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INTERNET CORPORATION FOR
8 ASSIGNED NAMES AND NUMBERS

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

12 DOTCONNECTAFRICA TRUST,

13 Plaintiff,

14 v.

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

17 Defendants.
18
19
20

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

**DECLARATION OF JEFFREY A.
LEVEE IN SUPPORT OF ICANN'S
MOTION FOR SUMMARY
JUDGMENT**

[Notice Of Motion And Motion For
Summary Judgment, Memorandum Of
Points And Authorities, Statement Of
Undisputed Facts, And [Proposed] Order
Filed Concurrently Herewith]

Date: August 9, 2017
Time: 8:30 a.m.
Dept: 53

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

1 8. DCA initiated an Independent Review Process proceeding against ICANN on
2 August 19, 2013. Attached hereto as **Exhibit F** is a true and correct copy of "DCA's Response to
3 the Panel's Questions on Procedural Issues," which DCA submitted to the IRP Panel on May 20,
4 2014.

5 9. Attached hereto as **Exhibit G** is a true and correct copy of the IRP Panel's 14
6 August 2014 "Declaration On Procedural Issues."

7 10. The IRP proceedings initiated by DCA in 2013 took two years. During this time,
8 ICANN produced hundreds of documents, drafted response pleadings and supporting declarations,
9 and participated at the IRP hearing, including putting forth witnesses to testify under oath.
10 ICANN had opposed allowing witnesses to testify at the IRP hearing, but the IRP Panel ordered
11 that the three persons who had submitted declarations must testify at the hearing, and each of
12 those three did testify.

13 11. DCA's CEO, Sophia Bekele Eshete, submitted a declaration to the IRP Panel. A
14 true and correct copy of an excerpt of that declaration is attached hereto as **Exhibit H**.

15 12. Attached hereto as **Exhibit I** is a true and correct copy of relevant portions of the
16 July 9, 2015 IRP Final Declaration. The full declaration is in the record and available as Exhibit
17 1 to the November 10, 2016 Declaration of Sophia Bekele in Support of DCA's Motion for
18 Preliminary Injunction, filed on November 15, 2016.

19 13. DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County
20 Superior Court. After the Superior Court denied DCA's request for a temporary restraining order,
21 ICANN timely removed the case to federal court, invoking diversity jurisdiction. On March 1,
22 2016, DCA moved for a preliminary injunction, which the federal court granted on April 12, 2016
23 on the basis of an admitted factual error and before DCA admitted in deposition that the entire
24 basis on which the district court had granted the injunction – that the IRP Panel had allowed DCA
25 to skip the geographic review requirement – was false.

26 14. Following remand, DCA again moved for preliminary injunction based on its ninth
27 cause of action. The Court denied that motion on December 22, 2016 based on "the reasoning
28 expressed in the oral and written arguments of defense counsel." Attached hereto as **Exhibit J** is

1 a true and correct copy of the Court's December 22, 2016 Minute Order denying DCA's
2 application for preliminary injunction.

3 15. The Court confirmed the broad basis for its December 22, 2016 Minute Order at
4 the January 4, 2017 hearing on DCA's *ex parte* TRO application, when the Court stated that its
5 ruling was indeed based on all defense arguments, just as the Court had written in its order.
6 These arguments included that the Covenant contained in the Applicant Guidebook barred DCA's
7 claim.

8 16. In January 2017, DCA again moved for preliminary injunction, this time based on
9 the second, fourth, and fifth causes of action of its First Amended Complaint. The Court denied
10 that motion as well, holding in part: "For the reasons set forth in the Ruby Glen order, it appears
11 that the Covenant is enforceable. If the Covenant is enforceable, DCA's claims against ICANN
12 for fraud and unfair business practices are likely to be barred. As a result, DCA cannot establish
13 that it is likely to succeed on the merits." Attached hereto as **Exhibit K** is a true and correct copy
14 of the Court's February 3, 2017 Order denying DCA's second application for preliminary
15 injunction.

16 17. Attached hereto as **Exhibit L** is a true and correct copy of the district court's order
17 in *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx)
18 (C.D. Cal. Nov. 28, 2016).

19 19. Attached hereto as **Exhibit M** is a true and correct copy of relevant portions of
20 ICANN's Bylaws, as modified 8 December 2011. The full document is in the record and
21 available as Exhibit B to the Declaration of Sophia Bekele Eshete in support of Plaintiff's Motion
22 for a Preliminary Injunction (Filed as a TRO), executed on January 6, 2017.

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

25 Executed this 26th day of May 2017, in Los Angeles, California.

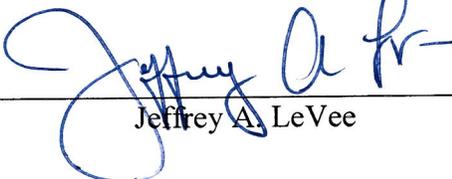
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28 Jeffrey A. LeVee

EXHIBIT A

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

)
 DOTCONNECTAFRICA TRUST,)
)
 Plaintiff,)
)
 vs.) No. BC607494
)
 INTERNET CORPORATION FOR)
 ASSIGNED NAMES AND NUMBERS)
 and DOES 1 through 50,)
 inclusive,)
)
 Defendants.)

***CONTAINS HIGHLY CONFIDENTIAL
ATTORNEYS' EYES ONLY SECTION***

VIDEOTAPED DEPOSITION OF PERSON MOST QUALIFIED OF
DOTCONNECTAFRICA TRUST
SOPHIA BEKELE ESHETE
Los Angeles, California
Thursday, December 1, 2016
Volume I

Reported by:
Melissa M. Villagran, RPR, CLR
CSR No. 12543
Job No. 2479429
PAGES 1 - 290

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

)
DOTCONNECTAFRICA TRUST,)
)
Plaintiff,)
)
vs.) No. BC607494
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
and DOES 1 through 50,)
inclusive,)
)
Defendants.)
_____)

Videotaped deposition of PERSON MOST QUALIFIED OF
DOTCONNECTAFRICA TRUST, SOPHIA BEKELE ESHETE, Volume I,
taken on behalf of Defendants, at 555 Flower Street, Los
Angeles, California, beginning at 9:42 and ending at
4:47 p.m. on Thursday, December 1, 2016, before Melissa
M. Villagran, RPR, CLR, Certified Shorthand Reporter
No. 12543.

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APPEARANCES :

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1 APPEARANCES (continued):

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10 dkesselman@kbslw.com

11

12 Videographer:

13 Julian Shine

14

15 Also Present:

16 John O. Jeffrey, Attorney at Law

17 ICANN, General Counsel

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INDEX (CONTINUED)

HIGHLY CONFIDENTIAL ATTORNEYS' EYES ONLY SECTION

251-256

INFORMATION REQUESTED

(None.)

INSTRUCTION NOT TO ANSWER

(None.)

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SOPHIA BEKELE ESHETE,

having been administered an oath, was examined and testified as follows:

EXAMINATION

BY MR. LE VEE:

Q Would you state your name and spell your last name for the record.

A My name is Sophia Bekele, and my last name is spelled as B-e-k-e-l-e. 09:44:09

Q Have you been deposed before?

A No.

Q Have you had an opportunity to spend a few minutes with your lawyer discussing the procedures of a deposition? 09:44:21

A Yes.

Q And as I recall you listened in on portions of the depositions that have already been taken in this case of the two ICANN witnesses; correct?

A Just one. 09:44:33

Q Oh, just one?

A Yes.

Q Okay. I forgot. For Mr. Attalah.

A Yes.

Q Okay. Real briefly, we are here today 09:44:38

1 A Okay.

2 Q -- court reporter can't take your answer.

3 The videographer can see you nod, but the court

4 reporter needs to understand.

5 A All right.

09:48:14

6 Q Okay. And let me ask you a few questions

7 about the release.

8 First of all, when you submitted your

9 application, had you read any draft of the guidebook

10 that contains similar language of the release?

09:48:28

11 A Yes.

12 Q Okay. Did you notice whether the language

13 that appears in Paragraph 6 of Module 6 had changed

14 over time during the drafting of the guidebook?

15 A It's gone back and forth with the GAC.

09:48:51

16 Q Okay.

17 A But I'm not quite sure if the serious

18 language changes.

19 Q Okay. So you under -- do you recall that the

20 GAC had comments on a previous version of the

09:49:03

21 language in Paragraph 6?

22 A I don't quite remember exactly which ones,

23 but I -- I just remember being -- it's an issue,

24 yes.

25 Q Okay. So the GAC had a comment but you don't

09:49:17

Page 16

1 remember what the comment was?

2 A Yes. It came to my attention later on.

3 Q Okay. And my understanding is that DCA
4 submitted some comments on various versions of the
5 guidebook; is that correct? 09:49:33

6 A It could be.

7 Q Do you remember one way or the other?

8 A I don't know which particular part, but we
9 were active participants in the --

10 Q In the development of the guidebook? 09:49:43

11 A Yes.

12 Q Okay. Do you remember whether DCA commented
13 on any portion of Module 6?

14 A No.

15 Q No -- 09:49:52

16 A We did not.

17 Q Did not. Okay.

18 And you understood that Module 6 was part of
19 the application?

20 A Yes. 09:49:59

21 Q Okay. Did you -- do you recall reading
22 through Module 6, Paragraph 6, and having any
23 understanding at the time you submitted the
24 application of what the paragraph meant?

25 A Not really. 09:50:17

Page 17

1 A But I'm -- I have attended a lot.

2 Q Okay. And so you mentioned also that you
3 have -- that -- that you submitted some public
4 comments in conjunction with the development of the
5 guidebook.

09:55:46

6 Were those submitted on behalf of DCA, or
7 were those submitted on behalf of you personally?

8 A I think most of it was on behalf of me as a
9 community participant.

10 Q Okay. And do you recall was it more than
11 five comments? More than ten? Do you recall -- I'm
12 not asking you for a specific number because I know
13 it was a few years ago, but roughly how many public
14 comments you've submitted?

09:55:58

15 A I don't remember really.

09:56:10

16 Q Okay. More -- do you know if it was more
17 than five?

18 A I don't remember.

19 Q Okay. And when I'm referring to public
20 comments, you understand that what I'm referring to
21 is that ICANN would post on it's Web site drafts --

09:56:19

22 A Yes.

23 Q -- of portions of the guidebook, or in some
24 instances, an entire draft of the guidebook and make
25 available to the public the ability to comment.

09:56:32

Page 23

1 And that's what you're referring to?

2 A Yeah.

3 Q Okay. And you understood when you submitted

4 your application that you were agreeing that DCA

5 would be bound by the terms of -- of the whole 09:56:59

6 guidebook?

7 A Yes.

8 Q Okay.

9 Okay. I'm going to change topics, and I -- I
10 want to talk to you for a while about the role of 09:57:09
11 the African Union Commission.

12 Are you aware of any reason why the African
13 Union Commission could not itself have applied for a
14 new gTLD?

15 MR. BROWN: Objection; calls for a legal 09:57:27
16 conclusion.

17 THE DEPONENT: I can't speak on behalf of
18 African Union.

19 BY MR. LE VEE:

20 Q Oh, no. I'm not asking you to speak on 09:57:34
21 behalf of the commission. I'm asking are you aware
22 of any reason under the guidebook that the AUC as an
23 entity could not have been an applicant for a new
24 gTLD?

25 A I think ICANN has a better relationship. You 09:57:47

1 That's -- that's what we asked for --

2 Q Okay.

3 A -- at that time.

4 Q But just to be clear, nothing in the final
5 declaration says that you get to skip the geographic 02:59:22
6 review process, right?

7 A Yes.

8 Q Okay. And so -- and you would not be
9 suggesting, would you, that an application for the
10 registry operator to operate a top-level domain that 02:59:39
11 is the name of a continent not have support of the
12 people of that continent, right?

13 A You mean the government.

14 Q The governments.

15 And you think that's a good thing, right? 02:59:53

16 A Can you rephrase that question.

17 Q I'll rephrase it.

18 Don't you think that it's appropriate that
19 whoever becomes the registry operator for the
20 .Africa top-level domain have support of the 03:00:08
21 governments in Africa?

22 A That is not my requirement. It is ICANN's
23 requirement.

24 Q Yes.

25 A I cannot insinuate that. You know, could be 03:00:15

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I, SOPHIA BEKELE ESHETE, do hereby declare under penalty of perjury that I have read the foregoing transcript; that I have made any corrections as appear noted, in ink, initialed by me, or attached hereto; that my testimony as contained herein, as corrected, is true and correct.

EXECUTED this _____ day of _____,
_____, at _____, _____.
(City) (State)

SOPHIA BEKELE ESHETE
VOLUME I

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I, the undersigned, a Certified Shorthand Reporter of the State of California, Registered Professional Reporter, Certified Live Note Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript [] was [] was not requested. I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: 12/5/2016



MELISSA M. VILLAGRAN

EXHIBIT B

**gTLD Applicant
Guidebook**

Version 2012-06-04



4 June 2012



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 2

4 June 2012

If there is more than one application for a string representing a certain geographic name as described in this section, and the applications have requisite government approvals, the applications will be suspended pending resolution by the applicants. If the applicants have not reached a resolution by either the date of the end of the application round (as announced by ICANN), or the date on which ICANN opens a subsequent application round, whichever comes first, the applications will be rejected and applicable refunds will be available to applicants according to the conditions described in section 1.5.

However, in the event that a contention set is composed of multiple applications with documentation of support from the same government or public authority, the applications will proceed through the contention resolution procedures described in Module 4 when requested by the government or public authority providing the documentation.

If an application for a string representing a geographic name is in a contention set with applications for similar strings that have not been identified as geographical names, the string contention will be resolved using the string contention procedures described in Module 4.

2.2.2 Applicant Reviews

Concurrent with the applied-for gTLD string reviews described in subsection 2.2.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

2.2.2.1 Technical/Operational Review

In its application, the applicant will respond to a set of questions (see questions 24 – 44 in the Application Form) intended to gather information about the applicant's technical capabilities and its plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual gTLD registry to pass the Technical/Operational review. It will be necessary, however, for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of a gTLD registry operation. Subsequently, each applicant that passes the technical evaluation and all other steps will be required to complete

a pre-delegation technical test prior to delegation of the new gTLD. Refer to Module 5, Transition to Delegation, for additional information.

2.2.2.2 Financial Review

In its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans identifying system hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment. That is, the evaluation criteria scale with the applicant plans to provide flexibility.

2.2.2.3 Evaluation Methodology

Dedicated technical and financial evaluation panels will conduct the technical/operational and financial reviews, according to the established criteria and scoring mechanism included as an attachment to this module. These reviews are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the Application Form.

The evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators. These communications will occur via TAS. Unless otherwise noted, such communications will include a 2-week deadline for the applicant to respond. Any supplemental information provided by the applicant will become part of the application.

It is the applicant's responsibility to ensure that the questions have been fully answered and the required documentation is attached. Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and are not obliged to take into account any information or evidence that is not made



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 3

4 June 2012

Module 3

Objection Procedures

This module describes two types of mechanisms that may affect an application:

- I. The procedure by which ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. This module describes the purpose of this procedure, and how GAC Advice on New gTLDs is considered by the ICANN Board once received.
- II. The dispute resolution procedure triggered by a formal objection to an application by a third party. This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination.

All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.

3.1 GAC Advice on New gTLDs

ICANN's Governmental Advisory Committee was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.

GAC members can raise concerns about any application to the GAC. The GAC as a whole will consider concerns

raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors.

The GAC can provide advice on any application. For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period (see Module 1).

GAC Advice may take one of the following forms:

- I. The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.
- II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.
- III. The GAC advises ICANN that an application should not proceed unless remediated. This will raise a strong presumption for the Board that the application should not proceed unless there is a remediation method available in the Guidebook (such as securing the approval of one or more governments), that is implemented by the applicant.

Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures. The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).



gTLD Applicant Guidebook

(v. 2012-06-04)

Module 6

4 June 2012

Module 6

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, consider and approve an application to establish one or more

gTLDs and to delegate new gTLDs after such approval 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 rejection or withdrawal 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, any withdrawal of 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. Applicant acknowledges that ICANN will handle personal information collected in accordance with its gTLD Program privacy statement <http://newgtlds.icann.org/en/applicants/agb/program-privacy>, which is incorporated herein by this reference. If requested by ICANN, Applicant will be required to obtain and deliver to ICANN and ICANN's background screening vendor any consents or agreements of the entities and/or individuals named in questions 1-11 of the application form necessary to conduct these background screening activities. In addition, Applicant acknowledges that to allow ICANN to conduct thorough background screening investigations:
 - a. Applicant may be required to provide documented consent for release of records to ICANN by organizations or government agencies;
 - b. Applicant may be required to obtain specific government records directly and supply those records to ICANN for review;
 - c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization;

- d. Applicant may be requested to supply certain information in the original language as well as in English.
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.
13. Applicant understands that ICANN has a long-standing relationship with Jones Day, an international law firm, and that ICANN intends to continue to be represented by Jones Day throughout the application process and the resulting delegation of TLDs. ICANN does not know whether any particular applicant is or is not a client of Jones Day. To the extent that Applicant is a Jones Day client, by submitting this application, Applicant agrees to execute a waiver permitting Jones Day to represent ICANN adverse to Applicant in the matter. Applicant further agrees that by submitting its Application, Applicant is agreeing to execute waivers or take similar reasonable actions to permit other law and consulting firms retained by ICANN in connection with the review and evaluation of its application to represent ICANN adverse to Applicant in the matter.
14. ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process, including the process for withdrawal of applications, at any time by posting notice of such updates and changes to the ICANN website, including as the possible result of new policies that might be adopted or advice to ICANN from ICANN advisory committees during the course of the application process. Applicant acknowledges that ICANN may make such updates and changes and agrees that its application will be subject to any such updates and changes. In the event that Applicant has completed and submitted its application prior to

such updates or changes and Applicant can demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN will work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for Applicant to the extent possible consistent with ICANN's mission to ensure the stable and secure operation of the Internet's unique identifier systems.

EXHIBIT C

1 Jeffrey A. LeVee (State Bar No. 125863)
2 Erin L. Burke (State Bar No. 186660)
3 Rachel Tessa Gezerseh (State Bar No. 251299)
4 Amanda Pushinsky (State Bar No. 267950)
5 JONES DAY
6 555 South Flower Street
7 Fiftieth Floor
8 Los Angeles, CA 90071.2300
9 Telephone: +1.213.489.3939
10 Facsimile: +1.213.243.2539
11 Email: jleee@JonesDay.com

12
13 Attorneys for Defendant
14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AND NUMBERS

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

13 DOTCONNECTAFRICA TRUST,

14 Plaintiff,

15 v.

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

18 Defendants.

CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

**DECLARATION OF CHRISTINE
WILLETT IN SUPPORT OF ICANN'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

1 **DECLARATION OF CHRISTINE WILLETT**

2 I, Christine Willett, declare the following:

3 1. I am the Vice President for Operations of the Global Domains Division of the
4 Internet Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this action. I
5 have personal knowledge of the matters set forth herein and am competent to testify as to those
6 matters. I make this declaration in support of ICANN’s opposition to DotConnectAfrica Trust’s
7 (“DCA’s” or “Plaintiff’s”) Motion for a Preliminary Injunction.

8 2. In my role as Vice President for Operations, I have been responsible for
9 overseeing the evaluation of the 1,930 gTLD applications ICANN received in 2012 as part of
10 ICANN’s New gTLD Program. Those applications are evaluated in accordance with the
11 procedures set forth in the New gTLD Applicant Guidebook (“Guidebook”). A copy of the
12 Guidebook is attached as Exhibit 3 to the declaration of Sophia Bekele Eshete (“Bekele
13 Declaration”).

14 3. In the spring of 2012, Plaintiff DCA and defendant ZA Central Registry (“ZACR”)
15 each submitted applications to operate the .AFRICA gTLD. In doing so, they, like all new gTLD
16 applicants, expressly accepted and acknowledged the Guidebook, including the release and
17 covenant not to sue (“Covenant”) in paragraph 6 of Module 6.

18 4. In order to ensure the safety and stability of the domain name system, new gTLD
19 operators are required to demonstrate that they are stable business entities that have the
20 significant technical and financial wherewithal required to operate a gTLD registry, and pay a
21 \$185,000 application fee.

22 5. The new gTLD application was complex and required considerable detail. A list
23 of the information new gTLD applicants were required to submit with their applications can be
24 found in the Guidebook. Bekele Decl., Ex. 3 at A1-46. Among other things, each applicant was
25 required to submit an extensive, technical explanation of its plans for operating a gTLD registry,
26 and evidence of financial support.

