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8 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS  
9

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
11 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

12  
13 DOTCONNECTAFRICA TRUST,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, *et*  
17 *al.*,

18 Defendants.  
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**CASE NO. BC607494**

Assigned for all purposes to  
Hon. Howard L. Halm

**DECLARATION OF KEVIN  
ESPINOLA IN SUPPORT OF  
ICANN'S OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

DATE: February 2, 2017  
TIME: 8:30 a.m.  
DEPT: 53

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**DECLARATION OF KEVIN ESPINOLA**

I, Kevin Espinola, declare the following:

1. I am a partner of Jones Day, counsel to defendant the Internet Corporation for Assigned Names and Numbers (“ICANN”). I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s opposition to DotConnectAfrica Trust’s (“Plaintiff’s”) motion for a preliminary injunction. I have served as outside counsel to ICANN since May 2009, and in that role I have assisted in the development of ICANN’s New gTLD Program.

2. ICANN and its community developed the New gTLD Applicant Guidebook (“Guidebook”) 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 versions of the Guidebook were published for public comment.

3. In the April 15, 2011 version of the Guidebook (“April 2011 Guidebook”), language was added to Section 6 of Module 6 of the Guidebook (“Covenant Not to Sue”) making explicit that: “[an] applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for [the] purposes of challenging any final decision made by ICANN with respect to the application.” Attached hereto as **Exhibit K** is a true and correct copy of Module 6 of the April 2011 version of the Guidebook, which was published with a redline, showing changes made from the prior version of the Guidebook.

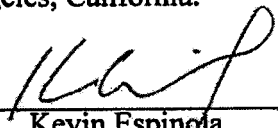
4. As ICANN has stated publicly, ICANN is a not-for-profit public benefit corporation and anticipated that, absent a broad waiver and limitation of liability in the Guidebook’s terms and conditions, the over 1,900 applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, which would imperil the successful implementation of the New gTLD Program. Accordingly, ICANN carefully considered how to protect the New gTLD Program from such challenges, and the Covenant Not to Sue in the Guidebook was deemed appropriate in light of these considerations.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8<sup>th</sup> day of December 2016, in Los Angeles, California.

  
\_\_\_\_\_  
Kevin Espinola

# **EXHIBIT K**



# **Applicant Guidebook**

## **April 2011 Discussion Draft Module 6**

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

**15 April 2011**

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# Module 6

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## *Top-Level Domain Application - Terms and Conditions*

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review and consider an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to

reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's or an ICANN Affiliated Party's consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's or an ICANN Affiliated Party's reliance on information provided by applicant in the application.
6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are

in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD-; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly



states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
  - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that,

- in ICANN's sole judgment, may be pertinent to the application;
- b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.
12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

1 **PROOF OF SERVICE**

2 I, Diane Sanchez, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On January 20,  
6 2017, I served a copy of the within document(s):

7 **DECLARATION OF KEVIN ESPINOLA IN SUPPORT OF ICANN'S**  
8 **OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

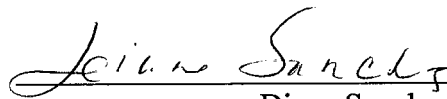
- 9  by placing the document(s) listed above in a sealed envelope with postage thereon  
10 fully prepaid, in the United States mail at Los Angeles, California addressed as set  
11 forth below.
- 12  by placing the document(s) listed above in a sealed Federal Express envelope and  
13 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery  
14 Service agent for delivery.
- 15  by personally delivering the document(s) listed above to the person(s) at the  
16 address(es) set forth below.
- 17  by transmitting via e-mail or electronic transmission the document(s) listed above  
18 to the person(s) at the e-mail address(es) set forth below.

16 Ethan J. Brown  
17 ethan@bnslawgroup.com  
18 Sara C. Colón  
19 sara@bnslawgroup.com  
20 Rowennakete "Kete" Barnes  
21 kete@bnsklaw.com  
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23 11766 Wilshire Boulevard, Suite 1670  
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Manhattan Beach, CA 90266  
(310) 307-4556  
(310) 307-4570 fax  
[dkesselman@kbslaw.com](mailto:dkesselman@kbslaw.com)

22 I declare that I am employed in the office of a member of the bar of this court at whose  
23 direction the service was made.

24 Executed on January 20, 2017, at Los Angeles, California.

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27 \_\_\_\_\_  
28 Diane Sanchez

27 NAI-1501037652v2