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DOTCONNECTAFRICA TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES -- CENTRAL

DOTCONNECTAFRICA TRUST, a Mauritius
Charitable Trust;

Plaintiff,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, a
California corporation;

Defendants.

Case No. BC607494

Assigned for all purposes to the Honorable
Howard L. Halm

**EVIDENTIARY OBJECTIONS BY
DOTCONNECTAFRICA TO
DECLARATION OF MARK MCFADDEN
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: February 2, 2017

TIME: 8:29 a.m.

DEPT: 53

Evidentiary Objections to Declaration of Mark McFadden

Mark 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>		
Mark 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 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.</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>2. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p>		
Mark 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</p>	<p>1. Best evidence rule. (Evid. Code § 1520.)</p> <p>2. Lacks foundation</p>		

<p>1 have the support of sixty (60) percent of 2 the governments in that region. ICANN 3 received many gTLD applications that 4 constituted geographic regions or 5 geographic names, and the ICC and EIU 6 were tasked with determining if the 7 applications had the requisite support.</p>	<p>and personal knowledge. (Evid. Code § 403.)</p>		
<p>Mark McFadden Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<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 UNECA letter submitted by DCA – because they did not include the specific language that was required in the Guidebook (discussed below).</p> <p>n.1 DCA’s original application actually was for the string .DOTAFRICA, but ICANN allowed DCA to change the application to .AFRICA.</p>	<p>1. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p> <p>n. 1: 1. Irrelevant. (Evid. Code § 350.)</p>		
<p>Mark McFadden Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶ 6: ICANN initially took the position that letters of support from the AUC and UNECA should not even count toward the 60 percent requirement. The ICC</p>	<p>1. Lacks foundation and personal knowledge. (Evid. Code § 403.)</p>		

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1 conducted further research on the AUC
 2 and UNECA, and we expressed our view
 3 to ICANN in March 2013 that both the
 4 AUC and UNECA were qualified to speak
 5 on behalf of the countries they represented
 6 and, thus, verified letters of support from
 7 those entities should count toward the 60
 8 percent requirement. Following our
 9 recommendation, ICANN agreed that
 10 verified letters of support from the AUC
 11 and UNECA should count toward the 60
 12 percent requirement, but only if those
 13 letters contained the language required in
 14 the Guidebook.

9 **Mark McFadden Declaration ¶**

DCA Objection

Sustained

Overruled

10 ¶ 7: Accompanying its application, DCA
 11 submitted a letter of support from the AUC
 12 dated August 27, 2009. Accompanying its
 13 application, ZACR submitted a letter of
 14 support from the AUC dated April 4,
 15 2012.² I am now aware that the AUC also
 16 wrote a letter to DCA in April 2010
 17 purporting to withdraw its August 2009
 18 endorsement of DCA. My understanding is
 19 that DCA did not submit the actual April
 20 2010 letter to ICANN with its gTLD
 21 application, and this letter was not brought
 22 to my attention until recently. The ICC was
 23 not aware of the AUC’s purported
 24 withdrawal letter and did not consider the
 25 letter in its evaluation of DCA’s
 26 application.

- 1. Best Evidence Rule (Evid. Code § 1520.)
- 2. Irrelevant. (Evid. Code §350.)
- 3. Prejudicial. (Evid. Code § 352.)
- 4. ICANN was copied on the purported withdrawal letter from the AUC. November 10, 2016 Bekele Decl., Ex. 7,

21 n.2 The AUC submitted additional letters
 22 of support for ZACR on July 3, 2013, and
 23 September 29, 2015.