27 6. In addition, because DCA and ZACR had each applied for a gTLD that represents
28 the name of a geographic region, the Guidebook requires that DCA and ZACR each provide

1 documentation of support or non-objection from at least 60% of the governments in the region.
2 Bekele Decl. Ex. 3 § 2.2.1.4.2. The Guidebook also provides that a Geographic Names Panel
3 operated by a third-party vendor retained by ICANN must verify the relevance and authenticity of
4 an applicant’s documentation of support. *Id.* §§ 2.4.2, 2.2.1.4.4. The Geographic Names Panel
5 evaluated the support letters submitted by the applicants pursuant to the criteria set forth in the
6 Guidebook. In particular, section 2.2.1.4.3 of the Guidebook required that letters of support for a
7 geographic name “clearly express the government’s or public authority’s support for or non-
8 objection to the applicant’s application and demonstrate the government’s or public authority’s
9 understanding of the string being requested and its intended use.” It further requires that a letter
10 of support “should demonstrate the government’s or public authority’s understanding that the
11 string is being sought through the gTLD application process and that the applicant is willing to
12 accept the conditions under which the string will be available, i.e., entry into a registry agreement
13 with ICANN requiring compliance with consensus policies and payment of fees.” The
14 Geographic Names Panel treated both of these requirements as mandatory for all applicants
15 (including DCA and ZACR).

16 7. DCA submitted with its application for .AFRICA (“Application”) what it called a
17 letter of support dated in 2009 (three years earlier) from the African Union Commission
18 (“AUC”). A copy of that letter is attached as Exhibit 6 to the Bekele Declaration. I now
19 understand that, in 2010, DCA had received a letter from the AUC that formally withdrew the
20 AUC’s support for DCA’s Application for the .AFRICA gTLD. A copy of that letter is attached
21 as Exhibit 7 to the Bekele Declaration. DCA did not submit to ICANN with its Application a
22 copy of the AUC’s 2010 letter withdrawing its support for DCA.

23 8. DCA also submitted with its Application an August 2008 letter from the United
24 Nations Economic Commission for Africa (“UNECA”). A copy of that letter is attached as
25 Exhibit 8 to the Bekele Declaration. In September 2015, UNECA wrote in a letter that it was a
26 “United Nations entity [that] is neither a government nor public authority and therefore is not
27 qualified to issue a letter of support for a prospective applicant,” and that its August 2008 letter
28 was “merely an expression of a view in relation to [DCA’s] initiatives and efforts regarding

1 internet governance [and] cannot be properly considered as a ‘letter of support’ within the
2 context of ICANN’s requirements and cannot be used as such.” A true and correct copy of
3 UNECA’s September 2015 letter is attached as Exhibit 10 to the Bekele Declaration.

4 9. On June 5, 2013, at the time when ICANN’s Board accepted the Governmental
5 Advisory Committee’s (“GAC’s”) advice objecting to DCA’s Application, DCA had not yet
6 passed the Geographic Names Panel review. At that time, the Geographic Names Panel had been
7 in the midst of its review of DCA’s Application; it had determined that the support documentation
8 submitted by DCA, including the letters from the AUC and UNECA, did not meet the criteria set
9 forth in the Guidebook, and was therefore planning to send “clarifying questions” to DCA.
10 Clarifying questions are sent where support documentation does not meet the criteria set forth in
11 the Guidebook, and they are an accommodation to provide applicants an opportunity to
12 explain/supplement their documentation. However, as a result of the ICANN Board’s acceptance
13 of the GAC’s advice, DCA’s Application was removed from processing, and the clarifying
14 questions were not sent at that time.

15 10. By July 31, 2015, following the ICANN Board’s adoption of the recommendations
16 of the Independent Review Panel in *DCA v. ICANN* (“IRP Panel”), DCA’s Application was
17 returned to processing as the Board directed. DCA’s Application was returned to precisely the
18 portion of the review that was pending on the date the Application was removed from
19 processing—the Geographic Names Panel review. As the Geographic Names Panel had been
20 preparing to do when DCA’s Application was removed from processing, the Geographic Names
21 Panel issued clarifying questions to DCA on September 2, 2015, regarding the documentation
22 DCA had submitted with its Application. Those clarifying questions are attached as Exhibit 13 to
23 the Bekele Declaration. DCA was given an opportunity to respond to those clarifying questions.
24 Instead of supplementing its documentation, DCA wrote to ICANN on September 28, 2015,
25 taking the position that the documentation that it had submitted with its Application in 2012 was
26 sufficient.

27 11. On October 13, 2015, ICANN issued the Initial Evaluation Report regarding
28 DCA’s Application. The Initial Evaluation Report noted that the Application had passed all

1 reviews except for the Geographic Names Panel review. As provided by the Guidebook, the
2 report stated that DCA would have the opportunity to participate in “Extended Evaluation,”
3 which offered DCA additional time to provide the requisite documentation of support or non-
4 objection from African governments. A true and correct copy of the Initial Evaluation Report is
5 attached hereto as **Exhibit A**.

6 12. As part of Extended Evaluation, the Geographic Names Panel again issued
7 clarifying questions to DCA on October 30, 2015, identifying the issues with the documented
8 support submitted by DCA. Those clarifying questions are attached as Exhibit 15 to the Bekele
9 Declaration. DCA was given until January 28, 2016, to supplement its documentation. However,
10 rather than supplementing its documentation, DCA submitted a letter from its counsel and again
11 took the position that the documentation that it had submitted with its Application in 2012 was
12 sufficient.

13 13. Notably, nearly identical clarifying questions were sent to ZACR in 2013 when
14 ZACR’s application for .AFRICA was undergoing Geographic Name Review. True and correct
15 copies of the clarifying questions issued to ZACR related to the AUC and UNECA letters are
16 attached hereto as **Exhibits B and C**. Unlike DCA, ZACR submitted an updated letter from the
17 AUC endorsing ZACR on July 3, 2013. That letter is attached as Exhibit A to Exhibit 2 of the
18 Declaration of Sara Colón (“Colón Decl.”).

19 14. On February 17, 2016, ICANN issued an Extended Evaluation Report stating that
20 the Geographic Names Panel had determined that DCA had failed to provide the requisite
21 documentation of support or non-objection from relevant governments, despite the extended
22 opportunity to do so. A copy of the Extended Evaluation Report is attached as Exhibit 18 to the
23 Bekele Declaration. As a result, and as provided by the Guidebook, ICANN stopped processing
24 DCA’s Application. (Guidebook at 174 (§ 2.2.1.4.4).)

25 15. On March 3, 2016, ICANN’s Board adopted a resolution lifting the stay on the
26 delegation of .AFRICA. A true and correct copy of the Board’s March 3, 2016 resolution is
27 attached to this declaration as **Exhibit D**. ICANN is now prepared to delegate the rights to
28 operate .AFRICA to ZACR. However, ICANN has voluntarily stayed the delegation pending the

1 Court's ruling on DCA's Motion for Preliminary Injunction. *See* Colón Decl. ¶ 2.

2 16. As described in the concurrently-filed declaration of Akram Atallah, ICANN's
3 Bylaws provide for several accountability mechanisms to ensure that ICANN operates in
4 accordance with its Articles of Incorporation, Bylaws, policies and procedures. For example, an
5 aggrieved applicant can file a "request for reconsideration," which is a mechanism that asks the
6 ICANN Board to re-evaluate certain Board or staff actions or inactions that the applicant believes
7 have harmed it. In addition, an aggrieved applicant can file a "request for independent review," a
8 unique process set forth in ICANN's Bylaws that asks independent panelists to evaluate whether
9 an action of ICANN's Board was consistent with ICANN's Articles of Incorporation and Bylaws.
10 Bekele Decl., Ex. 4 (Bylaws, Art. IV, §§ 2-3). DCA could have filed, but did not file, a
11 reconsideration request or a request for an independent review process ("IRP") related to the
12 clarifying questions issued to it, or to the determination that DCA had failed the Geographic
13 Names Review.

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

16 Executed this 8th day of December 2016, in Los Angeles, California.

17
18 

19 _____
Christine A. Willett

EXHIBIT A

New gTLD Program
Initial Evaluation Report
 Report Date: 13 October 2015

Update: This report has been updated as of the date above.

Application ID:	1-1165-42560
Applied-for String:	AFRICA
Priority Number:	1005
Applicant Name:	DotConnectAfrica Trust

Overall Initial Evaluation Summary

Initial Evaluation Result	Eligible for Extended Evaluation
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application and the responses to Clarification Question(s), the Evaluation Panel(s) determined that there was not sufficient information to award a passing score. Your application is eligible for Extended Evaluation as defined in Section 2.3 of the Applicant Guidebook.</p>	

Background Screening Summary

Background Screening	Eligible
<p>Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility up until the execution of the Registry Agreement.</p>	

Panel Summary

String Similarity	Pass - Contention																				
<p>The String Similarity Panel has determined that your applied-for string is visually similar to another applied-for gTLD string, creating a probability of user confusion. Based on this finding and per Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, your application was placed in a string contention set.</p>																					
DNS Stability	Pass																				
<p>The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.</p>																					
Geographic Names	Geographic Name - Eligible for Extended Evaluation																				
<p>The Geographic Names Panel has determined that your application falls within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4. However, the required documentation of support or non-objection was either not provided or did not meet the criteria described in Section 2.2.1.4.3 of the Applicant Guidebook. As per Section 2.3.1 of the Applicant Guidebook, your application is eligible for Extended Evaluation.</p>																					
Registry Services	Pass																				
<p>The Registry Services Panel has determined that the proposed registry services do not require further review.</p>																					
Technical & Operational Capability	Pass																				
<p>The Technical & Operational Capability Panel determined that:</p> <p>Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.</p> <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Question</th> <th style="text-align: right;">Score</th> </tr> </thead> <tbody> <tr> <td>24: SRS</td> <td style="text-align: right;">1</td> </tr> <tr> <td>25: EPP</td> <td style="text-align: right;">1</td> </tr> <tr> <td>26: Whois</td> <td style="text-align: right;">1</td> </tr> <tr> <td>27: Registration Life Cycle</td> <td style="text-align: right;">1</td> </tr> <tr> <td>28: Abuse Prevention and Mitigation</td> <td style="text-align: right;">1</td> </tr> <tr> <td>29: Rights Protection Mechanism</td> <td style="text-align: right;">1</td> </tr> <tr> <td>30: Security Policy</td> <td style="text-align: right;">1</td> </tr> <tr> <td>31: Technical Overview of Registry</td> <td style="text-align: right;">1</td> </tr> <tr> <td>32: Architecture</td> <td style="text-align: right;">2</td> </tr> </tbody> </table>		Question	Score	24: SRS	1	25: EPP	1	26: Whois	1	27: Registration Life Cycle	1	28: Abuse Prevention and Mitigation	1	29: Rights Protection Mechanism	1	30: Security Policy	1	31: Technical Overview of Registry	1	32: Architecture	2
Question	Score																				
24: SRS	1																				
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26: Whois	1																				
27: Registration Life Cycle	1																				
28: Abuse Prevention and Mitigation	1																				
29: Rights Protection Mechanism	1																				
30: Security Policy	1																				
31: Technical Overview of Registry	1																				
32: Architecture	2																				

33: Database Capabilities	2
34: Geographic Diversity	2
35: DNS Service	1
36: IPv6 Reachability	1
37: Data Backup Policies & Procedures	1
38: Data Escrow	1
39: Registry Continuity	2
40: Registry Transition	1
41: Failover Testing	1
42: Monitoring and Fault Escalation	2
43: DNSSEC	1
44: IDNs (Optional)	1
Total	26
Minimum Required Total Score to Pass*	22

**No zero score allowed except on optional Q44*

Financial Capability Pass

The Financial Capability Panel determined that:

Your application meets the Financial Capability criteria specified in the Applicant Guidebook.

Question	Score
45: Financial Statements	1
46: Projections Template	1
47: Costs and Capital Expenditures	2
48: Funding and Revenue	1
49: Contingency Planning	2
50: Funding Critical Registry Functions	3
Total	10
Minimum Required Total Score to Pass**	8

***No zero score allowed on any question*

Disclaimer: Please note that these Initial Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. All applications are subjected to due diligence at contracting time, which may include an additional review of the Continued Operations Instrument for conformance to Specification 8 of the Registry Agreement with ICANN. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook or the Registry Agreement. For updated application status and complete details on the program, please refer to the Applicant Guidebook and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

EXHIBIT B



Geographic Names Panel Clarifying Questions

Application ID: 1-1243-89583
String: AFRICA
Applicant: UniForum SA/ZACR

Clarifying Question 1:

Question 21b of the AGB states, "If [the application is for] a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities." Section 2.2.1.4.3 (*Documentation Requirements*) of the AGB states that each letter of support or non-objection for a Geographic Name applicant must meet the following criteria:

1. Must clearly express the government's or public authority's support for or non-objection to the applicant's application
2. Demonstrate the government's or public authority's understanding of the string being requested
3. Demonstrate the government's or public authority's understanding of the string's intended use
4. Should 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.

Your application for .AFRICA includes a letter from the African Union dated 4 April 2012, subject "Letter of Appointment". The letter is signed by Dr Elham M A Ibrahim, Commissioner Infrastructure and Energy and bears the seal of the African Union Commission. However, the letter does not meet criteria 1, 2, 3 and 4 above.

Please provide an updated letter of support from the Commissioner, Infrastructure and Energy of the African Union, or another signatory duly authorised on behalf of the African Union Commission, that:

1. Clearly expresses the government's or public authority's support for or non-objection to the applicant's application
2. Demonstrates the government's or public authority's understanding of the string being requested
3. Demonstrates the government's or public authority's understanding of the string's intended use
4. Demonstrates the government's or public authority's understanding



NewgTLDs

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.

For criterion number 4, "the applicant...[willingness] to accept the conditions under which the string will be available" can be satisfied by meeting the requirement of the first part of the criteria: "demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process."

This letter of support is due to ICANN by end of the initial evaluation period, August 31, 2013.

EXHIBIT C



Geographic Names Panel Clarifying Questions

Application ID: 1-1243-89533
String: AFRICA
Applicant: UniForum SA/ZACR

Clarifying Question 2:

Question 21b of the AGB states, "If [the application is for] a geographic name, attach documentation of support or non-objection from all relevant governments or public authorities." Section 2.2.1.4.3 (*Documentation Requirements*) of the AGB states that each letter of support or non-objection for a Geographic Name applicant must meet the following criteria:

1. Must clearly express the government's or public authority's support for or non-objection to the applicant's application
2. Demonstrate the government's or public authority's understanding of the string being requested
3. Demonstrate the government's or public authority's understanding of the string's intended use
4. Should 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.

Your application for .AFRICA includes a letter from the United Nations Economic Commission for Africa dated 16 September 2011. The letter is signed by Jennifer Kargbo, Deputy Executive Secretary to the Commissioner to the Minister for Infrastructure and Energy of the African Union. However, the letter does not meet criteria 1, 2, 3 and 4 above.

Please provide an updated letter of support from the United Nations Economic Commission for Africa, or another signatory duly authorised on behalf of the United Nations Economic Commission for Africa, that:

1. Clearly expresses the government's or public authority's support for or non-objection to the applicant's application
2. Demonstrates the government's or public authority's understanding of the string being requested
3. Demonstrates the government's or public authority's understanding of the string's intended use



NewgTLDs

4. Demonstrates 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.

For criterion number 4, "the applicant...[willingness] to accept the conditions under which the string will be available" can be satisfied by meeting the requirement of the first part of the criteria: "demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process."

This letter of support is due to ICANN by end of the initial evaluation period, August 31, 2013.

EXHIBIT D

GET
STARTEDNEWS &
MEDIA

POLICY

PUBLIC
COMMENT

RESOURCES

COMMUNITY

IANA
STEWARDSHIP
& ACCOUNTABILITY

Resources

 About ICANN Board Accountability Governance Groups

Business

Civil Society

 Contractual
Compliance Registrars Registries

GDD Metrics

 Identifier Systems
Security, Stability
and Resiliency (IS-
SSR) ccTLDs Internationalized
Domain Names Universal
Acceptance Initiative Policy Public CommentRoot Zone KSK
Rollover Technical Functions Contact

Approved Board Resolutions | Regular Meeting of the ICANN Board

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03 Mar 2016

1. Main Agenda

a. .AFRICA Update

Rationale for Resolution 2016.03.03.01

b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination

Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

1. Main Agenda

a. .AFRICA Update

Whereas, in its 11 April 2013 Beijing Communiqué, the Governmental Advisory Committee (GAC) provided consensus advice pursuant to the Applicant Guidebook that DotConnectAfrica Trust's (DCA)'s application for .AFRICA should not proceed.

Whereas, on 4 June 2013, the New gTLD Program Committee (NGPC) adopted the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué," which included acceptance of the GAC's advice related to DCA's application for .AFRICA. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a>)

Whereas, staff informed DCA of and published the "Incomplete" Initial Evaluation result and halted evaluation of DCA's application for .AFRICA on 3 July 2013 based on the NGPC resolution of 4 June 2013.

Whereas, on 25 November 2013, DCA initiated an Independent Review Process (IRP) regarding the 4 June 2013 resolution, but did not at that time seek to stay ICANN from moving forward the ZA Central Registry NPC trading as Registry.Africa's (ZACR) application.

Whereas, on 24 March 2014, ZACR executed a Registry Agreement (RA) for .AFRICA.

Whereas, on 13 May 2014 ICANN halted further progress with respect to ZACR's RA for .AFRICA following the IRP Panel's interim declaration that ICANN should stop proceeding with ZACR's application for .AFRICA during the pendency of the IRP that DCA had initiated.

Whereas, on 9 July 2015, the IRP Panel issued its Final Declaration and recommended that ICANN continue to refrain from delegating the .AFRICA gTLD in order to permit DCA's application to proceed through the remainder of the new gTLD application process. (See <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> [PDF, 1.04 MB])

Whereas, on 16 July 2015, the Board directed the President and CEO, or his designee(s), to continue to refrain from delegating the .AFRICA gTLD and to take all steps necessary to resume the evaluation of DCA's application for .AFRICA in accordance with the established process(es). (See <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a>)

Whereas, on 1 September 2015, evaluation of DCA's application for .AFRICA resumed.

Whereas, on 13 October 2015, the Initial Evaluation report based on the Geographic Names Panel's review of DCA's application was posted and indicated that DCA's application did not pass Initial Evaluation, but that DCA was therefore eligible for Extended Evaluation; DCA chose to proceed through Extended Evaluation.

Whereas, on 17 February 2016, an Extended Evaluation report was posted and indicated that the resumed evaluation of DCA's application for .AFRICA had concluded, and that DCA had failed to submit information and documentation sufficient to meet the criteria described in AGB Section 2.2.1.4.3, rendering it ineligible for further review or evaluation.

Resolved (2016.03.03.01), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN.

Rationale for Resolution 2016.03.03.01

Two applicants, DotConnectAfrica Trust (DCA) and ZA Central Registry trading as Registry.Africa (ZACR), applied to become the operator for the .AFRICA generic top-level domain (gTLD) in furtherance of ICANN's New gTLD Program. In its 11 April 2013 Beijing Communiqué, ICANN's Governmental Advisory Committee (GAC) provided consensus advice pursuant to the New gTLD Program's Applicant Guidebook (Guidebook) that DCA's application to operate .AFRICA should not proceed. The Board accepted that GAC advice, evaluation of DCA's application was halted, and ICANN proceeded to execute a Registry Agreement with the other applicant that applied to operate .AFRICA.

DCA challenged the GAC advice that DCA's application should not proceed, and the Board's acceptance of that advice, through the Independent Review Process (IRP). The IRP is one of the accountability mechanisms set out in ICANN's Bylaws. First, only after ICANN signed a registry agreement to operate .AFRICA with the other .AFRICA applicant, did DCA obtain interim relief from an IRP panel recommending that ICANN not proceed further with .AFRICA pending conclusion of the IRP. ICANN adopted that recommendation. Second, DCA prevailed in the IRP and the IRP Panel recommended that ICANN resume evaluation of DCA's application and continue to refrain from delegating .AFRICA to the party with which ICANN already had executed a Registry Agreement to operate the .AFRICA gTLD.

On 16 July 2015 the Board passed the following resolution:

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN shall continue to refrain from delegating the .AFRICA gTLD;
2. ICANN shall permit DCA's application to proceed through the remainder of the new gTLD application process as set out below; and
3. ICANN shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

(See <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a.>)

When the Board passed the above resolution, the only remaining evaluation process for DCA's application for .AFRICA during the Initial Evaluation (IE) period was the Geographic Names Panel review, as DCA had successfully completed the other stages of IE. Accordingly, at staff's request, in August 2015, the Geographic Names Panel resumed its evaluation of DCA's application to operate .AFRICA. The Geographic Names Panel determined that .AFRICA is a geographic name as defined in Guidebook Section 2.2.1.4, but that the DCA's application to operate .AFRICA has not sufficiently met the requisite criteria of possessing evidence of support or non-opposition from 60% of the relevant public authorities in the geographic region of Africa, as described in AGB Section 2.2.1.4.3.

