

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 MOCTAR YEDALY
IN SUPPORT OF ZACR'S OPPOSITION
TO PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

DATE: December 22, 2016

TIME: 8:30 a.m.

DEPT: 53

Objections to Declaration of Moctar Yedaly

DCA objects to the entire Yedaly declaration pursuant to Evid. Code § 352 on the grounds that his declaration is misleading as it fails to state that Defendant ZA Central Registry (“ZACR”) agreed to grant the AUC (“African Union Commission”) any rights to the gTLD .Africa that ZACR obtains and is therefore effectively itself an applicant for the .Africa gTLD. (Bekele Declaration, ¶33 Ex. 18, ¶22(7) [“It should be noted that the AUC shall retain all rights relating to the dotAfrica TLD”]). Moctar Yedaly is affiliated with the Infrastructure and Energy Department at the AUC.

Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶3: “Notwithstanding this, the Government of Morocco provided its letter of support for ZACR’s application for the .AFRICA TLD.”</p>	<p>1. DCA objects on the grounds that the letter of support from the Moroccan government is the best evidence of that letter. (Evid. Code §1520).</p> <p>2. Lacks Forndation (Evid. Code § 403)</p> <p>3. Conclusory (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.)</p>		
Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶6: “I have been integrally involved in the UAC’s efforts to support the delegation of a .AFRICA top level domain for the African continent. This initiative is fully endorsed by the African Union and has widespread support across the continent. The launch of the</p>	<p>1. Lacks personal knowledge (Evid. Code § 702),</p> <p>2. Lacks foundation (Evid. Code § 403),</p> <p>3. Speculative (Evid. Code § 702)</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

<p>.AFRICA domain is of historic significance to the African continent. With the goal of establishing “Africa in One Space”, .AFRICA will provide secure, world-class technical infrastructure to leverage the continent’s socio-economic capacity and potential. Built on a consensus-driven framework of best practices and open standards, the .Africa Registry will place special emphasis on securing the rights of intellectual property owners, Internet users and the broader African community. The .AFRICA gTLD will enable governments, business and civil society to build brands, promote development and establish long-term relationships ¶with this market. The .AFRICA gTLD will also help governments, the private sector, organizations and individuals associate their services, product and information with the continent.</p>	<p>4. Lacks Foundation (Evid. Code § 403) 5. Conclusory (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.) 6. Improper lay opinion (Evid. Code § 800-803)</p>		
<p>Yedaly Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶8: “Pursuant to that mandate, the AUC issued a public request for expressions of interest, followed by a request for proposals, (“RFP process”) seeking</p>	<p>1. Lacks foundation (Evid. Code § 403) 2. Prejudicial (Evid. Code § 352)</p>		

1	applications from private organizations			
2	(including DCA interested in operating			
3	the .AFRICA gTLD).”			
4	Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
5	¶9: “...The AUC letter was sent to DCA	1. Best evidence of the		
6	years before ICANN had issued the	document is the		
7	governing Guidebook and put out a	document itself (Evid.		
8	formal bid for new gTLD applications.	Code § 1520)		
9	Once the AUC recognized that ICANN			
10	was moving forward with the new gTLD			
11	process and likely would allow the			
12	.AFRICA gTLD to become a reality, the			
13	AUC determined that a fully vetted and			
14	transparent process was needed for the			
15	governments of Africa to provide proper			
16	support to an applicant seeking to serve			
17	as a registry for a gTLD that would			
18	represent the entire continent.”			
19	Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
20	¶10: “[O]n April 16, 2010, the AUC sent	1. The best evidence of		
21	DCA a letter informing it that ‘following	the April 16, 2010		
22	consultations with relevant	letter is the April 16,		
23	stakeholders...[it] no longer endorse[d]	2010 letter itself (Evid.		
24	individual initiates [for .AFRICA].’	Code § 1520)		
25	Instead, ‘in coordination with the			
26	Member States...the [AUC] w[ould] go			
27	through [an] open [selection] process.’			
28	This letter is attached as Exhibit 7 to the			

1 Declaration of Sophia Bekele Eshete
 2 (ECF No. 17-7). One of the purposes of
 3 this letter was to advise DCA that the
 4 AUC was withdrawing any previous
 5 support the AUC had announced for
 6 DCA now that the AUC was more fully
 7 engaged and had determined to conduct
 8 an open selection process to identify the
 9 registry operator that the AUC would
 10 endorse.

Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
-----------------------------	----------------------	------------------	------------------

11 ¶11: “DCA acknowledged that it was
 12 aware the AUC had withdrawn any
 13 previous support because it wrote a letter
 14 to the AUC on January 26, 2011
 15 complaining about what it believed to be
 16 the “wrongful withdrawal of [the AUC
 17 endorsement letter.” A true and correct
 18 copy of DCA’s January 26, 2011 letter is
 19 attached hereto as Exhibit D. Thereafter,
 20 DCA chose not to participate in the
 21 AUC’s RFP process. ZA Central
 22 Registry (“ZACR”), which was
 23 previously known as UniForum SA,
 24 prevailed in the RFP Process, and ZACR
 25 submitted an application to ICANN for
 26 the .Africa gTLD with the full support of
 27 the AUC and with more than 60%
 28

1. The best evidence of
 the January 26, 2011
 letter, is the letter itself.
 (Evid. Code § 1520).
 2. Lacks foundation as
 to DCA’s awareness or
 ZACR’s fulfillment of
 ICANN’s Guidebook
 requirements. (Evid.
 Code §403).
 3. Lacks credibility as
 Mark McFadden’s
 declaration directly
 contradicts the
 statement that “ZACR
 submitted an

<p>1 support from individual African 2 Governments as required by the new 3 gTLD Applicants' Guidebook.” 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24</p>	<p>application to ICANN for the .Africa gTLD with the full support of the AUC and with more than 60% support from individual African Governments as required by the new gTLD Applicants' Guidebook.” <i>See</i> McFadden Decl. ¶5. Yedaly's next statement in the declaration also contradicts this assertion. <i>See</i> Yedaly Decl. ¶12. (<i>People v.</i> <i>Skyes</i>, 44 Cal. 2d 166,172 (1955) (holding that prior inconsistent statements may impeach credibility)).</p>		
<p>Yedaly Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>26 ¶12: “On July 2, 2013, the AUC, 27 pursuant to the Abuja Declaration and 28</p>	<p>1. The best evidence of the document, is the</p>		

1 with full authority of its member states,
2 sent a letter to ICANN expressly
3 advising that the AUC had placed its full
4 support behind ZACR's application. (At
5 the time ZACR was known as UnForum
6 SA). Attached hereto as **Exhibit E** is a
7 true and correct copy of the July 2, 2013
8 letter expressing the AUC's support for
9 ZACR's application. I am further
10 informed that Morocco, the only
11 nonmember of the AUC, separately
12 provided a letter supporting ZACR's
13 application. Attached hereto as **Exhibit F**
14 is a true and correct copy of the March
15 28, 2012 letter from Morocco. It should
16 be noted that the AUC had provided an
17 earlier endorsement letter for ZACR
18 dated April 4, 2012. Attached hereto as
19 **Exhibit G** is a true and correct copy of
20 that earlier letter. After ZACR had been
21 informed that the earlier letter failed to
22 include additional language that ICANN
23 or its vendor deemed necessary to
24 comply with the Guidebook, the AUC
25 undertook to submit the July 2, 2013
26 letter. In so doing, the AUC had asked
27 ZACR to provide the language that was
28 deemed necessary. ICANN then provided

document itself. (Evid.
Code § 1520).