23 **Mark McFadden Declaration ¶**

DCA Objection

Sustained

Overruled

24 ¶ 8: Pursuant to section 2.2.1.4.3 of the
 25 Guidebook, a government may withdraw
 26 its support for a gTLD application at any
 27 time in the application process. The
 28 procedure required by ICANN and adopted
 by the ICC was to disregard any letter of
 support that was subsequently withdrawn,
 and no longer accept the letter as part of an
 applicant’s required 60 percent support.³ If

- 1. Best Evidence Rule (Evid. Code § 1520.)
 - 2. Lacks foundation. (Evid. Code § 403.)
 - 3. Speculative and conclusory. (Evid. Code § 403.)
- n.3

<p>1 the ICC had been aware of the purported 2 withdrawal of the AUC’s letter to DCA, 3 even if the August 2009 letter had 4 contained language sufficient under the 5 Guidebook (which it did not), the ICC 6 would have issued clarifying questions to 7 DCA explaining that DCA no longer had 8 the support from the AUC, and requiring 9 DCA to submit an updated letter.</p> <p>10 n.3 The ICC has encountered other 11 situations where letters of support have 12 been withdrawn, and in each instance, the 13 ICC removed the letter as documentation 14 of support and issued clarifying questions 15 to the applicant asking the applicant to 16 provide additional documentation of 17 support.</p>	<p>1. Lacks foundation. (Evid. Code § 403.) 2. Irrelevant. (Evid. Code § 350.)</p>		
<p>12 Mark McFadden Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>13 ¶ 9: Unaware of the AUC’s withdrawal 14 letter to DCA, the ICC followed a 15 documented evaluation process with 16 respect to DCA and ZACR’s letters of 17 support whereby each letter was evaluated 18 for required criteria pursuant to the 19 Guidebook. In particular, section 2.2.1.4.3 20 of the Guidebook required that letters of 21 support for a geographic name “clearly 22 express the government’s or public 23 authority’s support for or non-objection to 24 the applicant’s application and demonstrate 25 the government’s or public authority’s 26 understanding of the string being requested 27 and its intended use.” It further required 28 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 2013 that none of the letters of support submitted by DCA or ZACR from</p>	<p>1. Best evidence rule. (Evid. Code § 1520.) 2. Lacks foundation. (Evid. Code § 403.)</p>		

1	the AUC or UNECA contained language			
2	that was sufficient under this section of the			
	Guidebook.			
3	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
4	¶ 10: Specifically, Section 2.2.1.4.3 had	1. Best evidence rule.		
5	very specific requirements for each of the	(Evid. Code § 1520.)		
6	letters of support. Those requirements were	2. Lacks foundation,		
7	part of the policy making process that	speculative, and		
8	developed the Guidebook over a course of	conclusory. (Evid.		
9	several years, and they were there to	Code § 403.)		
10	ensure that any letter of support was			
11	legitimate, authoritative, and demonstrated			
12	that the governmental entity understood			
13	precisely what it was supporting. DCA’s			
14	letters from the AUC and UNECA failed to			
15	show that the governmental entities			
16	understood the process of the new gTLD			
17	program, and they also failed to show the			
18	governmental entity’s understanding that			
19	the applicant (DCA) would have to abide			
20	by ICANN consensus policy and be			
21	responsible for any related fees. Indeed, in			
22	our judgment, the letters that DCA			
23	submitted from the AUC and UNECA			
24	were not even close to conforming to the			
25	very specific requirements in the AGB;			
26	indeed, the two letters were drafted before			
27	the requirements in the Guidebook were			
28	even available to applicants.			
	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
19	¶ 11: The ICC adhered to an ICANN	1. Lacks foundation		
20	policy whereby the ICC was not permitted	and conclusory. (Evid.		
21	to contact any governmental authority that	Code § 403.)		
22	had submitted a letter of support for an	2. Directly contradicts		
23	applicant. Rather, the required procedure	the evidence. Nov. 15,		
24	for a noncompliant letter was to direct	2016 Colón Decl. Ex.		
25	“clarifying questions” to the applicant so	3, [Email between		
26	that the applicant could contact the	McFadden and		
27	governmental authority to obtain an	ICANN employee		
28	updated letter. Accordingly, the ICC	Trang Nguyen drafting		
	determined that it needed to send clarifying	support letter for		
	questions to both DCA and ZACR	ZACR from AUC.]		
	(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			