Per the Guidebook, having failed to pass IE, DCA was eligible and chose to proceed to Extended Evaluation (EE), which provided DCA with an additional 90 days to obtain the requisite documentation needed to pass the Geographic Names Panel review. On 17 February 2016, EE results were posted showing that DCA again did not satisfy the necessary criteria to pass the Geographic Names Panel review, rendering, DCA's application ineligible for any further review.

Now that both IE and EE have been completed for DCA's application to operate .AFRICA, and both have resulted in DCA not passing the Geographic Names Panel review, ICANN is prepared to move forward toward delegation of .AFRICA and with the party that has signed a Registry Agreement to operate .AFRICA. The party that has signed the Registry Agreement to operate .AFRICA is eager to move forward so that members of the African community can begin utilizing this gTLD. Further, as there are no remaining avenues available to DCA to proceed in the New gTLD Program, there is no reason within defined Guidebook processes to delay any further.

Accordingly, the Board today is authorizing the President and CEO or his designee(s), to resume delegating the .AFRICA gTLD, and all that entails, which it has previously directed ICANN to refrain from doing.

Taking this action is beneficial to ICANN and the overall Internet community, as it will allow delegation of the .AFRICA gTLD into the authoritative root zone. There likely will be a positive fiscal impact by taking this action in that there will be another operational gTLD. This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN wherein the Panel declared ICANN to be the prevailing party and that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) in which the Panel found that Vistaprint's applications for .WEBS were confusingly similar to Web.com's application for .WEB (Vistaprint SCO).

Whereas, while the IRP Panel found that ICANN did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel recommended that the Board exercise its judgment on the question of whether it is appropriate to establish an additional review mechanism to re-evaluate the Vistaprint SCO.

Whereas, in Resolutions 2014.10.12.NG02-2015.10.12.NG03, the New gTLD Program Committee (NGPC) exercised its discretion to address a certain limited number of perceived inconsistent and unreasonable SCO expert determinations that were identified as not being in the best interest of the New gTLD Program and the Internet community (SCO Final Review Mechanism).

Whereas, the NGPC has already considered the Vistaprint SCO Expert Determination, among other expert determinations, in evaluating whether to

expand the scope of the SCO Final Review Mechanism and determined that those other expert determinations, including the Vistaprint SCO Expert Determination, did not warrant re-evaluation.

Whereas, pursuant to the recommendations of the IRP Panel in the Final Declaration, the Board has again evaluated whether an additional review mechanism is appropriate to re-evaluate the Vistaprint SCO and resulting Expert Determination.

Resolved (2016.03.03.02), the Board concludes that the Vistaprint SCO Expert Determination is not sufficiently "inconsistent" or "unreasonable" such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.

Resolved (2016.03.03.03), the Board finds, as it has previously found, that ICANN's Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in Final Declaration do not support re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination.

Resolved (2016.03.03.04), the Board directs the President and CEO, or his designee(s), to move forward with processing of the .WEB/.WEBS contention set.

Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

The Board is taking action today to address the recommendation of the Independent Review Process (IRP) Panel (Panel) set forth in its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint). Specifically, the IRP Panel recommended that the Board exercise its judgment on the question of whether an additional review is appropriate to re-evaluate the Vistaprint String Confusion Objection (SCO) leading to the "Vistaprint SCO Expert Determination."

I. Background

A. VistaprintSCO Expert Determination

The background on the Vistaprint SCO Expert Determination is discussed in detail in the Reference Materials and IRP Final Declaration, which is attached as Attachment A to the Reference Materials. The Reference Materials are incorporated by reference into this resolution and rationale as though fully set forth here.

B. Vistaprint IRP

Vistaprint filed an IRP request challenging ICANN's acceptance of the Vistaprint SCO Expert Determination. In doing so, among other things, Vistaprint challenged procedures, implementation of procedures, and ICANN's purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, a three-member IRP Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board adopted the findings of the Panel. (See Resolutions 2015.10.22.17 – 2015.10.22.18, available at <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>; see also, IRP Final Declaration, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> [PDF, 920 KB].)

In the Final Declaration, the Panel found, among other things, that it did not have the authority to require ICANN to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections. However, the Panel did recommend that

the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the Vistaprint SCO, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

(Final Declaration at ¶ 196, available at <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> [PDF, 920 KB].) The Board acknowledged and accepted this recommendation in Resolution 2015.10.22.18. (See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d>.)

C. Confusing Similarity

1. The Generic Names Supporting Organization's (GNSO) Recommendation on confusing similarity.

In August 2007, the GNSO issued a set of recommendations (approved by the ICANN Board in June 2008) regarding the introduction of new generic top-level domains (gTLDs). The policy recommendations did not include a specific recommendation regarding singular and plural versions of the same string. Instead, the GNSO included a

recommendation (Recommendation 2) that new gTLD strings must not be confusingly similar to an existing top-level domain or a reserved name. (See GNSO Final Report: Introduction of New Generic Top-Level Domains, <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.)

2. The issue of confusing similarity was agreed as part of the Applicant Guidebook and is addressed in the evaluation processes.

As discussed in detail in Reference Materials document related to this paper, and which is incorporated by reference as though fully set forth here, the issue of confusing similarity is addressed in two manners in the evaluation processes – through the String Similarity Review (SSR) process and through the String Confusion Objection process. The objective of this preliminary review was to prevent user confusion and loss of confidence in the DNS resulting from delegation of similar strings. (See *Module 2.2.1.1*, available at <https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf> [PDF, 916 KB], and *Module 3.2.1*, available at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 260 KB].) The SSR Panel did not find any plural version of a word to be visually similar to the singular version of that same word, or vice versa. (<http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf> [PDF, 168 KB]; <http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en>.)

3. The Board previously addressed the issue of confusing similarity as it relates to singular and plural versions of the same string in response to Governmental Advisory Committee (GAC) advice.

On 25 June 2013, the Board, through the New gTLD Program Committee (NGPC), considered the issue of singular and plural versions of the same strings being in the root in response to the GAC's advice from the Beijing Communiqué. (<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> [PDF, 156 KB].) The NGPC determined that no changes are needed to the existing mechanisms in the Guidebook to address the GAC advice relating to singular and plural versions of the same string. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d>.) As noted in the Rationale for Resolution 2013.06.25.NG07,

the NGPC considered several significant factors as part of its deliberations, including the following factors: (i) whether the SSR evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel; (ii) whether taking an action to make program changes would cause a ripple effect and re-open the decisions of all expert panels; (iii) the existing nature of strings in the DNS and any positive and negative impacts resulting therefrom; (iv) whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed; (v) the SCO process as set forth in Module 3 of the Guidebook. (See [\)](https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en - 2.d.)

The NGPC determined that the mechanisms established by the Guidebook (SSR and SCO) should be unchanged and should remain as the mechanisms used to address whether or not the likelihood potential user confusion may result from singular and plural versions of the same strings.

D. SCO Final Review Mechanism

As discussed in full in the Reference Materials and incorporated herein by reference, the SCO Final Review Mechanism was established by the NGPC on 12 October 2014, after consultation with the community, to address a very limited set of perceived inconsistent and unreasonable SCO expert determinations. (See [\) The SCO Final Review Mechanism was not a procedure to address the likelihood of confusion of singular and plural versions of the same string in the root. Rather, it was a mechanism crafted to address two SCO expert determinations \(.CAM/.COM and .SHOPPING/.通販 expert determinations\) that had conflicting expert determinations about the same strings issued by different expert panels, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. \(NGPC Resolution 2014.10.12.NG03, *available at* \[\\) The NGPC also identified the SCO Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD Program and the Internet community, which also resulted in opposite determinations by different expert panels on objections to the exact same strings. Because the .CAR/.CARS contention set resolved prior to the approval of the SCO Final Review Mechanism, it was not part of the final review. \\(See *id.*\\)\]\(https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.\)](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.)

As part of its deliberations, the NGPC considered and

determined that it was not appropriate to expand the scope of the proposed SCO Final Review Mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination. With respect to its consideration of whether all SCO expert determinations relating to singular and plurals of the same string should be re-evaluated, the NGPC noted that it had previously addressed the singular/plurals issue in Resolutions 2013.06.25.NG07, and had determined "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook" (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.>)

II. Analysis

A. Confusing Similarity as it Relates to Singular/Plurals of the Same String Has Already Been Addressed By The Board.

As discussed above, the NGPC first considered the issue of singular and plural versions of same strings in the root in June 2013 in consideration of the GAC's advice from the Beijing Communiqué regarding singular and plural versions of the same strings. Then, the NGPC determined that no changes were needed to the existing mechanisms in the Guidebook to address the issue.

(<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> [PDF, 156 KB].) As part of its evaluation, the NGPC considered applicant responses to the GAC advice. The NGPC noted that most were against changing the existing policy, indicating that this topic was agreed as part of the Guidebook and is addressed in the evaluation processes. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d.>) The NGPC also considered existing string similarity in the DNS at the second level and any positive and negative impacts resulting therefrom. At the time, no new gTLD had been delegated, and therefore, there was no evidence of singular and plurals of the same string in the DNS at the top level. To date, seventeen singular/plural pairs have been delegated. The Board is not aware of any evidence of any impact (positive or negative) from having singular and plurals of the same string in the DNS. As such, the evidence of the existence of singular and plural versions of the same string, while it did not exist in June 2015, should not impact the NGPC's previous consideration of this matter.

As the NGPC acknowledged in Resolution 2013.06.25.NG07, the existing mechanisms (SSR and SCO) in the Guidebook to address the issue of potential consumer confusion resulting from allowing singular and plural versions of the same string are adequate. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d.>) These mechanisms are intended to address the issue of confusing

similarity at the outset of the application process. A decision to send the Vistaprint SCO Expert Determination back for re-evaluation because there is now evidence of singular and plural versions of the same string in the DNS would effectively strip away the objective function of the evaluation processes that have been set in place, which in the case of a SCO is to evaluate the likelihood of confusion at the outset of the application process, not some time after there has been evidence of delegation of singular and plural versions of the same string. (See Guidebook, Module 3.5.1.) To do so would be to treat Vistaprint differently and arguably more favorably than other applicants, which could be argued to be contradictory to ICANN's Bylaws.

B. The SCO Final Review Mechanism Does Not Apply to the Vistaprint Expert Determination.

The Board notes that Vistaprint argued in the IRP that the Vistaprint SCO Expert Determination is as equally unreasonable as the .CAM/.COM, .通販/.SHOP, .CARS/CAR Expert Determinations and therefore should be sent back for re-evaluation pursuant to the Final Review Mechanism. (See Final Declaration, ¶¶ 93, 94.) However, the Vistaprint SCO Expert Determination is plainly distinguishable from the .CAM/.COM, .通販/.SHOP, .CARS/.CAR expert determinations, and therefore, the reasons warranting re-evaluation as determined by the NGPC in those decisions do not apply to the Vistaprint Expert Determination.

The CAM/.COM, .通販/.SHOP, .CARS/.CAR Expert Determinations were ripe for re-evaluation because those expert determinations involved *multiple conflicting SCO determinations issued by different experts on the same strings*, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. Moreover, the NGPC discussion of the .CARS/.CAR expert determinations in the scope of the SCO Final Review Mechanism was not based on the singular/plural issue, but rather, due to conflicting SCO expert determinations (two expert determinations finding .CARS/.CAR not to be confusingly similar and one finding .CARS/.CAR to be confusingly similar. (See Charleston Road Registry, Inc. v. Koko Castle, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1377-8759-en.pdf> [PDF, 196 KB] (finding no likelihood of confusion between .CARS/.CAR); Charleston Road Registry, Inc. v. Uniregistry, Corp. SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determination-1-1-845-37810-en.pdf> [PDF, 7.08 MB] (finding no likelihood of confusion between .CARS/.CAR); and Charleston Road Registry, Inc. v. DERCars, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determination-1-1-909-45636-en.pdf> [PDF, 2.09 MB] (finding likelihood of confusion between .CARS/.CAR).)

Here, none of the factors significant to the NGPC's decision to send the CAM/.COM, .通販/.SHOP, expert determinations back for re-evaluation exist for the Vistaprint Expert Determination. The Vistaprint SCO proceedings resulted in one Expert Determination, in favor of Web.com on both objections. There were no other conflicting SCO expert determinations on the same strings issued by different expert panels ending in a different result. One expert panel had all of the arguments in front of it and considered both objections in concert, and made a conscious and fully informed decision in reaching the same decision on both objections. In this regard, Vistaprint already had the same benefit of consideration of the evidence submitted in both objection proceedings by one expert panel that the CAM/.COM, .通販/.SHOP objections received on re-evaluation. Thus, a re-evaluation of the objections leading to the VistaprintSCO Expert Determination is not warranted because it would only achieve what has already been achieved by having the same expert panel review all of the relevant proceedings in the first instance. Further, as discussed above, the NGPC has already considered the VistaprintSCO Expert Determination as part of its deliberations on the scope of the SCO Final Review Mechanism, and determined that the objection proceedings leading to the Expert Determination did not warrant re-evaluation. Thus, while Vistaprint may substantively disagree with the Expert Determination, there is no evidence that it is "inconsistent" or "unreasonable" such that it warrants re-evaluation.

The Board's evaluation is guided by the criteria applied by the NGPC in reaching its determination on the scope of the Final Review Mechanism, the NGPC's consideration and determination on the existence of singular and plurals of the same word as TLD as set forth in Resolution 2013.06.25.NG07, the GNSO Final Report Introduction of New Generic Top-Level Domains, the Applicant Guidebook, including the mechanisms therein to address potential consumer confusion, the circumstances and developments noted in the Final Declaration, and the core values set forth in Article I, Section 2 of the Bylaws. Applying these factors, for the reasons stated below, the Board concludes that a re-evaluation of the objection proceedings leading to the VistaprintSCO Expert Determination is not appropriate because the Expert Determination is not "inconsistent" or "unreasonable" as previously defined by the NGPC or in any other way to warrant re-evaluation.

The Board considered the following criteria, among others, employed by the NGPC in adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03:

- Whether it was appropriate to change the Guidebook at this time to implement a review mechanism.
- Whether there was a reasonable basis for certain

perceived inconsistent expert determinations to exist, and particularly why the identified expert determinations should be sent back to the ICDR while other expert determinations should not.

- Whether it was appropriate to expand the scope of the proposed review mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the VistaprintSCO Expert Determination.
- Community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings.

(See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en>. In addition, the Board also reviewed and took into consideration the NGPC's action on the existence of singular and plurals of the same string as a TLD in Resolution 2013.06.25.NG07.

As part of this decision, the Board considered and balanced the eleven core values set forth in Article I, Section 2 of the Bylaws. Article I, Section 2 of the Bylaws states that "situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values." (Bylaws, Art. I, § 2, <https://www.icann.org/resources/pages/governance/bylaws-en/#I>.) Among the eleven core values, the Board finds that value numbers 1, 4, 7, 8, 9, and 10 to be most relevant to the circumstances at hand. Applying these values, the Board concludes that re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not warranted.

This action will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative Function that does not require public comment.

Published on 3 March 2016



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EXHIBIT D

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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.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

**DECLARATION OF AKRAM
ATALLAH IN SUPPORT OF
ICANN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

DATE: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

1 **DECLARATION OF AKRAM ATALLAH**

2 I, Akram Atallah, declare the following:

3 1. I am the President, Global Domains Division, for the Internet Corporation for
4 Assigned Names and Numbers (“ICANN”), a defendant in this action. I have personal
5 knowledge of the matters set forth herein and am competent to testify as to those matters. I make
6 this declaration in support of ICANN’s Opposition to DotConnectAfrica Trust’s (“DCA’s”) Motion for Preliminary Injunction.

7 **ICANN and the New gTLD Program**

8 2. ICANN is a California not-for-profit public benefit corporation. ICANN oversees
9 the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the
10 Internet community, ensuring the DNS’s continued security, stability, and integrity. As set forth
11 in the version of ICANN’s Bylaws relevant to this dispute (“Bylaws”), ICANN’s mission “is to
12 coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular
13 to ensure the stable and secure operation of the Internet’s unique identifier systems,” including
14 the DNS. Declaration of Sophia Bekele Eshete (“Bekele Decl.”), Ex. 4 (Bylaws, Art. I, § 1).
15 ICANN’s amended Bylaws became effective October 1, 2016, and DCA does not contend that
16 the amended Bylaws are relevant to this dispute.

17 3. The essential function of the DNS is to convert numeric IP addresses into easily-
18 remembered domain names that permit users to find specific websites, such as
19 “USCOURTS.GOV” and “ICANN.ORG.” The “.GOV” and “.ORG” in these addresses, just like
20 the more well-known “.COM,” are referred to as top-level domains (“TLDs”). ICANN is solely
21 responsible for evaluating potential TLD operators and recommending that TLDs be added to the
22 DNS. No government entity or regulatory scheme governs ICANN’s decisions in that respect.

23 4. Throughout its history, ICANN has sought to expand the number of accessible
24 TLDs in the DNS in order to promote consumer choice and competition. The New gTLD
25 Program (“Program”), launched in 2012, constitutes ICANN’s most ambitious expansion of the
26 Internet’s naming system. The Program’s goals include enhancing competition and consumer
27 choice, and enabling the benefits of innovation via the introduction of new generic TLDs
28

1 (“gTLDs”), including both new ASCII gTLDs and new non-ASCII, internationalized domain
2 name gTLDs. It resulted in the submission of 1,930 applications for new gTLDs, including
3 DCA’s and ZA Central Registry’s (“ZACR’s”) applications for the .AFRICA gTLD.

4 5. A number of “Advisory Committees” advise ICANN’s Board on various topics
5 described in the ICANN Bylaws. The Governmental Advisory Committee (“GAC”) has
6 members composed of national governments and distinct economies as recognized in
7 international fora, including the United States, and its purpose is to “consider and provide advice
8 on the activities of ICANN as they relate to concerns of governments, particularly matters where
9 there may be an interaction between ICANN’s policies and various laws and international
10 agreements or where they may affect public policy issues.” Bekele Decl., Ex. 4 (Bylaws, Art. XI,
11 § 2.1).

12 **ICANN’s Accountability Mechanisms**

13 6. ICANN’s Bylaws provide for several accountability mechanisms to ensure that
14 ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and
15 procedures. *See* Bekele Decl., Ex. 4 (Bylaws, Arts. IV-V). For example, an aggrieved applicant
16 can file a “request for reconsideration,” which is a mechanism that asks the ICANN Board to re-
17 evaluate certain Board or staff actions or inactions that the applicant believes have harmed it. *Id.*
18 (Bylaws, Art. IV, § 2). In addition, an aggrieved applicant can file a “request for independent
19 review,” a unique process set forth in ICANN’s Bylaws that asks independent panelists to
20 evaluate whether an action of ICANN’s Board was consistent with ICANN’s Articles of
21 Incorporation and Bylaws. *Id.* (Bylaws, Art. IV, § 3).

22 7. The Bylaws provide for the IRP panel to issue a written determination “declar[ing]
23 whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or
24 Bylaws” and “recommend[ing] that the Board stay any action or decision, or that the Board take
25 any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”
26 Bekele Decl., Ex. 4 (Bylaws, Art. IV, § 3.11). The ICANN Board then considers and acts on the
27 determination. *Id.* (Bylaws, Art. IV, § 3.21).

28 8. I am informed and believe that prior to the opening of the New gTLD Program

1 application period, only one IRP had resulted in a written determination, *ICM Registry, LLC v.*
2 *ICANN*. The *ICM* Panel declared that the determinations of IRP panels were not binding on
3 ICANN's Board. Attached hereto as **Exhibit E** is a true and correct copy of an excerpt of the
4 Final Declaration of the *ICM* Panel.

5 9. To my knowledge, ICANN has never represented that IRPs are binding. Instead,
6 ICANN has consistently argued that IRP declarations are not binding.

7 10. In the case of the *DCA* IRP, the *DCA* Panel declared that its decision would be
8 binding on ICANN's Board. But the question of whether the Panel's declaration was or was not
9 legally binding became a moot issue once ICANN's Board elected to adopt all of the *DCA*
10 Panel's recommendations, contrary to the representations in Plaintiff's Motion for Preliminary
11 Injunction.

12 11. Specifically, on July 9, 2015, the *DCA* Panel issued its Final Declaration. Bekele
13 Decl., Ex. 1. The *DCA* Panel determined that ICANN's Board had violated ICANN's Articles of
14 Incorporation and Bylaws by accepting the GAC's consensus advice that Plaintiff's application
15 for .AFRICA ("Application") should not proceed. The *DCA* Panel therefore recommended that
16 "ICANN continue to refrain from delegating the .AFRICA gTLD and permit [Plaintiff]'s
17 application to proceed through the remainder of the new gTLD application process." Bekele
18 Decl., Ex. 1 ¶ 149.

19 12. ICANN's Board promptly considered and adopted each of the *DCA* Panel's
20 recommendations. On July 16, 2015, the Board resolved to "continue to refrain from delegating
21 the .AFRICA gTLD," "permit [Plaintiff's] application to proceed through the remainder of the
22 new gTLD application process," and "reimburse *DCA* for the costs of the IRP." Attached hereto
23 as **Exhibit F** is a true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting
24 the *DCA* Panel's recommendations.

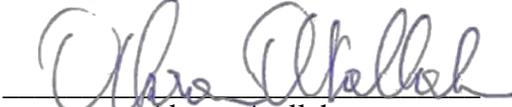
25 13. In the event ICANN is permitted to delegate the .AFRICA gTLD to ZACR, a
26 transfer or assignment of the gTLD in the future would still be possible, feasible and consistent
27 with ICANN's previous conduct. In fact, over forty gTLDs have had their registry contracts
28 transferred from one registry operator to a different registry operator, *i.e.*, transferred for

1 operation by a different registry operator than the operator when the registry contract was initially
2 executed. These transfers have occurred for a number of reasons, and transfers are not limited to
3 situations where a registry's contract with ICANN was expiring.

4 14. Nor is there any truth to DCA's argument in its Motion (at p. 12) that "the U.S.
5 government's ties with ICANN ceased" and therefore "the current procedure for gTLD re-
6 delegation is uncertain." In fact, nothing about the recent transition of the Internet Assigned
7 Numbers Authority ("IANA") functions from the United States government to ICANN has any
8 effect whatsoever upon the fact that it is possible to transfer the rights to operate a new gTLD
9 from one registry operator to another, post-delegation.

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

12 Executed this 9th day of December 2016, in Los Angeles, California.

13 
14 _____
Akram Atallah

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EXHIBIT E

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

EXHIBIT F



Resources

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Approved Board Resolutions | Special Meeting of the ICANN Board

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16 Jul 2015

1. Main Agenda

a. [DotConnectAfrica Trust \(DCA\) v. ICANN IRP Final Declaration](#) *Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05*

1. Main Agenda

a. [DotConnectAfrica Trust \(DCA\) v. ICANN IRP Final Declaration](#)

Whereas, on 9 July 2015, an independent review panel ("Panel") issued a final Declaration ("Declaration") in the independent review proceedings (IRP) initiated by DotConnectAfrica Trust (DCA), in which DCA sought relief relating to Board action or inaction on its application for .AFRICA.

Whereas, in the Declaration, the Panel set forth the following:

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness [sic], listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

150. The Panel declares DCA trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of the Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in

connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington D.C.

e) As a result of the above, the administrative fees of the ICDR totalling US\$4,600 and Panelists' compensation and expenses totalling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04.

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The parties shall also each bear their own legal representation fees.

Whereas, the independent review process is an integral ICANN accountability mechanism that helps support ICANN's multistakeholder model, and the Board thanks the Panel for its efforts in this IRP, and would like to specifically honor the memory of former panelist Hon. Richard C. Neal, who passed away during the proceedings.

Whereas, in addition to the Declaration, the Board must also take into account other relevant information, including but not limited to: (i) that ICANN received and accepted GAC consensus advice that DCA's application for .AFRICA should not proceed; and (ii) that ICANN has a signed Registry Agreement with ZA Central Registry ("ZACR") to operate the .AFRICA top-level domain.

Whereas, pursuant to Article IV, Section 3.21 of the Board considered the Declaration at the Board's next meeting, which the Board specifically scheduled in order to take action on this matter as quickly as possible.

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN shall continue to refrain from delegating the .AFRICA gTLD;
2. ICANN shall permit DCA's application to proceed through the remainder of the new gTLD application process as set out below; and
3. ICANN shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Resolved (2015.07.16.02), since the Board is not making a final determination at this time as to whether DCA's application for .AFRICA should proceed to contracting or delegation, the Board does not consider that resuming evaluation of DCA's application is action that is inconsistent with GAC advice.

Resolved (2015.07.16.03), the Board directs the President and CEO, or his designee(s), to take all steps necessary to resume the evaluation of DCA's application for .AFRICA and to ensure that such evaluation proceeds in accordance with the established process(es) as quickly as possible (see Applicant Guidebook at <http://newgtlds.icann.org/en/applicants/agb> for established processes).

Resolved (2015.07.16.04), with respect to the GAC's consensus advice in the Beijing Communiqué that DCA's application for .AFRICA should not proceed, which was confirmed in the London Communiqué, the Board will ask the GAC if it wishes to refine that advice and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration.

Resolved (2015.07.16.05), in the event that DCA's application for .AFRICA

successfully passes the remainder of the evaluation process, at that time or before, the Board will consider any further advice or information received from the GAC, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC's advice, the Board will follow the established process set out in the Bylaws (see ICANN Bylaws, Article XI, Section 2.1).

Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05

On 24 October 2013, DotConnectAfrica Trust (DCA) initiated an independent review proceeding (IRP) against ICANN, and filed a notice of independent review with the International Centre for Dispute Resolution (ICDR), ICANN's chosen IRP provider. In the IRP proceedings, DCA challenged the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (NGPC), which was delegated authority from the Board to make decisions regarding the New gTLD Program. In that decision, the NGPC accepted advice from ICANN's Governmental Advisory Committee (GAC) that DCA's application for .AFRICA should not proceed.

On 9 July 2015, the IRP Panel (Panel) issued its Final Declaration (Declaration or Decl.). The Panel cited two main concerns relating to the GAC's advice on DCA's application: (1) the Panel was concerned that the GAC did not include, and that ICANN did not request, a rationale on the GAC's advice; and (2) the Panel expressed concern that ICANN took action on the GAC's advice without conducting diligence on the level of transparency and the manner in which the advice was developed by the GAC. The Panel found that ICANN's conduct was inconsistent with the ICANN Articles and Bylaws because of certain actions and inactions of the ICANN Board.

As provided in [Article IV](#), Section 3 of the Bylaws, any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. The Panel is charged with comparing the contested Board actions to the Articles of Incorporation and Bylaws, and declaring whether the Board acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel must apply a defined standard of review to the IRP request focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

After the Panel issues its final Declaration, the Board is then required to consider the Declaration at its next meeting (where feasible). Pursuant to Article IV, Section 3.21 of the ICANN Bylaws, the Board has considered and discussed the Declaration and is taking action to: (1) continue to refrain from delegating the .AFRICA gTLD; (2) permit DCA's application to proceed through the remainder of the new gTLD application process; and (3) reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Additionally, the Board will communicate with the GAC and attempt to ascertain whether the GAC wishes to refine its advice concerning DCA's application for .AFRICA and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration. The Board will consider any response the GAC may choose to provide, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC's advice, the Board will follow the established processes set out in the Bylaws. As required by the Bylaws, if the Board

decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The Board's action represents a careful balance, weighing the opinion of the Panel, as well as other significant factors discussed in this rationale. In taking this action today, each of the Board members exercised independent judgment, was not conflicted on this matter, and believes that this decision is in the best interests of the ICANN. The Board considered several significant factors as part of its consideration of the Declaration and had to balance its consideration with other factors. Among the factors the Board considered to be significant are the following:

1. The IRP is an integral ICANN accountability mechanism that helps support ICANN's multistakeholder model. The Board considers the principles found in ICANN's accountability mechanisms to be fundamental safeguards in ensuring that ICANN's bottom-up, multistakeholder model remains effective, and ICANN achieves its accountability and transparency mandate. The Board has carefully considered the Declaration, and in taking its action the Board, as did the Panel, takes specific note of the following regarding the independent review process and its obligations for accountability and transparency:
 - ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. (Decl. ¶ 94.)
 - ICANN is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness." (Decl. ¶ 95.)
 - As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws. (Decl. ¶ 97.)
2. ICANN has a signed Registry Agreement with ZA Central Registry NPC trading as Registry.Africa (ZACR) under which ZACR is authorized to operate the .AFRICA top-level domain. Parties affected by these resolutions have had, and may continue to have, the ability to challenge or otherwise question DCA's application through the evaluation and other processes.
3. The Board considered the community-developed processes in the New gTLD Program Applicant Guidebook (Guidebook). According to Section 3.1 of the Guidebook, the GAC may provide public policy advice to the ICANN Board on any application, which the Board must consider. When the GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed, it "will create a strong presumption for the ICANN Board that the application should not be approved." In its 11 April 2013 Beijing Communiqué, the GAC [stated](#) it had reached consensus on GAC Objection Advice for .AFRICA application number 1-1165-42560, thereby creating a strong presumption for the ICANN Board that this application should not proceed through the program. Additionally, in its 25 June 2014 London Communiqué, the GAC [stated](#) that "Consistent with the new gTLD applicant guidebook, the GAC provided consensus advice articulated in the April 11 2013 communiqué that the DotConnectAfrica (DCA) application number 1-1165-42560 for dot Africa should not proceed. The GAC welcomes the June 2013 decision by the New gTLD Program Committee to accept GAC advice on this application."

The Guidebook does not require the Board to engage the GAC in a dialogue about its advice when consensus has been reached, or question the GAC how such consensus was reached. The acceptance of the GAC advice on this

matter was fully consistent with the Guidebook. Notably, however, the Board has requested additional information from the GAC when the Board thought it needed more information before taking a decision, both before and during the New gTLD Program. Here, the NGPC did not think it required additional information from the GAC. Further, in addition to the GAC advice, the Board also had DCA's response to that advice, which the NGPC considered before accepting the GAC advice. Notwithstanding the Guidebook, the Panel has suggested that, ". . . the GAC made its decision without providing any rationale . . ." (Decl. ¶ 104), and ". . . the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application." (Decl. ¶ 113).

4. The Board considered Section 5.1 of the Guidebook, which provides that, "ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism."

On balance, the Board has determined that permitting DCA's application to proceed through the remainder of the new gTLD application evaluation process is the best course of action at this time. Doing so helps promote ICANN's ability to make a decision concerning DCA's application for .AFRICA by applying documented procedures in the most transparent, neutral and objective manner possible, while also recognizing the importance of ICANN's accountability mechanisms. Completion of the application evaluation would allow DCA's application to undergo the same review processes as other gTLD applicants, and is not inconsistent with the GAC's advice. Further, completing the evaluation will provide additional relevant information for ICANN to consider as part of any final determination as to whether DCA's application for .AFRICA should proceed beyond initial evaluation.

There will be a financial impact on ICANN in taking this decision in that resuming the evaluation process for DCA's application for .AFRICA will result in additional cost, but that cost was anticipated in the application fee already received. The Board directs the President and CEO to re-engage the evaluation processes for DCA's application as quickly as possible, and to strongly encourage any third-party providers charged with performing the relevant New gTLD Program evaluations and analysis also to act as quickly as possible in concluding their evaluations in accordance with the established processes and procedures in the Guidebook.

There may also be additional costs to ICANN the extent any party challenges this decision. This action will have no impact on the security, stability or resiliency of the domain name system.

The significant materials related to the matters at issue in the Determination include, but are not limited to the following:

- Dakar Communiqué (27 October 2011) (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Dakar%20-%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
- Letter from Stephen Crocker to Elham M.A. Ibrahim (<https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf>)
- African Union Communiqué (<https://www.icann.org/resources/files/african-union-communication-2011-10-21-en>)

- DotConnectAfrica Trust's application for .AFRICA (<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276>)
- ZACR's application for .AFRICA (<https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184>)
- Letter from Heather Dryden to Stephen Crocker (17 June 2012) re: Processing of Applications for New Generic TopLevel Domain (<https://www.icann.org/en/news/correspondence/dryden-to-crocker-17jun12-en>)
- Letter from Stephen Crocker to Heather Dryden (27 July 2012) re: Processing of applications for New Generic Top-Level Domains (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf>)
- GAC Early Warnings filed against DCA's application for .AFRICA
 - African Union Commission: <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>
 - Comoros: <https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2>
 - Kenya: <https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2>
 - Cameroon: <https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2>
 - DRC: <https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2>
 - Benin: <https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2>
 - Egypt: <https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
 - Gabon: <https://gacweb.icann.org/download/attachments/27131927/Africa-GA-42560.pdf?version=1&modificationDate=1353451525000&api=v2>
 - Burkina Faso: <https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
 - Ghana: <https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
 - Mali: <https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
 - Uganda: <https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
 - Senegal: <https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
 - South Africa: <https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
 - Nigeria: <https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>

- Tanzania: <https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
- DCA Response to GAC Early Warning (<http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-GAC-Early-Warning-Advice-against-the-.Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf>)
- GAC Beijing Communiqué (11 April 2013) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf>)
- DCA Response to GAC Advice in Beijing Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>)
- NGPC Resolution 2014.06.04.NG01 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a>)
- The NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué (4 June 2013) (<https://www.icann.org/en/groups/board/documents/new-gtld-resolution-annex-1-04jun13-en.pdf>)
- DCA Trust Reconsideration Request 13-4 and attachments (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf>)
- BGC Recommendation on Reconsideration Request 13-14 (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf>)
- NGPC Action Adopting BGC Recommendation on Reconsideration Request 13-4 (<https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c>)
- GAC London Communiqué (25 June 2014) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-25jun14-en.pdf>)
- DCA Response to GAC Advice in London Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf>)
- NGPC Resolution 2014.09.08.NG02 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en-1.b>)
- The NGPC Scorecard - GAC Advice (London, Singapore, Buenos Aires, Durban, Beijing): Actions and Updates (as of 8 September 2014) (<https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf>)
- Letter from Steve Crocker to Heather Dryden re: NGPC Meeting of 8 September 2014 (<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf>)
- All briefs, declarations, and supporting documents filed by DCA Trust and ICANN in the Independent Review Proceeding *DCA Trust v. ICANN* (<https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en>)
- Letter from Akram Atallah to Neil Dundas (13 July 2015) re: Final Declaration in the DotConnectAfrica Trust (DCA) Independent Review Proceeding (IRP) (<https://www.icann.org/en/system/files/correspondence/atallah-to-undas-13jul15-en.pdf>)

- Letter from Dr. Elham M.A. Ibrahim to Steve Crocker (14 July 2015) re: Independent Review Panel (IRP) recommendation on the matter between DCA and ICANN related to Dot Africa gTLD
(<https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf>)
- Letter from Lucky Masilela to Steve Crocker (15 July 2015) re: ZACR Response on the Independent Review Process (IRP) Final Declaration
(<https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf>)

This is an Organizational Administrative function that does not require public comment.

Published on 16 July 2015



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Community Wiki



ICANN Blog

Who We Are

Get Started
Learning
Participate
Groups
Board
President's Corner
Staff
Careers
Newsletter
Development and Public Responsibility

Contact Us

Offices
Global Support
Security Team
PGP Keys
Certificate Authority
Registry Liaison
Specific Reviews
Organizational Reviews
Request a Speaker For Journalists

Accountability & Transparency

Accountability Mechanisms
Independent Review Process
Request for Reconsideration
Ombudsman

Governance

Documents
Agreements
Specific Reviews
Annual Report
Financials
Document Disclosure
Planning
KPI Dashboard
RFPs
Litigation
Correspondence

Help

Dispute Resolution
Domain Name Dispute Resolution
Name Collision
Registrar Problems
WHOIS

EXHIBIT E

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7 Attorneys for Defendant
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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.

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: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

1 **DECLARATION OF KEVIN ESPINOLA**

2 I, Kevin Espinola, declare the following:

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

9 2. ICANN and its community developed the New gTLD Applicant Guidebook
10 (“Guidebook”) as part of a years-long, bottom-up multistakeholder process during which
11 numerous versions were published by ICANN for public comment and revised, in part based on
12 comments received. In total, six versions of the Guidebook were published for public comment.

13 3. In the April 15, 2011 version of the Guidebook (“April 2011 Guidebook”),
14 language was added to Section 6 of Module 6 of the Guidebook (“Covenant Not to Sue”) making
15 explicit that: “[an] applicant may utilize any accountability mechanism set forth in ICANN’s
16 Bylaws for [the] purposes of challenging any final decision made by ICANN with respect to the
17 application.” Attached hereto as **Exhibit K** is a true and correct copy of Module 6 of the April
18 2011 version of the Guidebook, which was published with a redline, showing changes made from
19 the prior version of the Guidebook.

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

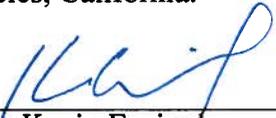
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 8th 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

Module 6

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.

EXHIBIT F

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

**DCA'S RESPONSE TO THE PANEL'S QUESTIONS ON PROCEDURAL
ISSUES**

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Counsel for Claimant

20 May 2014

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I. INTRODUCTION

1. DCA hereby provides its responses to the questions posed by the IRP Panel on 12 May 2014.¹

II. THE IRP PANEL HAS THE DISCRETION TO DETERMINE THAT THE IRP IS FINAL AND BINDING PURSUANT TO THE DOCUMENTS GOVERNING THE PROCESS AND CALIFORNIA LAW (Questions 1-9, 12-16)

2. The documents ICANN itself drafted provide the foundation for responding to the Panel's questions.² ICANN selected the ICDR to administer the IRP under *both* the Supplementary Procedures and the ICDR Rules.³ Within this framework, the Panel "may conduct the arbitration in *whatever manner it considers appropriate*, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."⁴

A. The IRP Is Final and Binding Pursuant to the Documents Governing the IRP Process (Question 16)

3. The IRP Panel's declaration is final and binding according to these governing documents.⁵ ICANN gave the IRP Panel the power to "*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws"⁶ and provided that the "*declarations*" of the IRP Panel are "*final and have precedential value*."⁷ ICANN is correct that "Section 3 never refers to the IRP panel's declaration as a 'decision' or 'determination,'"⁸ but the Supplementary Procedures—*the procedures that ICANN designed to govern the IRP*—define "**declaration**" as "**decisions/opinions of**

¹ See Questions for the Parties' Representatives to Address in Their Rebuttal Memorials of 20 May 2014 (12 May 2014).

² ICANN created the IRP to provide for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws." ICANN Bylaws, § 3(1) [Amended Notice of IRP, Ex. C-10]. The documents which control the proceeding are the ICANN Bylaws, the ICANN Supplementary Procedures for IRP and the ICDR Rules.

³ See ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibit C-3]. The Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern. Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern. See *id.*, at § 2.

⁴ ICDR Rules, Art. 16 (emphasis added) [Ex. C-M-15]; see also DCA's Submission on Procedural Issues, para. 45 (5 May 2014).

⁵ See DCA's Submission on Procedural Issues, paras. 23-35.

⁶ ICANN Bylaws, Art. IV, § 3(11)(c) [Amended Notice of IRP, Ex. C-10].

⁷ *Id.*, at Art. IV, § 3(21).

⁸ ICANN's Memorandum Regarding Procedural Issues, para. 33.

the IRP PANEL.”⁹ By contrast, ICANN used different terminology to describe the reconsideration process in order to leave no doubt that that process is non-binding, specifying that the Board need not follow Board Governance Committee recommendations.¹⁰

B. ICANN Submitted Itself to the Jurisdiction of the IRP Panel Because Its Bylaws Contain a Standing Offer to Arbitrate Claims (Question 5)

4. ICANN’s Bylaws contain its standing offer to arbitrate disputes concerning Board actions, much as some sovereign States provide a standing offer to arbitrate investment disputes in bilateral or multilateral treaties.¹¹ On 24 October 2013, DCA accepted ICANN’s standing offer to arbitrate by submitting its Notice of Independent Review (the “Notice”) to the ICDR.¹² Thus, this process is consensual.

C. As The Sole Process Through Which DCA Can Pursue Its Claims Against ICANN, The IRP Must Be Capable Of Providing A Final and Binding Decision In This Matter (Questions 1-6, 12-15)

5. The New gTLD Applicant Guidebook (the “Guidebook”) shepherds applicants through the new gTLD application and evaluation process.¹³ Module 6 of the Guidebook contains eight pages of terms and conditions that an applicant “agrees to . . . without modification” by submitting an application for a gTLD, including significant waivers of rights:¹⁴

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 FOR A [SIC] ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY*

⁹ ICANN Supplementary Procedures for IRP, § 1 [Amended Notice of IRP, Exhibit C-3]. A decision or opinion connotes finality. *See* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “opinion” as “[a] court’s written statement explaining its decision in a given case,” and “decision” as “[a] judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case”) [Ex. C-M-24].

¹⁰ *See* ICANN Bylaws, Art. IV, § 2 [Amended Notice of IRP, Ex. C-10]; *see also* DCA’s Submission on Procedural Issues, paras. 33-35 (5 May 2014).

¹¹ *See* ICANN Bylaws, Art. IV, § 3(1), 3(7) [Amended Notice of IRP, Ex. C-10].

¹² DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

¹³ *See* ICANN Guidebook (Version 2012-06-04) [Amended Notice of IRP, Ex. C-11].

¹⁴ *Id.*, Module 6.

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.¹⁵

Applicants also forgo the right to recover “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.”¹⁶ In exchange for waiving these significant legal rights, Section 6 of Module 6 grants applicants the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN’s Bylaws, including the IRP.¹⁷

6. As a result, the IRP is the *sole forum* in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere “corporate accountability mechanism.”¹⁸ Such a result would make ICANN—the caretaker of an immensely important (and valuable) global resource—effectively judgment-proof.

7. It is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights to challenge ICANN in court or any other forum and not provide a substitute accountability mechanism capable of producing a binding remedy.¹⁹ Such one-sided terms imposed on parties signing litigation waivers have been flatly rejected by California courts.²⁰ Where California courts have considered and upheld broad litigation waivers, the

¹⁵ *Id.*, Module 6(6) (emphasis added).

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ ICANN’s Memorandum Regarding Procedural Issues, para. 19 (5 May 2014). We are not aware of nor has ICANN cited any genuine support for its argument that ICANN would be in violation of California law if the Panel’s decision on whether ICANN acted consistently with its Articles of Incorporation and Bylaws is final and binding on both parties.

¹⁹ California law and United States federal law constitute the law of the seat and form the relevant legal background for matters of procedure in this IRP. The merits of the dispute are governed by ICANN’s Bylaws and Articles of Incorporation, the gTLD Applicant Guidebook, and international and local law, as provided in Article 4 of ICANN’s Articles of Incorporation. *See* DCA’s Submission on Procedural Issues, paras. 2-3 (5 May 2014). In response to the Panel’s **Question 12**, we are not aware of any other case (aside from *ICM v. ICANN*) in which a decision-maker has upheld an arbitration-like proceeding that was non-binding yet foreclosed the claimant from seeking any other remedies.

²⁰ *See, e.g., Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 (Cal. Ct. App. 1980) [Ex. C-M-27].

alternative to court litigation provided by the parties' contract is inevitably a *binding* dispute resolution mechanism.²¹ Thus, in order for this IRP not to be unconscionable, it must be binding.

1. The Principle of *Contra Proferentem* Should Apply to the Terms Governing the IRP Because Section 6 of Module 6 of the Guidebook is an Unenforceable Adhesion Contract (Question 6)

8. Module 6 of the Guidebook is an adhesion contract under California law.²² ICANN, the party that holds all of the power to decide who is awarded gTLDs, drafted Module 6 of the Guidebook to apply to all applicants on a “take it or leave it” basis. When an applicant submits its application, the applicant agrees to be bound by the terms and conditions “*without modification.*”²³ Furthermore, DCA had *no other option* to obtain the rights to .AFRICA but to apply to ICANN and be bound by ICANN's terms, including those governing its right to relief in the IRP—the *only* process through which DCA can pursue its claims against ICANN.

9. California law supports applying the principle of *contra proferentem* to adhesion contracts, particularly in situations such as this where there is a significant imbalance of power between the parties.²⁴ Accordingly, all ambiguities in the documents governing the IRP should be construed against ICANN.

2. The Panel May Limit the Application of Certain Terms Governing the IRP Because the Agreement to Use the IRP is Procedurally and Substantively Unconscionable (Questions 1-6, 12-15)

10. If the Panel were to find that the IRP were a non-binding procedure that wholly replaces any right of applicants to seek redress against ICANN in any other forum, this proceeding would be unconscionable under California law. A contractual clause or agreement is unenforceable under

²¹ See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979 [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922 [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 161 Cal. Rptr. 146 [Ex. C-M-27] (each upholding the arbitration clause, absent the portion providing for appeal).

²² An ‘adhesion contract’ is a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.” *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1159 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) [Ex. C-M-29]; see, e.g., *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 925 (Cal. Ct. App. 1996) [C-M-26].

²³ ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

²⁴ See *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1173 (N.D. Cal. 2002) [Ex. C-M-30]; *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989) [Ex. C-M-31].

California law if it is both procedurally and substantively unconscionable.²⁵ “California courts apply a ‘sliding scale’ analysis in making this determination . . . the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”²⁶

11. Procedural unconscionability arises from the manner of negotiation.²⁷ While there is no consensus among California courts that an adhesion contract is *ipso facto* procedurally unconscionable, at a minimum, adhesion contracts notify courts that a contract may be procedurally unconscionable.²⁸ Courts have found that “negotiations” where one party has no real negotiating power—like DCA when it submitted its application for a new gTLD—are oppressive for purposes of procedural unconscionability under California law.²⁹

12. California courts recognize a heightened degree of procedural unconscionability where there is a lack of disclosure of terms to the weaker party or when the weaker party is bound to terms that are subject to change at the discretion of the stronger party.³⁰ As we have argued elsewhere, the language ICANN used in the documents governing the IRP suggests that the IRP Panel’s decision is final and binding on ICANN.³¹ Yet ICANN now denies that the impression it has given applicants is correct. In addition, ICANN reserved all rights to modify its Bylaws at any time during the gTLD application process.³² While ICANN has not modified the IRP process in the Bylaws since DCA filed its

²⁵ See *Pokorny v. Quixtar*, 601 F.3d 987, 996 (9th Cir. 2010) (citing *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1072 (9th Cir. 2007) [Ex. C-M-32]).

²⁶ *Id.* (quoting *Davis v. O’Melveny & Myers*, 485 F.3d at 1072).

²⁷ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746, 179 L. Ed. 2d 742 (2011) [Ex. C-M-33]; *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 922 (9th Cir. 2013) [Ex. C-M-34].

²⁸ See *Roman v. Superior Court*, 92 Cal. Rptr. 3d 153, 161 (Cal. Ct. App. 2009) [Ex. C-M-35]; see generally *Mance v. Mercedes-Benz USA*, 901 F. Supp. 2d 1147, 1160 (N.D. Cal. 2012) [Ex. C-M-28]; *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th at 113 [Ex. C-M-29].

²⁹ See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d at 996 (describing the “oppression” element of procedural unconscionability) [Ex. C-M-32].

³⁰ See *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

³¹ See DCA’s Submission on Procedural Issues, paras. 23-35 (5 May 2014).

³² ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].

application, ICANN did modify the IRP proceeding in December 2012, *after* the application period for new gTLDs had opened and closed.³³

13. The terms of the Guidebook are “oppressive” because applicants like DCA have no opportunity to negotiate the terms and conditions. ICANN is uniquely positioned to distribute TLDs, and applicants wishing to operate one have literally no other market to turn to in order to operate a TLD on the public Internet.³⁴ Because all individuals wishing to operate a new gTLD were required to sign an application in 2012 waiving all their legal rights against ICANN, Module 6 is clearly oppressive under California law. Similarly, because ICANN reserves the sole right to modify the terms of that waiver by modifying its IRP procedures under the Bylaws and Supplementary Procedures, applicants signing Module 6 are subject to an element of surprise. Finally, in this case, DCA was subject to surprise because ICANN has argued an interpretation of its IRP rules that contradicts the reasonable reading that IRP procedures will be “final and binding.” Thus, Section 6 of Module 6 and the IRP procedures are procedurally unconscionable.

14. The terms of Section 6 of Module 6 and the IRP as interpreted by ICANN are also substantively unconscionable because the nature of the terms is so unjustifiably one-sided that it “shocks the conscience.”³⁵ Courts determine substantive unconscionability on a case-by-case basis; however, terms which have been found substantively unconscionable include (i) a one-sided obligation that the weaker party utilize alternative dispute resolution, while the stronger party retains all legal rights;³⁶ (ii) a clause

³³ The application period for new gTLDs opened on 12 January 2012, and all applications were required to be submitted by the closing date of 20 April 2012. See “New gTLD Program,” ICANNwiki.com, http://icannwiki.com/index.php/New_gTLD_Program. Meanwhile, ICANN modified its Bylaws on 16 March 2012, 20 December 2012, 11 April 2013 and 7 February 2014. The 20 December 2012 modification resulted in significant changes to the IRP process.

³⁴ Notably, however, the lack of negotiation of Module 6 of the Guidebook could be considered equally oppressive for the purposes of procedural unconscionability under California law, even if there were an alternate provider for TLDs. See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 997 [Ex. C-M-32].

³⁵ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 923 [Ex. C-M-34].

³⁶ See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 1001 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36]; *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

which allows the stronger party to unilaterally modify the terms of the arbitration agreement;³⁷ (iii) an obligation that the weaker party initially utilize a non-binding mechanism that provides the stronger party a “free peek” at the weaker party’s evidence;³⁸ (iv) stringent time limits imposed only on the weaker party;³⁹ and (v) an effect that is binding only on the weaker party.⁴⁰ ICANN’s interpretation of the rules governing this proceeding implicates *every single one of these factors*. To highlight a few—

- Applicants surrender all rights to bring suit against ICANN and must utilize the IRP process, whereas ICANN retains all legal rights against applicants;⁴¹
- ICANN reserves the power to unilaterally alter the IRP process;⁴²
- ICANN effectively forces applicants to give ICANN a “peek” at their cases, by imposing fee sanctions on applicants who do not utilize the cooperative engagement process prior to filing an IRP;⁴³
- Strict time limits apply to applicants: applicants must file their case within 30 days of the Board decision they wish to challenge, and according to ICANN, applicants must present their entire case in the IRP in their initial request for an IRP Panel;⁴⁴ and
- The IRP process is binding on applicants, but ICANN argues it is not binding on ICANN.⁴⁵

15. California courts have ruled non-binding arbitration agreements similar to what ICANN claims the IRP is unconscionable.⁴⁶ Under California law, where a court or a tribunal determines that a contract term is unconscionable, the deciding body may (i) refuse to enforce the contract as a whole, (ii) enforce the remainder of the contract without the unconscionable clause or (iii) limit any unconscionable clause

³⁷ See *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 998 (9th Cir. 2010) [Ex. C-M-32].

³⁸ *Id.*, at 998; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

³⁹ See *Pokorny v. Quixtar, Inc.*, 601 F.3d at 999 [Ex. C-M-32]; *Nyulassy v. Lockheed Martin Corp.*, 16 Cal.Rptr.3d at 307 [Ex. C-M-36].

⁴⁰ See *Little v. Auto Stiegler, Inc.*, 29 Cal. 4th 1064, 63 P.3d 979 (2003) [Ex. C-M-25]; *Saika v. Gold*, 49 Cal. App. 4th 1074, 56 Cal. Rptr. 2d 922 (1996) [Ex. C-M-26]; *Beynon v. Garden Grove Medical Group*, 100 Cal.App.3d 698, 161 Cal. Rptr. 146 (1980) [Ex. C-M-27].

⁴¹ ICANN Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

⁴² ICANN Bylaws, Art. XIX [Amended Notice of IRP, Ex. C-10].

⁴³ *Id.*, Art. IV § 3(16).

⁴⁴ *Id.*, Art. IV § 3(3).

⁴⁵ *Id.*, Art. IV § 3(11) (“The IRP Panel shall have the authority to...summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious”).

⁴⁶ See, e.g., *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 [Ex. C-M-32].

to avoid an unconscionable result.⁴⁷ The IRP can function as an effective accountability mechanism if this Panel limits the application of the unconscionable terms to avoid an unconscionable result.⁴⁸

III. INTERNATIONAL PRINCIPLES OF DUE PROCESS APPLY TO THE IRP BECAUSE IT WAS DEvised AS A MECHANISM TO HOLD ICANN ACCOUNTABLE IN A GLOBAL CONTEXT (Questions 10-11, 17-19)

16. Pursuant to general principles of international law, DCA has a right to view and rebut the evidence presented by ICANN against it.⁴⁹ These same principles give tribunals great latitude to structure a procedure in order to establish the truth of a case.⁵⁰ Pursuant to ICANN's Articles of Incorporation, the ICANN IRP proceeding must accord with these general principles.⁵¹

A. The Procedures ICANN Argues Should Apply in the IRP Are More Restrictive of DCA's Procedural Due Process Rights than Other Major Sets of International Arbitration Rules (Questions 17-18)

17. More specifically, the Bylaws indicate that ICANN must respect fundamental principles of fairness.⁵² According to ICANN's interpretation, it has crafted the IRP so as to deprive claimants of common procedural rights. For example, no other major set of international arbitration rules requires a claimant to submit all evidence supporting its claim with the initial filing.⁵³ None of the other major sets of international arbitration rules preclude live testimony or cross-examination of witnesses.⁵⁴

⁴⁷ See Cal. Civil Code Sec. 1670.5. Section 1670.5 of the California Civil Code gives tribunals the authority to examine whether an arbitration or other alternative dispute resolution clause is unconscionable pursuant to California law, just as it provides the authority to examine the unconscionability of any other contract clause [Ex. C-M-37]. See also, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d at 919 (holding that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not prevent California courts from applying section 1670.5 of the California Code to determine the unconscionability of arbitration agreements) [Ex. C-M-34].

⁴⁸ DCA's position is consistent with the general preference of courts to read the contract so as to exclude the unconscionable portion, unless doing so would achieve an unconscionable result or unless doing so is impossible given the prevalence of substantive and procedural unconscionability throughout the entire contract. See, e.g., *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987 (Cal. 2003) [Ex. C-M-25]; *Saika v. Gold*, 56 Cal. Rptr. 2d 922, 923 (Cal. Ct. App. 1996) [Ex. C-M-26]. California courts will invalidate the entire arbitration agreement if two conditions are satisfied: (i) there are multiple unlawful provisions and (ii) the unconscionability is so rampant that there is no way for the court to remove the unconscionable "taint" from the agreement. *Armenariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 124 (Cal. 2000) [Ex. C-M-29].

⁴⁹ According to the principle of *audi alteram partem*, "whenever there is such new evidence, alteration of the legal basis of the claim or amendment of the original submission, the other party is always assured of an opportunity to reply thereto, or comment thereon." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 295 (2006) [Ex. C-M-38].

⁵⁰ See *id.*

⁵¹ See ICANN Articles of Incorporation, Art. 4 [Amended Notice of IRP, Ex. C-9].

⁵² See ICANN Bylaws, Art. I § 2 [Amended Notice of IRP, Ex. C-10].

⁵³ See ICDR Rules, Art. 2(2), (3)(e) [Ex. C-M-15]; International Chamber of Commerce Arbitration Rules [hereinafter, ICC Rules], Art. 4(3)(c) [Ex. C-M-39]; the United Nations Commission on International Trade Law Arbitration Rules [hereinafter, the UNCITRAL

18. ICANN, however, is asking this Panel, to conduct a one-sided process that—if we accept ICANN’s interpretation of the terms of the IRP—severely limits DCA’s opportunity to gather evidence, test the evidence presented against it and present its case.⁵⁵

B. Document Production is Necessary and Appropriate, In Light of the Restrictions on Procedural Due Process Argued for by ICANN (Question 19)

19. The IRP Panel has the authority to order the production of documents in these proceedings, and DCA respectfully requests that it do so.⁵⁶ ICANN seeks a decision on the merits with the deck stacked against DCA, even relying on documents it has not provided. While DCA agrees that these proceedings should be expedited, they should not be a one-sided process.

C. Harvard’s Berkman Center Report on ICANN’s Accountability Structure (Question 10)

20. The Berkman Center has made available some of the materials it used in preparing its report on its website.⁵⁷ The Panel may wish to consult, *inter alia*, Professor Jack Goldsmith’s reflections on the IRP process based on his knowledge of the *ICM* case,⁵⁸ and the history of the new gTLD process.⁵⁹

IV. CONCLUSION

21. Based on the foregoing, DCA respectfully requests that the Panel issue a procedural order declaring that—

Rules], Art. 3(3)(e)(f) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rule 9(a)-(b) (1 Oct. 2010) [Ex. C-M-41]. Although the UNCITRAL Rules permit a claimant to submit its written submission and all supporting evidence with its notice, the rules do not require it. UNCITRAL Rules, Art. 20(1), (4) [Ex. C-M-40].

⁵⁴ See ICC Rules, Art. 25(3), (5) [Ex. C-M-39]; UNCITRAL Rules, Arts. 17(3), 28(2) [Ex. C-M-40]; JAMS Comprehensive Arbitration Rules & Procedures, Rules 21-22 (1 Oct. 2010) [Ex. C-M-41].

⁵⁵ We note here in response to the Panel’s **Question 11** that, even in advisory proceedings such as those before the International Court of Justice, interested parties are provided an opportunity to make submissions. Similarly, arbitral tribunals increasingly permit submissions by third parties who may have an interest in the outcome of a dispute, and UNCITRAL has recently promulgated rules on transparency in investor-State arbitration encouraging this practice, among others. See UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (effective as of 1 April 2014), available at <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf> (accessed 19 May 2014).

⁵⁶ See DCA’s Submission on Procedural Issues, paras. 67-68 (5 May 2014).

⁵⁷ See <http://cyber.law.harvard.edu/pubrelease/icann/> (accessed 19 May 2014).

⁵⁸ <http://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf> (noting, among other things, that the IRP process is flawed, but permits fully developed hearings with cross-examination of witnesses, particularly where the facts are complex and the stakes high) (accessed 19 May 2014).

⁵⁹ http://cyber.law.harvard.edu/pubrelease/icann/pdfs/AppendixC_gTLDs.pdf (accessed 19 May 2014).

- The Panel has the authority to strike out any unconscionable element of the IRP framework imposed by ICANN;
- Each party shall have the opportunity to request documents from the other, and to seek an order from the Panel compelling production of documents if necessary;
- Each party shall have the opportunity to submit one additional written pleading on the merits of this dispute;
- There will be a hearing on the merits conducted by videoconference; and
- The Panel retains the discretion to examine witnesses at the hearing.

Respectfully submitted,



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EXHIBIT G

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE # 50 2013 001083

DECLARATION ON THE IRP PROCEDURE

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures (ICDR Rules)* of the International Centre for Dispute Resolution (ICDR), and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel:
Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

I. BACKGROUND

- 1) DCA Trust is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
- 2) In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
- 3) ICANN is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
- 4) On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
- 5) On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
- 6) On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
- 7) On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

II. SUMMARY OF THE PARTIES’ POSITIONS ON THE MERITS

- 8) According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process (“IRP”) invoked by DCA Trust in October 2013 and described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

- 9) According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
- 10) In its 10 February 2014 [sic]⁴ Response to DCA Trust’s Amended Notice, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
- 11) ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
- 12) Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error; it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4. Underlining is from the original text.

⁶ *Ibid.*, *para.* 5.

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."⁷

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."⁸

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.

Issues:

- a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
- b) Document request and exchange.
- c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

⁷ *Ibid.*

⁸ ICANN's Response to Claimant's Amended Notice, *para.* 6. Underlining is from the original text.

- d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties (“Outstanding Procedural Issues”); and (c) certain *primaie impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

IV. ISSUES TO BE DECIDED BY THE PANEL

19) Having read the Parties’ submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

- 1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?
- 2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?
- 3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

Summary of the Panel’s findings

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

V. ANALYSIS OF THE ISSUES AND REASONS FOR THE DECISION

1) Can the Panel interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

Interpretation and Future Conduct of the IRP Proceedings

DCA Trusts' Submissions

21) In its 5 May 2014 Submission on Procedural Issues ("DCA Trust First Memorial"), DCA Trust submitted, *inter alia*, that:

"[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision[...]. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration."⁹

22) According to DCA Trust, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear disputes involving ICANN. Therefore, it "qualifies as a third-party decision-maker for the purposes of defining the IRP as an arbitration."¹⁰ DCA Trust submits that, "ICANN's Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws."¹¹

23) DCA Trust submits that, it "accepted ICANN's standing offer to arbitrate by submitting its Notice of Independent Review [...] to the ICDR on 24 October 2013 [...] when the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules, amended and effective 1 June 2009. The Parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration."¹²

24) According to DCA Trust, "the Supplementary Procedures provide that the IRP is to be comprised of 'neutral' [individuals] and provide that the panel shall be comprised of members of a standing IRP Panel or as selected by the

⁹ DCA Trust First Memorial, *para.* 4 and 5.