<p>1 the required language; that language was 2 ultimately incorporated into the July 2, 3 2013 AUC endorsement letter.”</p>			
Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>5 ¶13: The AUC never supported DCA’s 6 application at any time after April 16, 7 2010, and certainly not at any time after 8 ICANN issued its Applicant’s 9 Guidebook and invited new applicants to 10 apply for gTLDs, including .AFRICA. 11 Thus, the AUC did not support DCA’s 12 application for .AFRICA at the time 13 DCA submitted it to ICANN in 2012, 14 and it does not support DCA’s 15 application now. It should be noted that 16 DCA never requested a letter of support 17 from the AUC after ICANN issued its 18 Guidebook in 2012, and the AUC would 19 have declined such a request because 20 following the RFP process the AUC had 21 determined only to support ZACR’s 22 application. The strong feelings of the 23 African governments on this matter can 24 also be gleaned by the 17 (seventeen) 25 GAC Early Warning Notices issued by 26 individual African governments that 27 were issued against DCA’s application 28 for .AFRICA. Attached hereto as Exhibit</p>	<p>1. Irrelevant. (Evid. Code § 350); 2. Lacks personal knowledge (Evid. Code § 702), 3. Lacks foundation (Evid. Code § 403), 4. Speculative (Evid. Code § 702) 5. Conclusory (<i>Evinger v. MacDougall</i> (1938) 28 Cal.App.2d 175.) 6. The GAC Early Warning Notices themselves are the best evidence of the notices. (Evid. Code § 1520).</p>		

<p>1 H are true and correct copies of the GAC 2 Early Warning Notices.</p>			
<p>3 Yedaly Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>4 ¶14: On September 29, 2015, the AUC 5 sent a further letter to ICANN to clarify, 6 once again, that the AUC, on behalf of 7 the African governments, only supports 8 ZACR’s application and does not support 9 the application submitted by DCA. 10 Attached hereto as Exhibit I is a true and 11 correct copy of the AUC’s letter of 12 September 29, 2015. The AUC deemed 13 this additional letter necessary after it 14 came to light that DCA was still 15 attempting to use an early letter that had 16 been expressly withdrawn and 17 repudiated. As addressed in the 18 September 29, 2015 AUC letter: 19 • “To be clear, the application 20 submitted by ZA Central Registry 21 (ZACR) . . . is the only application fully 22 endorsed and supported by the AUC and 23 hence African member states. The AUC 24 officially endorsed the ZACR application 25 in our letter dated 4 April 2012, which 26 was followed by our letter of support 27 dated 2 July 2013.”</p>	<p>1. The best evidence of the “early letter” is the letter itself. (Evid. Code § 1520).</p>		

1 • “Any reliance by DCA in its
 2 application . . . proclaiming support or
 3 endorsement by the AUC, must be
 4 dismissed. The AUC does not support the
 5 DCA application and, if any such support
 6 was initially provided, it has
 7 subsequently been withdrawn with the
 8 full knowledge of DCA even prior to the
 9 commencement of ICANN’s new gTLD
 10 application process.”

Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
-----------------------------	----------------------	------------------	------------------

11
 12 ¶15: I should also note that, on or about
 13 July 20, 2015, the AUC received a letter
 14 from the Secretary of the Commission
 15 and Legal Advisor for the United Nations
 16 Economic Commission for Africa
 17 (“UNECA”). A true and correct copy of
 18 the July 20, 2015 UNECA letter is
 19 attached hereto as **Exhibit J**. As set forth
 20 in the letter, UNECA “reaffirmed its
 21 commitment and support to the AU in the
 22 management of Internet-based resources
 23 in Africa”, and further advised that an
 24 earlier 2008 UNECA letter referenced by
 25 DCA could not constitute a proper
 26 endorsement by the governments of
 27 Africa:

1. The best evidence of
 the letter is the letter
 itself. (Evid. Code §
 1520).

<p>1 • “ECA as United Nations entity is 2 neither a government nor a public 3 authority and therefore is not qualified to 4 issue a letter of support for a prospective 5 applicant in support of their application. 6 In addition, ECA does not have a 7 mandate to represent the views or convey 8 the support or otherwise of African 9 governments in matters relating to 10 application for delegation of the gTLD.”</p> <p>11 • “In this regard, the August 2008 12 letter referenced above is merely 13 expressions of a view in relation to the 14 entity’s initiatives and efforts regarding 15 internet governance, including efforts to 16 obtain a gTLD for Africa. It is ECA’s 17 position that the August 2008 letter to 18 Ms. Bekele [later used by DCA] cannot 19 be properly considered as a “letter of 20 support or endorsement” within the 21 context of ICANN’s requirements and 22 cannot be used as such.”</p>			
Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>24 ¶16: ZACR has signed a registry 25 agreement with ICANN, and I am 26 informed that ZACR is fully prepared to 27 proceed once ICANN is able to complete 28 the delegation.</p>	<p>1. Irrelevant. (Evid. Code § 350); 2. Lacks personal knowledge (Evid. Code § 702).</p>		

Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶17: On June 2, 2014 – more than two years ago – the AUC sent a letter to ICANN explaining “DotAfrica is an extremely important initiative for Africa’s participation and contribution to the Internet economy and to the broader Internet governance ecosystem,” and that it was “with great concern that we are faced with [] delay in delegating this important regional TLD.” Our letter continued: “[I]t is becoming increasingly difficult for the AUC to explain to not only its member states but also other African stakeholders, why the African geographic TLD application has become so challenging for ICANN to expedite despite the various statements made towards the need to support developing regions.” A true and correct copy of this letter is attached to this declaration as Exhibit K.</p>	<p>1. The best evidence of the letter is the letter itself. (Evid. Code § 1520).</p>		
Yedaly Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶18: In my role at the AUC, I communicate regularly with political, business and civic leaders from throughout the African Union and its member states regarding the .AFRICA</p>	<p>1. Lacks personal knowledge (Evid. Code § 702), 2. Speculative (Evid. Code § 702)</p>		

<p>1 gTLD. It is evident that the ongoing 2 delay in the delegation of .AFRICA is 3 depriving the people of the African 4 continent of an important opportunity to 5 expand internet domain capabilities. 6 There are real opportunities being lost 7 because we remain unable to develop and 8 promote a gTLD that would be uniquely 9 identified with the African continent. It is 10 difficult to explain to African citizens 11 why .AFRICA is not yet operational 12 when other continents have their own 13 unique gTLDs that have been available 14 for years. It is particularly frustrating 15 when I am informed that the delay is due 16 to DCA’s efforts to continue to rely upon 17 a supposed endorsement by the AUC that 18 was withdrawn over six years ago – a 19 point that the AUC, on behalf of its 20 representative governments, has 21 repeatedly advised in the correspondence 22 referenced above.</p>	<p>3. Lacks Foundation (Evid. Code § 403)</p>		
<p>Yedaly Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>24 ¶19: In addition, the AUC has required 25 as a condition to its support of .AFRICA 26 that all surplus funds generated through 27 the administration of the .AFRICA gTLD 28 will be channeled into a Development</p>	<p>1. Irrelevant. (Evid. Code § 350); 2. Lacks personal knowledge (Evid. Code § 702),</p>		


1 Fund, which will be applied towards
2 African developmental projects and
3 initiatives. The Development Fund will
4 be administered by the dotAfrica
5 Foundation, which will ensure that
6 dotAfrica's core developmental
7 objectives are addressed. I am informed
8 that these projects and initiatives will
9 provide millions of dollars to benefit
10 projects supporting the people of Africa.
11 The continued delay in the delegation of
12 the .AFRICA gTLD to ZACR has
13 impeded this goal and further prejudices
14 the AUC's member states and the
15 African community.

3. Lacks foundation
(Evid. Code § 403),
4. Speculative (Evid.
Code § 702)

16
17
18 Dated: December 15, 2016

BROWN NERI SMITH & KHAN LLP

19
20 By: _____



Sara C. Colón

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST