i i	# 12. The ICC did and	1. Best evidence	Best Evidence. Mr.	
13	¶ 12: The ICC did send	rule. (Evid. Code §	McFadden's statement is	\$
	clarifying questions to	•	not offered to prove the	
14	ZACR, and following that,	1520.)	contents of a writing. Mr.	
15	the AUC submitted a revised		McFadden's testimony is	
15	endorsement letter for ZACR		based on his personal	
16	on July 3, 2013. The ICC determined that the revised		knowledge of the ICC's	
			evaluation procedures for	
17	letter satisfied all required criteria in the Guidebook.	3. Prejudicial and	ZACR's application	
10		contradictory to	for .AFRICA and the	
18	Thus, the ICC concluded that	evidence. Colón	ICC's ultimate	
19	ZACR had passed the	Decl. Ex. 3,	determination that ZACR	
•	Geographic Names Review	[Email between	passed the Geographic	
20	by obtaining the requisite 60 percent support. The ICC did	McFadden and	Names Review.	
	not rely on any of the other	ICANN employee	Traines review.	
21	letters of support that ZACR	Trang Nguyen	Prejudicial/Contradictory.	
22	submitted with its application	drafting support	This testimony is not	
22	in 2012.	letter for ZACR	materially misleading nor	
23	m 2012.	from AUC.]	prejudicial. Mr.	
		nom Acc.j	McFadden's declaration	
24			simply states the ICC's	
			evaluation procedures for	
25			ZACR's application	
26			for .AFRICA and the	
20			ICC's ultimate	
27			determination that ZACR	
			passed the Geographic	
28	L	<u> </u>	1	I
		12.		

			Names Review.	
1	McFadden Declaration	DCA Objection	ICANN's Response	Court's
2	¶ 12. I was denoted that DCA	1. Lacks personal	Personal Knowledge.	Ruling
3	¶ 13: I understand that DCA challenged, via an	knowledge. (Evid.	McFadden testified that he	
	"Independent Review	Code § 403.)	is the Principal IP and	
4	Procedure" under ICANN's		DNS Specialist at ICC, and	
5	Bylaws, the decision of the		that the ICC was	
	ICANN Board to accept the GAC's consensus advice that		designated by ICANN to evaluate the .AFRICA	
6	DCA's application should		applications. (McFadden	
7	not proceed. After the IRP		Decl. ¶ 1.) As such, he has	
	issued its declaration in		personal knowledge of	
8	DCA's favor in July 2015,	•	ICANN's instructions to	
9	ICANN directed the ICC to		the ICC relating to DCA	
	resume processing DCA's		and ZACR's applications	
10	application in order to		and the ICC's evaluation of DCA and ZACR's	
11	determine if DCA's application could pass the		applications for .AFRICA.	
	Geographic Names review,		upplications for all records	**
12	which is exactly where	2. Best Evidence	Best Evidence. Mr.	
13	DCA's application had been	Rule (Evid. Code	McFadden's statement is	
ויי	prior to the time the Board	§ 1520.)	not offered to prove the	
14	voted in 2013 to accept the		contents of a writing. Mr.	
15	GAC's advice. In September		McFadden's testimony is based on his personal	
15	2015, the ICC sent DCA the clarifying questions we had		knowledge of ICANN's	
16	determined in 2013 to be		instructions to the ICC	
17	necessary before		relating to DCA and	
17	discontinuing work on		ZACR's applications and	
18	DCA's application. The		the ICC's evaluation of	
10	questions explained that both		DCA and ZACR's	
19	the AUC and UNECA letters		applications for .AFRICA.	
20	submitted in support of		True and correct copies of the Clarifying Questions	
	DCA's application did not comply with section 2.2.1.4.3		issued to DCA are in the	
21	of the Guidebook, and we		record (Bekele Decl., Exs.	
22	requested updated letters of		13, 15).	
22	support.			
23	McFadden Declaration	DCA Objection	ICANN's Response	Court's
24		1 IDECA 1:1 -4	-	Ruling
	¶ 14: I am now aware that UNECA wrote a letter dated	1. UNECA did not submit a July 20,	Objection No. 1. It is unclear what evidentiary	
25	July 20, 2015 in which	2015 letter.	objection DCA intended to	
26	UNECA stated that it is	(Bekele Decl., Ex.	make with its first	
	neither a government nor a	10.)	objection. DCA's	
27	public authority and		statement is not an	
28	therefore is not qualified to		evidentiary objection.	
		13		

1	issue a letter of support under		Further, nowhere in	
1	the Guidebook. This letter	2. Lacks	paragraph 14 does it state	
2	also was not brought to my	foundation. (Evid.	that UNECA "submitted"	
	attention until very recently.	Code § 403.)	the July 20, 2015 letter.	
3	The ICC did not consider this		However, UNECA did	
.	letter in its evaluation of		draft a July 20, 2015 letter	
4	DCA's application; however,		making the same	
5	as noted above, the ICC		statements regarding its	
ا	already had determined that		nonsupport for DCA's	
6	the original UNECA letter		application, which Ms.	
	from 2008– written four		Bekele conceded she	
7	years before DCA submitted		received in the December	
8	its application and before		1, 2016 deposition.	
°	ICANN had even posted the		m 1.4 M.D.11	
9	first draft of the Guidebook –		Foundation. McFadden	
	did not contain the		laid the foundation for his	
10	information required by the		testimony. McFadden testified that he is the	
11	Guidebook, and we required			
11	DCA to provide an updated		Principal IP and DNS Specialist at ICC, and that	
12	letter.		the ICC was designated by	
			ICANN to evaluate	
13			the .AFRICA applications.	
			(McFadden Decl. ¶ 1.) As	
14			such, he has personal	
15			knowledge of the	
			Guidebook requirements	
16	<u>'</u>		and the ICC's evaluation	
17			of DCA and ZACR's	
17			applications for .AFRICA.	
18	McFadden Declaration	DCA Objection	ICANNIa Damongo	Court's
			ICANN's Response	Ruling
19	¶ 15: In response to the	1. Lacks personal	Foundation/Personal	
20	clarifying questions that the	knowledge and	Knowledge. Mr.	
20	ICC sent to DCA in	foundation. (Evid.	McFadden laid the	
21	September 2015, DCA took	Code § 403.)	foundation for his	
	the position that its original		testimony. McFadden	
22	documentation of support		testified that he is the	
23	submitted with its application		Principal IP and DNS	
23	in 2012 was sufficient, and		Specialist at ICC, and that the ICC was designated by	
24	DCA provided no additional		ICANN to evaluate	
	or updated letters of support.		the .AFRICA applications.	
25	Because DCA's existing		(McFadden Decl. ¶ 1.) As	
26	letters of support were		such, he has personal	
20	noncompliant, the ICC concluded that DCA had not		knowledge of DCA and	
27	passed Geographic Names		ZACR's applications	
	Review. DCA elected to		for .AFRICA and the	
28	10 view. Dozi elected to			4
		14		
	ICANN'S RESPONSES TO I	OCA'S OBJECTIONS T	O THE DECLARATION OF M.	McFADDEN
l	1			'

,	participate in "Extended		ICC's evaluation of DCA	
1	Evaluation," which entailed		and ZACR's applications	
2	sending clarifying questions		for .AFRICA.	
	again to give DCA additional			
3	time to provide the requisite			
	documentation of support.			
4	The ICC sent DCA the			
ا ۔	extended evaluation			
5	clarifying questions on			
6	October 30, 2015. In			
· ·	response, DCA again took			
7	the position that its original			
	application was sufficient			
8	and that it did not need to			
9	submit any additional letters			
7	of support. Thus, the ICC			
10	determined that DCA had			
- 3	failed to provide the requisite			
11	documentation of support or			
	non-objection for			
12	the .AFRICA gTLD.			
13	McFadden Declaration	DCA Objection	ICANN's Response	Court's
13			ICANIA S Response	Ruling
14	¶ 16: The ICC treated all	1. Conclusory.	Conclusory. Mr.	
	gTLD applications equally	(Evid. Code §	McFadden's own	
15	including DCA and ZACR's	403.)	understanding of the ICC's	
16	applications for .AFRICA.		evaluation of DCA and	
10	Both applications initially		ZACR's applications	
17	had letters of support from		for .AFRICA is not	
	the AUC and/or UNECA.		conclusory, but a subject	
18	The ICC recommended that		Mr. McFadden has	
10	both of those entities be		personal knowledge of.	
19	viewed as authorized to	0.00	01 '4' N- 2 I4'-	
20	provide an official	2. Contradicts	Objection No. 2. It is	
	endorsement on behalf of the	earlier testimony	unclear what evidentiary	
21	countries in Africa that each	in that ZACR did	objection DCA intended to make with its second	
	represented, and ICANN	not have support	objection. DCA's	
22	ultimately agreed. The ICC	from UNECA.	statement is not an	
23	then evaluated each letter for	(McFadden Decl.,	evidentiary objection, but	
23	required criteria pursuant to	¶ 5.)	rather argument, that goes	
24	the Guidebook, and		to weight. Nor does Mr.	
	determined that all three of		McFadden claim that	
25	the initial letters (two from the AUC and one from		ZACR had a support letter	
26			from UNECA.	
20	UNECA) were not sufficient under the terms of the		nom orthorn	
27	Guidebook. The ICC			
	conducted its evaluation not			
28	conducted its evaluation not		1	<u> </u>
		15		

1	knowing whether the AUC or UNECA still endorsed any
2	application and not knowing the views of AUC or
3	UNECA as to whether they
4	were authorized to speak for the countries on the African
5	to represent. ZACR was able
6	to provide an updated letter of support compliant with the
7	Guidebook, and it passed the
8	Geographic Names Review; DCA's application failed the
9	Geographic Names Review.
10	Dated: February 1, 2017 Jones Day
11	
12	By:
13	Jeffrey M AeVee
14	Attorneys for Defendant INTERNET CORPORATION FOR
15	ASSIGNED NAMES AND NUMBERS
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PROOF OF SERVICE 1 I, Diane Sanchez, declare: 2 I am a citizen of the United States and employed in Los Angeles County, California. I am 3 over the age of eighteen years and not a party to the within-entitled action. My business address 4 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On February 1, 5 2017, I served a copy of the within document(s): 6 ICANN'S RESPONSES TO DCA'S EVIDENTIARY OBJECTIONS TO THE 7 **DECLARATION OF MARK MCFADDEN** 8 by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set 9 forth below. 10 by placing the document(s) listed above in a sealed Federal Express envelope and 11 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery. 12 by personally delivering the document(s) listed above to the person(s) at the 13 address(es) set forth below. 14 by transmitting via e-mail or electronic transmission the document(s) listed above × to the person(s) at the e-mail address(es) set forth below. 15 16 David W. Kesselman, Esq. Ethan J. Brown Kesselman Brantly Stockinger LLP ethan@bnslawgroup.com 1230 Rosecrans Ave, Suite 690 17 Sara C. Colón Manhattan Beach, CA 90266 sara@bnslawgroup.com Rowennakete "Kete" Barnes (310) 307-4556 18 (310) 307-4570 fax kete@bnsklaw.com dkesselman@kbslaw.com 19 BROWN NERI & SMITH LLP 11766 Wilshire Boulevard, Suite 1670 20 Los Angeles, California 90025 Telephone: (310) 593-9890 21 I declare that I am employed in the office of a member of the bar of this court at whose 22 direction the service was made. 23 Executed on February 1, 2017, at Los Angeles, California. 24 Diane Sanchez 25 26

NAI-1501037652v2

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Proof of Service