¹⁰ *Ibid*, *para.* 8.

¹¹ *Ibid*, *para.* 9.

¹² *Ibid*.

parties under the ICDR Rules. The ICDR Rules [...] provide that panelists serving under the rules, ‘shall be impartial and independent’, and require them to disclose any circumstances giving rise to ‘justifiable doubts’ as to their impartiality and independence [...] The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration.”¹³

25) DCA Trust further submitted that the “IRP affords both parties an opportunity to be heard, both in writing and orally” and the “governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding.” According to DCA Trust, the “IRP is the final accountability and review mechanism available to the parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party [...] The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself.”¹⁴

26) As explained in its 20 May 2014 Response to the Panel’s Questions on Procedural Issues (“DCA Trust Second Memorial”), according to DCA Trust, “the IRP is the ***sole forum*** in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere ‘corporate accountability mechanism’. Such a result would make ICANN – the caretaker of an immensely important (and valuable) global resource – effectively judgment-proof.”¹⁵

27) Finally DCA Trust submitted that:

“[It] is [...] critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN’s decision on DCA’s application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of

¹³ *Ibid*, paras. 10, 11 and 12.

¹⁴ *Ibid*, paras. 13, 16, 21 and 23.

¹⁵ DCA Trust Second Memorial, para. 6. Bold and italics are from the original text.

administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.”¹⁶

ICANN’s Submissions

28) In response, in its first memorial entitled ICANN’s Memorandum Regarding Procedural Issues filed on 5 May 2014 (“ICANN First Memorial”), ICANN argued, *inter alia*, that:

“[This] proceeding is *not* an arbitration. Rather, an IRP is a truly unique ‘Independent Review’ process established in ICANN’s Bylaws with the specific purpose of providing for ‘independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws’. Although ICANN is using the International Center [sic] for Dispute Resolution (‘ICDR’) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an ‘arbitration’, and the Bylaws make clear that these proceedings are not to be deemed as the equivalent of an ‘international arbitration.’ Indeed, the word ‘arbitration’ does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels [...] ICANN’s Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a non-profit public benefit corporation to adopt and amend the corporation’s bylaws).”¹⁷

29) In its 20 May 2014 Further Memorandum Regarding Procedural Issues (“ICANN Second Memorial”), ICANN submitted that many of the questions that the Panel posed “are outside the scope of this Independent Review Proceeding [...] and the Panel’s mandate.”¹⁸ According to ICANN:

“The Panel’s mandate is set forth in ICANN’s Bylaws, which limit the Panel to ‘comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”¹⁹

The Panel’s Decision on its power to interpret and determine the IRP Procedure

(i) Mission and Core Values of ICANN

30) ICANN is not an ordinary California non-profit organization. Rather, ICANN has a large international purpose and responsibility, to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular, to ensure the stable and secure operation of the Internet’s unique identifier systems.

¹⁶ DCA Trust First Memorial, *para.* 22.

¹⁷ ICANN First Memorial, *paras.* 10 and 11. Bold and italics are from the original text.

¹⁸ ICANN Second Memorial, *para.* 2.

¹⁹ *Ibid.*

31) ICANN coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. ICANN's special and important mission is reflected in the following provisions of its Articles of Incorporation:

3. This Corporation is a [non-profit] public benefit corporation and is not organized for the private gain of any person. It is organized under the California [Non-profit] Public Benefit Corporation Law for charitable and public purposes. The Corporation is *organized, and will be operated, exclusively for charitable, educational, and scientific purposes ...* In furtherance of the foregoing purposes, and in *recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall, except as limited by Article 5 hereof, *pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

4. The Corporation *shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law* and, to the extent appropriate and consistent with these Articles and its Bylaws, through *open and transparent processes* that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. [Emphasis by way of italics is added]

32) In carrying out its mission, ICANN must be accountable to the global internet community for operating in a manner that is consistent with its Bylaws, and with due regard for its core values.

33) In performing its mission, among others, the following core values must guide the decisions and actions of ICANN: preserve and enhance the operational stability, security and global interoperability of the internet, employ open and transparent policy development mechanisms, make decisions by applying documented policies neutrally and objectively, with integrity and fairness and remain accountable to the internet community through mechanisms that enhance ICANN's effectiveness.

34) The core values of ICANN as described in its Bylaws are deliberately expressed in general terms, so as to provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each situation will necessarily depend on many factors that cannot be fully anticipated or enumerated.

(ii) Accountability of ICANN

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

"In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations of the BGC.*"

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy.'" The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of 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 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 ON THE BASIS OF ANY OTHER LEGAL CLAIM.”²⁰

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate “accountability” remedy for applicants is the IRP.

(iii) IRP Procedures

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider (“IRPP”) to, with the approval of the ICANN’s Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP (“Supplementary Procedures”), to “supplement the [ICDR’s] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”

45) According to the Definitions part of the Supplementary Procedures, “Independent Review or IRP” refers to “the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation”, and “International Dispute Resolution Procedures or Rules” refers to the ICDR’s International Arbitration Rules (“ICDR Rules”) that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these “procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws” and Article

²⁰ Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para.* 6. Capital letters are from the original text.

2 of the Supplementary Procedures requires the ICDR to apply the Supplementary Procedures, *in addition* to the ICDR Rules, in all cases submitted to it in connection with Article IV, Section 3(4) of ICANN's Bylaws. In the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

- 47)The online Oxford English Dictionary defines the word “supplement” as “a thing added to something else in order to complete or enhance it”. Supplement, therefore, means to complete, add to, extend or supply a deficiency. In this case, according to ICANN’s desire, the Supplementary Rules were designed to “add to” the ICDR Rules.
- 48)A key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”
- 49)Another key provision, Article 36 of the ICDR Rules, directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of exercise of such powers are left to the discretion of the Panel itself.
- 50)Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
- 51)To the contrary, the Panel finds support in the “Independent Review Process Recommendations” filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate. [Emphasis added].
- 52)Therefore, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings, and it does so here, with specificity in relation to the issues raised by the Parties as set out below.

2) What directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

a) Document request and exchange

Parties' Submissions

- 53) In the DCA Trust First Memorial, DCA Trust seeks document production, since according to it, "information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control."²¹ According to DCA Trust, in this case, "ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided." Given that these proceedings may be "DCA's only opportunity to present and have its claims decided by an independent decision-maker", DCA Trust argues "that further briefing on the merits should be allowed following any and all document production in these proceedings."²²
- 54) According to DCA Trust, "by choosing the ICDR Rules, the Parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines"). The ICDR Guidelines provide that 'parties shall exchange, in advance of the hearing, all documents upon which each intends to rely' [...]"²³ DCA Trust submits that, "nothing in the Bylaws or Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field."²⁴
- 55) DCA Trust therefore, requests that the Panel issue a procedural order providing the Parties with an opportunity to request documents from one another, and to seek an order from the Panel compelling production of documents if necessary.
- 56) ICANN agrees with DCA Trust, that pursuant to the ICDR Guidelines, which it refers to as "Discovery Rules", "a party must request that a panel order the production of documents."²⁵ According to ICANN, "those documents must be 'reasonably believed to exist and to be relevant and material to the outcomes of the case,' and requests must contain 'a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."²⁶ ICANN argues, however, that despite the requirement by the Supplementary Rules that, '**all necessary evidence** to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation

²¹ DCA Trust First Memorial, *para.* 61.

²² *Ibid*, *paras.* 61 and 66.

²³ *Ibid*, *para.* 67.

²⁴ *Ibid*.

²⁵ ICANN First Memorial, *para.* 28.

²⁶ *Ibid*.

should be part of the [initial written] submission’, DCA Trust has not to date “provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.”²⁷

57) ICANN further submits that, “while ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation.”²⁸ In support of its contention, ICANN refers to the ICDR Guidelines and states that those Guidelines have made it ‘clear that its Discovery Rules do not contemplate such broad discovery. The introduction of these rules states that their purpose is to promote ‘the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.’ According to ICANN, the ICDR Guidelines note that:

“One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”²⁹

The Panel’s directions concerning document request and exchange

58) Seeing that the Parties are both in agreement that some form of documentary exchange is permitted under the IRP Procedure, and considering that Articles 16 and 19 of the ICDR Rules respectively specify, *inter alia*, that, “[s]ubject to these Rules the [Panel] may conduct [these proceedings] in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case” and “at any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate”, the Panel concludes that some document production is necessary to allow DCA Trust to present its case.

59) The Panel is not aware of any international dispute resolution rules, which prevent the parties to benefit from some form of document production. Denying document production would be especially unfair in the circumstances of this case given ICANN’s reliance on internal confidential documents, as advanced by DCA Trust. In any event, ICANN’s espoused goals

²⁷ *Ibid*, para. 29. Bold and italics are from the original text.

²⁸ *Ibid*, para. 30.

²⁹ ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60)The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61)In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very “receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.”

b) Additional filings, including memoranda and hearing exhibits

Parties’ Submissions

62)In the DCA Trust First Memorial, DCA Trust submits that:

“[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that ‘initial written submissions of the parties shall not exceed 25 pages.’ The word ‘initial’ confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.”³⁰

63)DCA Trust also submits that, “Section 5 of the Supplementary Procedures [...] provides that ‘[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.’ Use of the word ‘should’—and not ‘shall’—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.”³¹

64)According to DCA Trust, in addition, “section 5 of the Supplementary Procedures provides that ‘the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

³⁰ DCA Trust First Memorial, *para.* 57.

³¹ *Ibid*, *para.* 58.

Organizations, or from other parties.’ Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.”³²

65) In response, ICANN submits that, DCA Trust “has no automatic right to additional briefing under the Supplementary Procedures.”³³ According to ICANN, “paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. ***All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.*** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. ***The IRP Panel may request additional written submissions from the party seeking review,*** the Board, the Supporting Organizations, or from other parties.” [Bold and italics are ICANN’s]

ICANN adds:

“This section clearly provides that DCA [Trust’s] opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the ‘initial’ written submission, but the word ‘initial’ refers to the fact that the Panel ‘may request additional written submissions,’ not that DCA [Trust] has some ‘right’ to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA [Trust] has twice failed to submit evidence in support of its claims is not justification for allowing DCA [Trust] a third attempt.”³⁴

66) ICANN further notes, that in its 20 April 2014 letter to the Panel, ICANN already submitted that, “DCA [Trust’s] argument that it submitted its papers ‘on the understanding that opportunities would be available to make further submissions’ is false. ICANN stated in an email to DCA [Trust’s] counsel on 9 January 2014—prior to the submission of DCA [Trust’s] Amended Notice—that the Supplementary [Procedures] bar the filing of supplemental submissions absent a request from the Panel.”³⁵

67) According to ICANN:

“[The] decision as to whether to allow supplemental briefing is within the Panel’s discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA [Trust] might respond to ICANN’s presentation on the merits, DCA [Trust] has never even attempted to explain

³² *Ibid*, para. 59.

³³ ICANN First Memorial, para. 24.

³⁴ *Ibid*.

³⁵ *Ibid*, para. 25.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."³⁶

The Panel's directions concerning additional filings

- 68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.
- 69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.
- 70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.
- 71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

³⁶ *Ibid*, paras. 26 and 27.

c) Method of Hearing and Testimony

Parties' Submissions

72) In the DCA Trust First Memorial, DCA Trust submitted that:

“[The] parties agree that a hearing on the merits is appropriate in this IRP. DCA [Trust] respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA [Trust] would agree to a video hearing, as stated during the April 22 hearing on procedural matters.”³⁷

73) In response, ICANN submitted that, “during the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.”³⁸ In addition, in the ICANN First Memorial, ICANN argued that according to Article IV, Section 3.12 of the Bylaws and paragraph 4 of the Supplementary Procedures, the IRP should conduct its proceedings by email and otherwise via Internet to the maximum extent feasible and in the extraordinary event that an in-person hearing is deemed necessary by the panel, the in-person hearing shall be limited to argument only.

74) ICANN also advanced, that:

“[It] does not believe [...] that this IRP is sufficiently ‘extraordinary’ so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straightforward – limited to whether ICANN’s Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA’s application for. AFRICA. – and can, easily [...], be resolved following a telephonic oral argument with counsel and the Panel.”³⁹

75) In the DCA Trust First Memorial, DCA Trust also argued that, in “April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to ‘argument only.’ At some point after the *ICM* Panel’s 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to ‘argument only.’ Accordingly, and as ICANN argued at the procedural hearing, ICANN’s revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous.”⁴⁰

³⁷ DCA Trust First Memorial, *para.* 63.

³⁸ ICANN First Memorial, *para.* 36.

³⁹ *Ibid*, *para.* 36.

⁴⁰ DCA Trust First Memorial, *para.* 64.

76)DCA Trust submitted that:

“[Regardless] of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel ‘may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.’ It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA [Trust], it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA [Trust] strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA [Trust] agrees are to be expedited – but not at the cost of the parties’ right to be heard, and the Panel’s right to obtain the information it needs to render its decision.”⁴¹

77)In response, ICANN submitted that:

“[Both] the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP.” Paragraph 4 of the Supplementary Procedures, which according to ICANN governs the “Conduct of the Independent Review”, demonstrates this point. According to ICANN, “indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to ‘argument only,’ and (2) the phrase stating that ‘all evidence, including witness statements, must be submitted in advance.’ The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony. The latter reiterates the point that *all evidence, including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.”⁴²

78)ICANN added:

“[Paragraph] 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that ‘[i]n the unlikely event that a telephonic or in-person hearing is convened, **the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance**.’” [...] While DCA [Trust] may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard. Despite the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of live witness testimony, DCA [Trust] attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, ‘the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each

⁴¹ *Ibid*, paras. 65 and 66.

⁴² ICANN First Memorial, paras. 15 and 16.

party has the right to be heard and is given a fair opportunity to present its case.’ However, as discussed above, the Supplementary Procedures provide that ‘[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,’ and the Bylaws require that the ICDR Rules ‘be consistent’ with the Bylaws. As such, the Panel **does not have discretion** to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.”⁴³

79) ICANN further submitted:

“[During] the 22 April Call, DCA vaguely alluded to ‘due process’ and ‘constitutional’ concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, ‘constitutional’ protections do not apply with respect to a *corporate accountability mechanism*. Second, ‘due process’ considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP. And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that ‘[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution’.”⁴⁴

80) According to ICANN:

“[The] U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses [...] Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. ***‘Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.’*** It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”⁴⁵

81) In short, ICANN advanced that:

“[Even] if this were a formal ‘arbitration’, ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings [...] DCA [Trust] argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA [Trust] did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA [Trust] to present any written witness statements in support of its position, ICANN would not be entitled to cross examine

⁴³ *Ibid*, paras. 17 and 18. Bold and italics are from the original text.

⁴⁴ *Ibid*, para. 19.

⁴⁵ *Ibid*, paras. 20 and 21. Bold and italics are from the original text.

those witnesses, just as DCA [Trust] is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination."⁴⁶

The Panel's directions on method of hearing and testimony

- 82) The considerations and discussions under the prior headings addressing document exchange and additional filings apply to the hearing and testimony issues raised in this IRP proceeding as well.
- 83) At this juncture, the Panel is of the preliminary view that at a minimum a video hearing should be held. The Parties appear to be in agreement. However, the Panel does not wish to close the door to the possibility of an in-person hearing and live examination of witnesses, should the Panel consider that such a method is more appropriate under the particular circumstances of this case after the Parties have completed their document exchange and the filing of any additional materials.
- 84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.
- 85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.
- 86) The Panel, therefore, reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits. The Panel also permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.
- 87) Having said this, the Panel acknowledges the Parties' desire that the IRP proceedings be as efficient and economical as feasible, consistent with the overall objectives of a fair and independent proceeding. The Panel will certainly bear this desire and goal in mind as these proceedings advance further.

⁴⁶ *Ibid*, paras. 22 and 23.

3) Is the Panel's Decision on the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

DCA Trust's Submissions

88) In addition to the submissions set out in the earlier part of this Decision, DCA Trust argues that, the language used in the Bylaws to describe the IRP process is demonstrative that it is intended to be a binding process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, DCA Trust explains:

“[It] is clear that the declaration of an IRP is intended to be final and binding [...] For example, the Bylaws provide that the [ICANN] [Board Governance Committee] BGC ‘shall act on a Reconsideration Request on the basis of the written public record’ and ‘shall make a final determination or recommendation.’ The Bylaws even expressly state that **‘the Board shall not be bound to follow the recommendations’** of the BGC. By contrast, the IRP Panel makes **‘declarations’** — defined by ICANN in its Supplementary Procedures as ‘decisions/opinions’— that **‘are final and have precedential value.’** The IRP Panel ‘shall specifically designate the prevailing party’ and may allocate the costs of the IRP Provider to one or both parties. Moreover, nowhere in ICANN’s Bylaws or the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling.”⁴⁷

89) In light of the foregoing, DCA Trust advances:

“[The] IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration.”⁴⁸

ICANN's Submissions

90) In response, ICANN submits that:

“[The] provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel will not be binding on ICANN. Section 3.11 gives the IRP panels the authority

⁴⁷ DCA Trust First Memorial, *paras.* 33, 34 and 35. Bold and italics are from the original text.

⁴⁸ *Ibid.* *para.* 44.

to ‘declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws’ and ‘recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.’ Section 3.21 provides that ‘[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting.’ Section 3 never refers to the IRP panel’s declaration as a ‘decision’ or ‘determination.’ It does refer to the ‘Board’s subsequent action on [the IRP panel’s] declaration [...]’ That language makes clear that the IRP’s declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel’s declaration and take whatever action it deems appropriate.”⁴⁹

91) According to ICANN:

“[This] issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel. The *ICM* Panel specifically considered the argument that the IRP proceedings were ‘arbitral and not advisory in character,’ and unanimously concluded that its declaration was ‘not binding, but rather advisory in effect.’ At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN’s Bylaws provided that ‘IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators . . . nominated by that provider.’ *ICM* unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel’s declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel’s declaration is not binding on the Board.”⁵⁰

92) ICANN also submits that:

“[The] lengthy drafting history of ICANN’s independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that ‘the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations.’ And when, in 2001, the Committee on ICANN Evolution and Reform (‘ERC’) recommended the creation of an independent review process, it called for the creation of ‘a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws.’ The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP ‘decisions will be nonbinding, because the Board will retain final decision-making authority’.”⁵¹

93) According to ICANN:

“[The] only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding and recognized that an IRP panel’s declaration ‘is not binding, but rather advisory in effect.’ Nothing has occurred since the issuance of the *ICM* IRP Panel’s declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the

⁴⁹ ICANN First Memorial, *para.* 33,

⁵⁰ *Ibid*, *para.* 34,

⁵¹ ICANN Second Memorial, *para.* 5,

ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term ‘arbitration’ were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word ‘arbitration’ in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word ‘arbitration’ in conjunction with the amendments to the Bylaws.”⁵²

94) ICANN further submits that:

“[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that ‘declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.’ DCA argues that this new language, which does not actually use the word ‘binding,’ nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.”⁵³

95) According to ICANN:

“[The] language DCA references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (‘ASEP’). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process. The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP’s recommendations in this regard were raised in light of the second IRP constituted under ICANN’s Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that ‘[t]he declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.’ The ASEP’s recommendations in this regard did not convert IRP Panel declarations into binding decisions.”⁵⁴

96) Moreover, ICANN argues:

“[One] of the important considerations underlying the ASEP’s work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN’s Board retain the ultimate responsibility for decision-making. As a result, the ASEP’s recommendations were premised on the understanding that the declaration of the IRP Panel is not ‘binding’ on the Board. In any event, a declaration clearly can be both non-binding and precedential.”⁵⁵

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, “not only is there no language in the Bylaws stating that IRP Panel declarations

⁵² *Ibid*, para. 6.

⁵³ *Ibid*, para. 7.

⁵⁴ *Ibid*, paras. 8 and 9.

⁵⁵ *Ibid*, paras. 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding.”⁵⁶ According to ICANN, words such as “arbitration” and “arbitrator” were removed from the Bylaws to ensure that the IRP Panel’s declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, “fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one.”⁵⁷ Finally, ICANN submits that “it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board...the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws’.”⁵⁸

The Panel’s Decision on Binding or Advisory nature of IRP decisions, opinions and declarations

98) Various provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the Panel’s decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.⁵⁹

99) In paragraph 1, the Supplementary Procedures define “Declaration” as the “decisions and/or opinions of the IRP Panel”. In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading “Form and Effect of an IRP Declaration”, they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to “specifically designate the prevailing party”.⁶⁰

⁵⁶ ICANN letter of 2 June 2014 addressed to the Panel.