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1	DCA in the Spring of 2013, ICANN’s			
2	Board voted to stop processing DCA’s			
3	application following receipt by the Board			
4	of consensus advice from ICANN’s			
5	Governmental Advisory Committee (the			
6	“GAC”) recommending that DCA’s			
7	application should not proceed. As a result,			
8	on June 7, 2013, ICANN advised the ICC			
9	to discontinue work on DCA’s application.			
10	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
11	¶ 12: The ICC did send clarifying	1. Best evidence rule.		
12	questions to ZACR, and following that, the	(Evid. Code § 1520.)		
13	AUC submitted a revised endorsement	2. Prejudicial and		
14	letter for ZACR on July 3, 2013. The ICC	contradictory to		
15	determined that the revised letter satisfied	evidence. Nov. 15,		
16	all required criteria in the Guidebook.	2016 Colón Decl. Ex.		
17	Thus, the ICC concluded that ZACR had	3, [Email between		
18	passed the Geographic Names Review by	McFadden and		
19	obtaining the requisite 60 percent support.	ICANN employee		
20	The ICC did not rely on any of the other	Trang Nguyen drafting		
21	letters of support that ZACR submitted	support letter for		
22	with its application in 2012.	ZACR from AUC.]		
23	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
24	¶ 13: I understand that DCA challenged,	1. Lacks personal		
25	via an “Independent Review Procedure”	knowledge. (Evid.		
26	under ICANN’s Bylaws, the decision of	Code § 403.)		
27	the ICANN Board to accept the GAC’s	2. Best Evidence Rule		
28	consensus advice that DCA’s application	(Evid. Code § 1520.)		
	should not proceed. After the IRP issued			
	its declaration in DCA’s favor in July			
	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			

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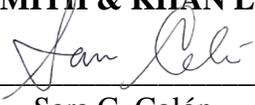
1	2.2.1.4.3 of the Guidebook, and we requested updated letters of support.			
2	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
3	¶ 14: I am now aware that UNECA wrote a letter dated July 20, 2015 in which UNECA stated that it is neither a government nor a public authority and therefore 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 application; however, as noted above, the ICC already had determined that the original UNECA letter from 2008 – written four years before DCA submitted its application and before ICANN had even posted the first draft of the Guidebook – did not contain the information required by the Guidebook, and we required DCA to provide an updated letter.	1. UNECA did not submit a July 20, 2015 letter. (November 10, 2016 Bekele Decl., Ex. 10.) 2. Lacks foundation. (Evid. Code § 403.)		
4	Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
5	¶ 15: In response to the clarifying questions that the ICC sent to DCA in September 2015, DCA took the position that its original documentation of support submitted with its application in 2012 was sufficient, and DCA provided no additional or updated letters of support. Because DCA’s existing letters of support were noncompliant, the ICC concluded that DCA had not passed Geographic Names Review. DCA elected to participate in “Extended Evaluation,” which entailed sending clarifying questions again to give DCA additional time to provide the requisite documentation of support. The ICC sent DCA the extended evaluation clarifying questions on October 30, 2015. In response, DCA again took the position that its original application was sufficient and that it did not need to submit any additional letters of support. Thus, the ICC determined that DCA had failed to provide the requisite documentation of support or non-objection for the .AFRICA gTLD.	1. Lacks personal knowledge and foundation. (Evid. Code § 403.)		

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Mark McFadden Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶ 16: The ICC treated all gTLD applications equally including DCA and ZACR’s applications for .AFRICA. Both applications initially had letters of support from the AUC and/or UNECA. The ICC recommended that both of those entities be viewed as authorized to provide an official endorsement on behalf of the countries in Africa that each represented, and ICANN ultimately agreed. The ICC then evaluated each letter for required criteria pursuant to the Guidebook, and determined that all three of the initial letters (two from the AUC and one from UNECA) were not sufficient under the terms of the Guidebook. The ICC conducted its evaluation not knowing whether the AUC or UNECA still endorsed any application and not knowing the views of AUC or UNECA as to whether they were authorized to speak for the countries on the African continent that they purported to represent. ZACR was able to provide an updated letter of support compliant with the Guidebook, and it passed the Geographic Names Review; DCA’s application failed the Geographic Names Review.</p>	<p>1. Conclusory. (Evid. Code § 403.) 2. Contradicts earlier testimony in that ZACR did not have support from UNECA. (McFadden Decl., ¶ 5.)</p>		

Dated: January 26, 2017

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