⁵⁷ *Ibid.* Italics are from the original decision.

⁵⁸ *Ibid.*

⁵⁹ The Reconsideration process established in the Bylaws expressly provides that ICANN’s “Board *shall not be bound to follow* the recommendations” of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel’s IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP’s decisions, opinions or declarations are “advisory”—this word appears in the Reconsideration Process.

⁶⁰ Moreover, the word “Declaration” in the common law legal tradition is often synonymous with a binding decision. According to Black’s Law Dictionary (7th Edition 1999) at page 846, a “declaratory

- 100) Section 10 of the Supplementary Procedures, resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to “Awards”, section 10 refers to “Declarations”. Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are “final and binding” on the parties.
- 101) As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented⁶¹ with the Supplementary Procedures.
- 102) This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: “These procedures supplement the International Centre for Dispute Resolution’s International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws”.
- 103) And second, under section 2 entitled (Scope), that states that the “ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws”. It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.
- 104) There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.
- 105) One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline

judgment” is, “a binding adjudication that establishes the rights and other legal obligations of the parties without providing for or ordering enforcement”.

⁶¹ As explained by the Panel before, the word “supplement” means to complete, add to, extend or supply a deficiency. The Supplementary Procedures, therefore, *supplement* (not replace or supersede) the ICDR Rules. As also indicated by the Panel before, in the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

set of procedures for IRP's, therefore, points to a binding adjudicative process.

106) Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panelists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107) The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

108) Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.

109) In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

110) ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111) The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor⁶²;

⁶² If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker,

and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

112) Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. Typically, this discussion is found in the Uniform Commercial Code Official Comment to section 2719, which deals with “Contractual modification or limitation of remedy.” That Comment states:

“Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, *it is the very essence of a sales contract that at least minimum adequate remedies be available.* If the parties intend to conclude a contract for sale within this Article *they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.*” [Panel’s emphasis by way of italics added]

113) The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.

114) The need for a compulsory remedy is concretely shown by ICANN’s longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust’s claim, and also prejudicing the interest of a competing .AFRICA applicant.

115) Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they

ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process “neutral,” as ICANN’s “core values” call for in its Bylaws.

understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the “ultimate guarantor” of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.⁶³

ICM Case

116)The Parties in their submissions have discussed the impact on this Decision of the conclusions reached by the IRP panel in the matter of *ICM v. ICANN* (“*ICM Case*”). Although this Panel is of the opinion that the decision in the *ICM Case* should have no influence on the present proceedings, it discusses that matter for the sake of completeness.

117)In the *ICM Case*, another IRP panel examined the question centrally addressed in this part of this Decision: whether declarations and/or decisions by an IRP panel are binding, or merely advisory. The *ICM Case* panel concluded that its decision was advisory.⁶⁴

118)In doing so, the *ICM Case* panel noted that the IRP used an “international arbitration provider” and “arbitrators nominated by that provider,” that the ICDR Rules were to “govern the arbitration”, and that “arbitration connotes a binding process.” These aspects of the IRP, the panel observed, were “suggestive of an arbitral process that produces a binding award.”⁶⁵ But, the panel continued, “there are other indicia that cut the other way, and more deeply.” The panel pointed to language in the Interim Measures section of the Supplementary Procedures empowering the panel to “recommend” rather than order interim measures, and to language requiring the ICANN Board to “consider” the IRP declaration at its next meeting, indicating, in the panel’s view, the lack of binding effect of the Declaration.

119)The *ICM Case* panel specifically observed that “the relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasized that it is not binding. If the IRP’s declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on ‘Form and Effect of an IRP Declaration’, significantly omit provision of Article 27 of the ICDR Rules specifying that an award ‘shall be final and binding on the parties’. Moreover, the preparatory work of the IRP provisions...confirms that the

⁶³ See in this regard the Memorandum of Jack Goldsmith dated 29 July 2010 at <https://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf>, referred to in footnote 58 of DCA Trust’s Second Memorial.

⁶⁴ *ICM Case*, footnote 30. The panel’s brief discussion on this issue appears in *paras.* 132-134 of the *ICM Decision*.

⁶⁵ *Ibid*, *para.* 132.

intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”⁶⁶

120)Following the issuance of the *ICM* Case Declaration, ICANN amended its Bylaws, and related Supplementary Procedures governing IRPs, removing most, but not all, references to “arbitration”, and adding that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”

Difference between this IRP and the *ICM* Case

121)According to DCA Trust, the panel in the *ICM* Matter, “based its decision that its declaration would not be binding, ‘but rather advisory in effect,’ on specific language in both a ***different*** set of Bylaws and a ***different*** set of Supplementary Procedures than those that apply in this dispute...one crucial difference in the Bylaws applicable during the *ICM* was the absence of the language describing panel declarations as ‘final and precedential’.”⁶⁷ The Panel agrees.

122)Section 3(21) of the 11 April 2013 ICANN Bylaws now provides: “Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” At the time the *ICM* Matter was decided, section 3(15) of Article IV of ICANN’s Bylaws did not contain the second sentence of section 3(21).

123)As explained in the DCA Trust First Memorial:

“[In] finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP [panel] the authority to ‘declare,’ rather than ‘decide’ or ‘determine,’ whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws. However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined ‘declaration’ as ‘decisions/opinions of the IRP’. If a ‘declaration’ is a ‘decision’, then surely a panel with the authority to ‘declare’ has the authority to ‘decide’.”⁶⁸

The Panel agrees with DCA Trust.

124)Moreover, as explained by DCA Trust:

⁶⁶ *Ibid*, para. 133.

⁶⁷ DCA Trust First Memorial, para. 36. Bold and italics are from the original text.

⁶⁸ *Ibid*, para. 39.

“[The] *ICM* Panel [...] found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules – which specifies that an award ‘shall be final and binding on the parties.’ On that basis, the *ICM* Panel concluded that Article 27 did not apply. ICANN’s Supplementary Rules, however, were – and continue to be – silent on the effect of an award. In the event there is inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an **omission** of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that ‘the ICDR’s International Arbitration Rules [...] will govern the process **in combination** with these Supplementary Procedures. Furthermore, it is only in the event there is ‘any inconsistency’ between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.”⁶⁹

Again, the Panel agrees with DCA Trust.

125) With respect, therefore, this Panel disagrees with the panel in the *ICM* Case that the decisions and declarations of the IRP panel are not binding. In reaching that conclusion, in addition to failing to make the observations set out above, the *ICM* panel did not address the issue of the applicant’s waiver of all judicial remedies, it did not examine the application of the *contra proferentem* doctrine, and it did not examine ICANN’s commitment to accountability and fair and transparent processes in its Articles of Incorporation and Bylaws.

126) ICANN argues that the panel’s decision in the *ICM* Case that declarations are not binding is dispositive of the question. ICANN relies on the provision in the Bylaws, quoted above, (3(21)) to the effect that declarations “have precedential value.” Like certain other terms in the IRP and Supplementary Procedures, the Panel is of the view that this phrase is ambiguous. Legal precedent may be either binding or persuasive.⁷⁰ The Bylaws do not indicate which kind of precedent is intended.

127) *Stare decisis* is the legal doctrine, which gives binding precedential effect, typically to earlier decisions on a settled point of law, decided by a higher court. The doctrine is not mandatory, as illustrated by the practice in common law jurisdictions of overruling earlier precedents deemed unwise or unworkable. In the present case, there is no “settled” law in the usual sense of a body of cases approved by a court of ultimate resort, but instead, a single decision by one panel on a controversial point, which this Panel, with respect, considers to be unconvincing.

128) Therefore, the Panel is of the view that the ruling in the *ICM* Case is *not* persuasive and binding upon it.

⁶⁹ *Ibid*, para. 40. Bold and italics are from the original text.

⁷⁰ Black’s Law Dictionary, (7th Edition 1999), p. 1195.

VI. DECLARATION OF THE PANEL

129)Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130)Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131)Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132)The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.

133)The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

This Declaration on the IRP Procedure has thirty-three (33) pages.

Thursday, 14 August 2014

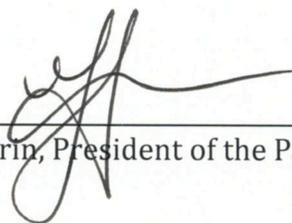
Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. Richard C. Neal



Babak Barin, President of the Panel

EXHIBIT H

International Centre for Dispute Resolution

CASE No. Case 50-20-1300-1083

Between

DOTCONNECTAFRICA TRUST (DCA TRUST),
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),
Respondent

WITNESS STATEMENT OF SOPHIA BEKELE ESHETE

I, SOPHIA BEKELE ESHETE, of Walnut Creek, California, hereby make the following statement:

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust (“DCA”) for rights to .AFRICA, a new generic top-level domain name (“gTLD”), to the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. I am the founder and executive director of DCA and a champion for DCA’s application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN’s breaches of its Bylaws,

Articles of Incorporation, and the New gTLD Guidebook due to its improper cooperation with the African Union Commission (“AUC”), the backer of the competing application for the .AFRICA gTLD submitted by UniForum S.A., now known as ZA Central Registry (“ZACR”).¹ ICANN basically drew a road map for the AUC to prevent any other applicant from obtaining rights to .AFRICA by advising the AUC that it could reserve .AFRICA for its own use as a member of ICANN’s Governmental Advisory Committee (“GAC”). ICANN then accepted the GAC’s advice—engineered by the AUC following ICANN’s road map—to block DCA’s application for .AFRICA. In my view, this entire process was highly improper and most irregular.

I. PERSONAL AND PROFESSIONAL BACKGROUND

3. I was born in Addis Ababa, Ethiopia, the third of six children, to Ato Bekele Eshete and Sister Muluaem Beyene. My father was a prominent and successful businessman who was involved in diverse businesses in Ethiopia and was the founder and board member of United Bank and United Insurance, one of the largest financial institutions in Ethiopia. My mother was a career nurse. Growing up, I idolized my mother, who was kind, compassionate and deeply religious. At the same time, I listened to my father talk about his businesses to friends and family at home, where I learned a lot from him about the business world and learned the value of independence, networking, and risk-taking. I came to the U.S. after completing my secondary school education. I earned my bachelor’s degree in business analysis and information systems from San Francisco State University and a master’s of business administration in management of information systems from Golden Gate University.

¹ For the sake of consistency, I refer to the applicant competing with DCA for .AFRICA as ZACR in my statement.

4. When I finished my bachelor's degree, I was recruited by Bank of America ("BoA") to serve as an information auditing and security professional. As a senior information technology audit consultant, I led, planned and executed medium to complex control reviews of production application systems for various technical platforms and I served as lead auditor for BoA's Capital Markets activities in San Francisco, New York, Chicago and Latin America. My responsibilities included auditing computer systems to ensure that data inputs and outputs were consistent (similar to how an auditor would examine a company's cash flows), performing and overseeing corporate governance and risk management functions, providing training and support to BoA employees on system security and technology related issues and coordinating and implementing pilot projects, including developing working standards, models and programs within various audit divisions.

5. Approximately five years later, I moved to UnionBanCal, to reengineer and manage UnionBanCal's audit division. In the role of senior information technology audit specialist, I reported directly to the audit director in UnionBanCal's Corporate Audit Risk Management Division. My main role was to set up a new information technology auditing unit and team. I provided strategies and action plans for streamlining existing auditing processes and procedures, improving existing audit programs, developing new audit programs and recommending technical and business specifications for implementing a local area network within the division. I also mentored and supervised auditors and executed technology and integrated audits locally and within the holding bank located in New York, as well as supported external auditors (*e.g.*, Deloitte & Touche) on audit projects. About one year later, I moved to PricewaterhouseCoopers ("PwC") to manage the information technology audit portfolio of one of the firm's largest

banking accounts, Barclay's Bank. After spending one year at PwC in the role of senior technology advisory consultant, I started my own companies.

6. In 1998, I founded and became the chief executive officer of tech start-ups CBS International ("CBS"), based in California, and affiliate SbCommunications Network plc ("SbCnet"), based in Addis Ababa. CBS primarily offers services in the areas of technology and business consulting and internet solutions. Using Africa as a base, I launched affiliate SbCnet, which specializes in systems and technology integration and support services. Both companies are part of an initiative to support the transfer of technology and knowledge to enterprises in emerging markets. Clients include global, multinational, continental and national organizations in both the private and public sectors.

7. In 2004, I shifted my focus back to the U.S. to help meet the challenges arising from the major corporate governance scandals taking place, such as Enron and WorldCom. I advised U.S.-based clients, including Intel Corp., NASDAQ, Genetech, BDO Sieldman LLP and the Federal Reserve Bank, on corporate governance and risk management within the context of information technology, including on complying with the requirements of Sarbanes-Oxley. I also advised clients on corporate relations and communications programs.

8. In the course of my career, I have obtained and I continue to maintain various professional certifications, including Certified Information Systems Auditor or "CISA," Certified Control Specialist or "CCS," and Certified in the Governance of Enterprise Information Technology or "CGEIT." These certifications are issued to professionals who demonstrate knowledge and proficiency in the field of information systems auditing and security, and enterprise information technology governance principles and practices.

9. I am also a founding member and executive director of the San Francisco Bay Area chapter of the Internet Society (“ISOC”), which serves the ISOC’s purpose of promoting open access to the Internet for all persons by focusing on local issues and representing the interests of those who live or work in the San Francisco Bay Area. In addition, I am a co-founder of the Internet Business Council for Africa (“IBCA”), the aim of which is to promote the involvement and participation of the African private/non-governmental sector (and the global private sector involved in Africa) in the global information and communication technology and Internet community, and also to provide an avenue for them to participate in global Internet governance.²

10. In 2008, I formed DCA to pursue applying for and obtaining a .AFRICA gTLD. Through my involvement in the Internet domain name systems (“DNS”) industry, I got the idea to apply for .AFRICA and recognized the potential benefits to the people of Africa of operating a .AFRICA gTLD for charitable purposes. In 2012, DCA applied for .AFRICA through the New gTLD Program.

II. EARLY INVOLVEMENT WITH ICANN AND INTERNET GOVERNANCE MATTERS

11. Since 2005, I have been very active in the DNS industry, which encompasses website design and hosting, building servers and hosting domain names, managing and registering domain names and setting up email addresses. In 2005, I was elected as the first African to serve on ICANN’s Generic Names Supporting Organization Council (“GNSO”), a policy advisory body that advises the ICANN Board of Directors (the “Board”) on global public policies that guide the development of the Internet, including the gTLD policy and processes affecting such TLDs as .asia, .com, .net, .org, and others.

² Internet Business Council for Africa, <http://theibca.org/>.

12. In my initial statement of interest to ICANN, I declared my interest in issues facing emerging economies relating to information and communications technology and the Internet as well as my interest in pursuing an initiative to obtain a .AFRICA continental domain name.³ Later, my statement of interest evolved to encompass the many projects I worked on at the GNSO, including my efforts to obtain the .AFRICA gTLD.

13. During the two years that I served on the GNSO, ICANN was actively engaged in a global Internet expansion project to introduce new gTLDs. As a member of the GNSO, I helped develop the rules and requirements for the New gTLD Program and participated in discussions about how to “standardize” the rules to ensure that the process for awarding new gTLDs would be fair, transparent and equitable. When we were formulating the rules and requirements, we tried to craft the requirements in such a way as to ensure that the application process would be open and competitive, and that applications would be evaluated on the basis of objective criteria.

14. During my service on the GNSO, I was also instrumental in initiating policy dialogue over internationalized domain names (“IDNs”). I led an active campaign to introduce IDNs under which new IDNs in Arabic, Cyrillic, Chinese and other non-Latin alphabets would become available, thereby providing non-English/non-Latin language native speakers an opportunity to access and communicate on the Internet in their native languages. In furtherance of this goal, I helped form an IDN working group within ICANN to bring the global voices of the IDN stakeholders to ICANN. I was then nominated to chair ICANN’s IDN Working Group at the GNSO and was highly influential in drafting the IDN policy guidelines.⁴ Our group, which later organized itself as the International Domain Resolution Union (“IDRU”), is credited with

³ Sophia Bekele Statement of Interest, ICANN, <https://mex.icann.org/node/4985>.

⁴ Sophia Bekele, ICANNWiki, http://icannwiki.com/index.php/Sophia_Bekele.

pioneering the IDN TLD globally.⁵ These new IDNs have been introduced by ICANN through the current New gTLD Program.⁶

III. NEW gTLD PROGRAM

15. One of ICANN's key responsibilities is to introduce and promote competition in the registration of Internet domain names, while ensuring that the domain name system is secure and stable. For the first several years of ICANN's existence, TLDs were very few in number and were limited by ICANN. The New gTLD Program is a response to demands by Internet stakeholders that ICANN permit the expansion of new top-level domain names into the root zone (*i.e.*, the top-level Domain Name System zone maintained by ICANN). The New gTLD Program is meant to allow an unlimited number of new TLDs in order to enhance competition for and to promote consumer choice in domain names. It evolved, in large part, out of the work ICANN's GNSO performed between 2005 and 2007 to explore introducing new gTLDs, work in which I was directly involved as a member of the GNSO Council at that time.

16. In 2005, the year I was elected to the GNSO, I and other members of the GNSO began the process of developing the parameters for introducing new gTLDs. The process involved detailed discussions and debate about what the rules and requirements should be for new gTLDs, including what technical, operational and financial standards should apply. During this process, we were mindful of the balance between ICANN's objective of expanding the universe of Internet domain names and protecting the security and stability of the system. In 2008, relying on the work of the GNSO, ICANN's Board adopted the GNSO's recommendations for introducing new gTLDs. Ultimately, these recommendations and input from various Internet

⁵ Letter from David Allen, Exec. Director IDRU, to Sophia Bekele, Exec. Director, DCA (5 Dec. 2010), *available at* <http://origin.library.constantcontact.com/download/get/file/1102516344150-330/TAS-IDRU+endorsement+-+DCA.pdf>.

⁶ *ICANN in Beijing, China: IDNs to win big in the new gTLD process*, Tандаа Биашара (17 Apr. 2013), <http://tandaabiashara.com/icann-in-beijing-idn-to-win-big-in-the-new-gtld-process/>.

stakeholders was brought together in 2011 in ICANN’s gTLD Applicant Guidebook (the “AGB”) and the launch of the New gTLD Program.

IV. THE DOTCONNECTAFRICA INITIATIVE AND THE DOTCONNECTAFRICA TRUST

17. While serving on the GNSO Council, I came across discussions being held on new geographic TLDs like .asia and .lat, as well as .EU under the country-code TLD (“ccTLD”) program. Being from Africa and in light of my activities in Africa at the time, I asked my colleagues at the GNSO why a “.AFRICA” did not exist. Part of the diligence I performed to ensure that my efforts to obtain a .AFRICA gTLD would not overlap with the work of others, included making inquiries into registered TLDs potentially relating to .AFRICA. After confirming that no one was championing it among the African participants in ICANN, that there was no African participation in GNSO sessions nor any sign that anyone appeared to be interested in .AFRICA as a new gTLD, I turned my focus to securing the .AFRICA TLD.

a. Creation of the DotConnectAfrica Initiative and Formation of DCA

18. I first proposed developing .AFRICA as a new gTLD in 2006, in a presentation given to the African members of the ICANN Board. The following year, I gave a presentation on the topic to different African organizations of the ICANN community during the ICANN 28 meeting in Lisbon, Portugal.⁷ Soon thereafter, I led the .AFRICA initiative under a new start-up, envisioning connecting the dots in Africa under one umbrella and calling the initiative “DotConnectAfrica.” In February 2008, I wrote to the Board to notify ICANN of the “DotConnectAfrica Initiative”⁸ and in June of 2008, at the ICANN 32 meeting in Paris, I made

⁷ Presentation to the ICANN Africa Group ICANN 28 meeting in Lisbon, Portugal (2007), *available at* <http://www.slideshare.net/Nyosef/dotafrika>.

⁸ Letter from Sophia Bekele, Executive Coordinator (.Africa), to P. Dengate Thrush, Chairman, ICANN (13 Feb. 2008), *available at* <http://www.scribd.com/doc/99725682/Letter-of-Notification-for-ICANN-for-Applying-for-Delegation-of-Dotafrika-TLD-Chairman-ICANN>.

the seemingly inappropriate level of influence ICANN permitted DCA's competitor over the process.

127. The NGPC's acceptance of the GAC objection advice on DCA's application for .AFRICA stopped the processing of DCA's application and permitted ZACR's application to proceed as "not in contention with any other applied-for strings."¹⁰⁵ Given the serious issues DCA has raised with respect to the rendering and acceptance of the GAC's advice and the evaluations performed, I believe the only solution is to stop the entire process. I also would request that ICANN write a letter to the AUC and African heads of state declaring that the application process has been nullified as a result of these irregularities and ICANN's failure to follow its governing documents and the AGB.

128. I strongly believe that nullifying the current process that resulted in ICANN awarding the .AFRICA gTLD to ZACR is the minimum of what should be done towards rectifying the harm suffered by DCA as a result of the Board's failure to abide by ICANN's Articles of Incorporation and Bylaws. Given the degree of misconduct by ICANN Board members and staff, which proved injurious to DCA's application for .AFRICA, I also believe that DCA should be compensated by ICANN for damages suffered. Finally, to ensure that DCA is given the opportunity to compete for the .AFRICA gTLD without prejudice, DCA should be allowed by ICANN to work independently with African governments to commence a new strategy for implementing the .AFRICA new gTLD.

I affirm that the foregoing is true and correct to the best of my knowledge.

sbekele

Sophia Eshete Bekele

November 3, 2014
Walnut Creek, CA

¹⁰⁵ UniForum New gTLD Program Initial Evaluation Report (12 July 2013), *available at* <http://newgtlds.icann.org/sites/default/files/ier/bqe3so7p3lu2ia8ouwp7eph9/ie-1-1243-89583-en.pdf>.

EXHIBIT I

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE #50 2013 001083

FINAL DECLARATION

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation For Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* (ICDR Rules) and the *Supplementary Procedures for ICANN Independent Review Process* of the International Centre for Dispute Resolution (ICDR),

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee and Ms. Rachel Zernik of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel

**Prof. Catherine Kessedjian
Hon. William J. Cahill (Ret.)
Babak Barin, *President***

46. On the last day of the hearing, DCA Trust was asked by the Panel to clearly and explicitly articulate its prayers for relief. In a document entitled Claimant's Final Request for Relief which was signed by the Executive Director of DCA Trust, Ms. Sophia Bekele and marked at the hearing as Hearing Exhibit 4, DCA Trust asked the Panel to:

Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by:

- Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
- Failing to apply ICANN's procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
- Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA;

And to declare that:

- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Recommend, as a result of each of these violations, that:

- ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR;
- ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA; and
- ICANN compensate DCA for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

47. In its response to DCA Trust's Final Request for Relief, ICANN submitted that, "the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate."

48. ICANN also submitted that:

DCA urges that the Panel issue a declaration in its favor...and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN’s Beijing, People’s Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading “GAC Advice to the ICANN Board” states:

IV. GAC Advice to the ICANN Board

1. New gTLDs

a. GAC Objections to the Specific Applications

i. The GAC Advises the ICANN Board that:

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-1165-42560)

[...]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, “Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.” A similar statement in this regard can be found in paragraph 5 of Ms. Dryden’s 7 February 2014 witness statement.

113. In light of the clear “Transparency” obligation provisions found in ICANN’s Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust’s application, the NGPC stipulated:

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

145. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, however, DCA Trust and ICANN shall each bear their own expenses, and they shall also each bear their own legal representation fees.

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

V. DECLARATION OF THE PANEL

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to

refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.
- e) As a result of the above, the administrative fees of the ICDR totaling US\$4,600 and the Panelists' compensation and expenses totaling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

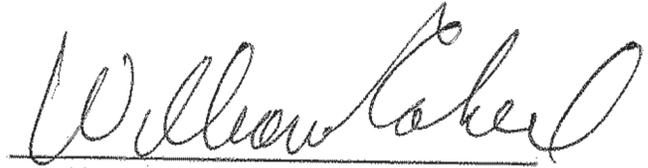
This Final Declaration has sixty-three (63) pages.

Date: Thursday, 9 July 2015.

Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barin, President

EXHIBIT J

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE S. SMYTHE

DEPUTY CLERK

HONORABLE
1

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

Plaintiff	BROWN, HERI, SMITH & KHAN
Counsel	BY: ETHAN J. BROWN and KETE BARNES
Defendant	JONES DAY
Counsel	BY: JEFFREY A. LeVEE and ERIN L. BURKE

DOTCONNECTAFRICA TRUST
VS.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

170.6 JUDGE KWAN BY DEFENDANT

NATURE OF PROCEEDINGS:

ALSO APPEARING:

KESSELMAN BRANTLY STOCKINGER
BY: DAVID W. KESSELMAN
and AMY T. BRANTLY

**MOTION OF PLAINTIFF DOTCONNECTAFRICA TRUST,
FOR PRELIMINARY INJUNCTION**

The motion of plaintiff DotConnectAfrica Trust for a Preliminary Injunction comes on for hearing.

The plaintiff is seeking to enjoin defendant Internet Corporation for Assigned Names and Numbers (ICANN) from issuing the .Africa generic top level domain (gTLD) until this case has been resolved.

The matter is argued at length and stands submitted.

Note that the court advised counsel that he was lacking exhibit F to the declaration of Mokgabudi Lucky Masilela, with its summary of costs, which was conditionally placed under seal by prior order of court.

A copy was provided by the intervenor's counsel, and will be returned to counsel upon service of the court's ruling.

MINUTES ENTERED 12/22/16 COUNTY CLERK

910778771

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE

S. SMYTHE

DEPUTY CLERK

HONORABLE

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

1
F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

Plaintiff	BROWN, HERI, SMITH & KHAN
Counsel	BY: ETHAN J. BROWN and KETE BARNES
Defendant	JONES DAY
Counsel	BY: JEFFREY A. LeVEE and ERIN L. BURKE

DOTCONNECTAFRICA TRUST
VS.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

170.6 JUDGE KWAN BY DEFENDANT

NATURE OF PROCEEDINGS:

The court sets this matter for a case management conference on 1-23-17, 8:30 a.m., this department.

The court intends to set the matter for trial at that time, and asks that counsel begin checking their calendars for mutually agreeable dates.

Case Management Statements must be submitted before the conference.

LATER: The plaintiff's motion for the imposition of a Preliminary Injunction is denied, based on the reasoning expressed in the oral and written arguments of defense counsel.

Further, the court has considered the unopposed application of the defendant to file exhibit F to the Masilela declaration under seal, and it is so-ordered.

Clerk to give notice.

CLERK'S CERTIFICATE OF MAILING

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the minute order dated 12-22-16 upon all parties/counsel named below by placing the document for collection and mailing so as to

MINUTES ENTERED 12/22/16 COUNTY CLERK

9107767771

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE S. SMYTHE

DEPUTY CLERK

HONORABLE
1

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

F. RODRIGUEZ, C.A.

Deputy Sheriff

S. DORN, CSR #11387

Reporter

8:29 am

BC607494

DOTCONNECTAFRICA TRUST
VS.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

Plaintiff BROWN, HERI, SMITH & KHAN
Counsel BY: ETHAN J. BROWN
and KETE BARNES
Defendant JONES DAY
Counsel BY: JEFFREY A. LeVEE
and ERIN L. BURKE

170.6 JUDGE KWAN BY DEFENDANT

NATURE OF PROCEEDINGS:

cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: 12-22-16

Sherri R. Carter, Executive Officer/Clerk

By: _____

S. Smythe
S. Smythe, Deputy

Brown, Neri, Smith & Khan
Attn.: Ethan J. Brown, Esq.
11766 Wilshire Blvd., #1670
Los Angeles, Calif. 90025

Jones Day
Attn.: Jeffrey A. LeVee, Esq.
555 S. Flower St., 50th Floor
Los Angeles, Calif. 90071-2300

<p align="center">MINUTES ENTERED 12/22/16 COUNTY CLERK</p>

9107/07/71

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 12/22/16

DEPT. 53

HONORABLE HOWARD L. HALM

JUDGE

S. SMYTHE

DEPUTY CLERK

HONORABLE
1

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

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8:29 am

BC607494

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Counsel

BY: ETHAN J. BROWN
and KETE BARNES

Defendant

JONES DAY

Counsel

BY: JEFFREY A. LeVEE
and ERIN L. BURKE

DOTCONNECTAFRICA TRUST
VS.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

170.6 JUDGE KWAN BY DEFENDANT

NATURE OF PROCEEDINGS:

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EXHIBIT K

FILED
Superior Court of California
County of Los Angeles

FEB 03 2017

By [Signature] Sherri A. Carter, Executive Officer/Clerk
K. Mason Deputy

1 SUPERIOR COURT OF CALIFORNIA
2 COUNTY OF LOS ANGELES – CENTRAL DISTRICT
3 DEPARTMENT 53

4
5 DOTCONNECTAFRICA TRUST;

6 Plaintiff,

7
8 vs.

9 INTERNET CORPORATION FOR
10 ASSIGNED NAMES AND NUMBERS, et
11 al.;

12 Defendants.

Case No.: BC607494

Hearing Date: February 3, 2017

Time: 8:30 a.m.

ORDER RE:

PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

13 Plaintiff DOTCONNECTAFRICA TRUST'S motion for a preliminary injunction is
14 DENIED. The court has considered, very carefully, the excellent arguments of counsel. The
15 tentative ruling will remain the ruling on the motion.
16

17 **BACKGROUND**

18 This action involves the award and delegation of the generic top-level domain name
19 (“gTLD”)¹ “.Africa.” Defendant Internet Corporation for Assigned Names and Numbers
20 (“ICANN”) is a California not-for-profit public benefit corporation that oversees the technical
21 coordination of the Internet’s domain name system. In 2012, ICANN launched the “New gTLD
22 program,” in which it invited interested parties to apply to be designated the operator of their
23 chosen gTLD. The operator would manage the assignment of names within the gTLD and
24 maintain its database of names and IP addresses.
25

26 In March 2012, Plaintiff DotConnectAfrica Trust (“DCA”) applied to ICANN for the
27 delegation of the .Africa gTLD. DCA was formed with the charitable purpose of advancing
28

¹ Examples of gTLDs are .com, .gov, and .org

1 information technology education in Africa and providing a continental Internet domain name to
2 provide access to internet services for the people of Africa. Defendant ZA Central Registry, NPC
3 (“ZACR”) also applied to be the operator of .Africa. ZACR is a South African non-profit
4 company which was formed to promote open standards and systems in computer hardware and
5 software.

6 The competition for the .Africa gTLD came down to DCA and ZACR. In 2013,
7 ICANN’s Government Advisory Committee (“GAC”) issued advice that DCA’s application
8 should not proceed due to issues with regional endorsements. ICANN rejected DCA’s
9 application based on the GAC advice, while ZACR’s application continued. Thereafter, DCA
10 challenged ICANN’s decision and filed a request for review by an Independent Review Process
11 (“IRP”) Panel, a form of alternative dispute resolution provided for by the ICANN bylaws.

12 On July 9, 2015, the IRP Panel issued a “Final Declaration” finding in favor of DCA and
13 concluding that ICANN should “continue to refrain from delegating the .Africa gTLD and permit
14 DCA Trust’s application to proceed through the remainder of the new gTLD application
15 process.” In July 2015, ICANN placed DCA’s application back in the geographic names
16 evaluation phase. ICANN later concluded that DCA’s application was insufficient to proceed
17 past this phase.

18 In January 2016, after learning that ICANN would reject its application, DCA filed suit
19 against ICANN. ICANN then removed the case to the Central District of California. While this
20 case was pending before the district court, DCA moved for and was granted a temporary
21 restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating
22 the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the
23 preliminary injunction order which ICANN joined. The motion for reconsideration was denied.
24 On October 19, 2016, the district court remanded the case to this Court due to lack of
25 jurisdiction.

26 Upon remand, DCA moved for the same preliminary injunction that the district court
27 previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has
28 been resolved. DCA initially sought this relief under its ninth cause of action for declaratory

1 relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at
2 length. The Court denied the motion.

3 DCA now moves again for the same preliminary injunction. The instant motion is
4 substantially the same as the motion which was denied on December 22, 2016. The only
5 meaningful difference is that DCA now moves under alternative causes of action: its second and
6 fifth causes of action for intentional misrepresentation and unfair business practices. The motion
7 is opposed by Defendant ICAAN and by intervenor ZACR.

8
9 **EVIDENCE**

10 ICANN's evidentiary objections are overruled.

11 DCA's evidentiary objections are overruled.

12
13 **LEGAL STANDARD**

14 "As its name suggests, a preliminary injunction is an order that is sought by a plaintiff
15 prior to a full adjudication of the merits of its claim." (White v. Davis (2003) 30 Cal.4th 528,
16 554.) "[A]n order granting or denying a preliminary injunction does not amount to an
17 adjudication of the ultimate rights in controversy. Its purpose is to preserve the status quo until
18 the merits of the action can be determined." (Socialist Workers etc. Committee v. Brown (1975)
19 53 Cal. App. 3d 879, 890-91 (citations omitted).)

20 "In determining whether to issue a preliminary injunction, the trial court considers: (1)
21 the likelihood that the moving party will prevail on the merits and (2) the interim harm to the
22 respective parties if an injunction is granted or denied. The moving party must prevail on both
23 factors to obtain an injunction." (Pittsburg Unified School District v. S.J. Amoroso Construction
24 Co., Inc. (2014) 232 Cal.App.4th 808, 813-814.) "The trial court's determination must be guided
25 by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on
26 one, the less must be shown on the other..." (Church of Christ in Hollywood v. Superior Court
27 (2002) 99 Cal.App.4th 1244, 1251-52.) "The ultimate goal of any test to be used in deciding
28 whether a preliminary injunction should issue is to minimize the harm which an erroneous

1 interim decision may cause.” (White, supra, 30 Cal.4th at p. 554.) The burden is on the party
2 seeking injunctive relief to show all elements necessary to support issuance of a preliminary
3 injunction. (O’Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481.)
4

5 **DISCUSSION**

6 A. Interim Harm to the Parties

7 “To obtain a preliminary injunction, a plaintiff ordinarily is required to present evidence
8 of the irreparable injury or interim harm that it will suffer if an injunction is not issued pending
9 an adjudication of the merits.” (White, supra, 30 Cal.4th at p. 554.) “In evaluating interim harm,
10 the trial court compares the injury to the plaintiff in the absence of an injunction to the injury the
11 defendant is likely to suffer if an injunction is issued.” (Shoemaker, supra, 37 Cal.App.4th at
12 633.)

13 Notably, DCA has not provided any new evidence of harm that was not considered by the
14 Court in the prior motion for preliminary injunction. DCA contends that, if .Africa is delegated
15 to ZACR before this case is resolved, DCA’s mission will be seriously frustrated, funders will
16 likely pull their support, and DCA will likely be forced to stop operating. (Bekele Decl. ¶¶34-
17 35.) This harm is highly speculative and fails to account for the possibility of re-delegation.

18 The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this
19 litigation. This is not disputed by DCA. Instead, DCA argues, without supporting evidence, that
20 the procedure for gTLD re-delegation is uncertain. But the evidence reflects that re-delegation is
21 not uncommon and has occurred numerous times. (Atallah Decl. ¶13.) Indeed, ICANN has an
22 established procedure for re-delegating a gTLD, which is set forth in a published manual.
23 (Masilela Decl. I, Ex. I.) Accordingly, there is no potential for irreparable harm to DCA. Further,
24 it appears that any interim harm to DCA can be remedied by monetary damages, as requested in
25 DCA’s Complaint. (See Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255
26 Cal.App.2d 300, 306 (“if monetary damages afford adequate relief and are not extremely
27 difficult to ascertain, an injunction cannot be granted”).)
28

1 In contrast to the speculative nature of DCA's harm, ZACR presents evidence in the form
2 of a detailed spreadsheet prepared by its finance section demonstrating that ZACR is incurring
3 significant financial costs with no attendant benefits as a result of the delay in delegation of the
4 .Africa gTLD. (Masilela Decl. ¶11-12, Ex. F.)

5 The public interest also weighs in favor of denying the injunction because the delay in the
6 delegation of the .Africa gTLD is depriving the people of Africa of having their own unique
7 gTLD. (See Vo v. City of Garden Grove (2004) 115 Cal.App.4th 425, 435 (courts consider "the
8 degree of adverse effect on the public interest or interests of third parties the granting of the
9 injunction will cause".) Although the public also has an interest in having the .Africa gTLD
10 properly awarded through a fair and transparent application process, this concern does not apply
11 to the interim harm analysis because, in the event that DCA ultimately prevails in this action, the
12 gTLD can be re-delegated.

13 The Court finds that the balance of the interim harm weighs in favor of denying the
14 preliminary injunction.

15
16 B. Likelihood of Success on the Merits

17 A preliminary injunction must not issue unless it is "reasonably probable that the moving
18 party will prevail on the merits." (San Francisco Newspaper Printing Co., Inc. v. Sup.Ct. (Miller)
19 (1985) 170 Cal.App 3d 438, 442.) The "likelihood of success on the merits and the balance-of-
20 harms analysis are ordinarily 'interrelated' factors in the decision whether to issue a preliminary
21 injunction." (White, supra, 30 Cal.4th at 561.) "The presence or absence of each factor is usually
22 a matter of degree, and if the party seeking the injunction can make a sufficiently strong showing
23 of likelihood of success on the merits, the trial court has discretion to issue the injunction
24 notwithstanding that party's inability to show that the balance of harms tips in his favor." (Id.)
25 However, this does not mean that a trial court may grant a preliminary injunction on the basis of
26 the likelihood-of-success factor alone when the balance of hardships dramatically favors denial
27 of a preliminary injunction. (Id.; see also Yu v. Univ. of La Verne (2011) 196 Cal.App.4th 779,
28

1 787 (a trial court's order denying a motion for preliminary injunction should be affirmed if the
2 trial court correctly found the moving party failed to satisfy either of the factors).)

3 Here, as discussed above, the balance of hardships clearly favors denial of the
4 preliminary injunction. In any event, DCA has not made a sufficient evidentiary showing to
5 establish that it is likely to prevail on the merits.

6 ICANN contends that DCA is unlikely to prevail on the merits because, among the terms
7 and conditions that DCA acknowledged and accepted by submitting a gTLD application, was a
8 covenant barring all lawsuits against ICANN arising out of its evaluation of new gTLD
9 applications (the "Covenant"). The Covenant provides:

10
11 Applicant hereby releases ICANN and the ICANN Affiliated Parties
12 from any and all claims by applicant that arise out of, are based upon, or
13 are in any way related to, any action, or failure to act, by ICANN or any
14 ICANN Affiliated Party in connection with ICANN's or an ICANN
15 Affiliated Party's review of this application, investigation or verification,
16 any characterization or description of applicant or the information in this
17 application, any withdrawal of this application or the decision by
18 ICANN to recommend, or not to recommend, the approval of applicant's
19 gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN
20 COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL
21 DECISION MADE BY ICANN WITH RESPECT TO THE
22 APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO
23 SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA
24 ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN
25 AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE
26 APPLICATION.

21 DCA contends that the Covenant is unenforceable because it violates Civil Code §1668,
22 it is unconscionable, and it was procured by fraud. However, a federal district court recently
23 rejected these same arguments and dismissed a gTLD applicant's lawsuit against ICANN on the
24 sole ground that the Covenant bars all "claims related to ICANN's processing and consideration
25 of a gTLD application." (Ruby Glen, LLC v. Internet Corp. 2016 WL 6966329, at *4 (C.D. Cal.
26 Nov. 28, 2016).) The court stated: "the Court concludes that the covenant not to sue is, at most,
27 only minimally procedurally unconscionable. The Court also concludes that the covenant not to
28 sue is not substantively unconscionable or void pursuant to California Civil Code section 1668.

1 Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with
2 prejudice." (Id. at *5.)

3 For the reasons set forth in the Ruby Glen order, it appears that the Covenant is
4 enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair
5 business practices are likely to be barred. As a result, DCA cannot establish that it is likely to
6 succeed on the merits.

7 For the foregoing reasons, the Court finds that DCA has not met its burden of showing
8 the elements necessary to support issuance of a preliminary injunction. DCA's motion for a
9 preliminary injunction is denied.

10 ICANN is ordered to provide notice of this ruling.

11
12 DATED: February 3, 2017

13
14
15 

16 _____
17 Howard L. Halm
18 Judge of the Superior Court
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EXHIBIT L



Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers

CV 16-5505 PA (ASx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2016 U.S. Dist. LEXIS 163710

November 28, 2016, Decided

November 28, 2016, Filed

COUNSEL: [*1] For Ruby Glen, LLC, Plaintiff: Aaron M McKown, LEAD ATTORNEY, Cozen O'Connor PC, Seattle, WA; Paula L Zecchini, LEAD ATTORNEY, Cozen O'Connor, Seattle, WA.

For Internet Corporation for Assigned Names and Numbers, Defendant: Jeffrey A LeVee, LEAD ATTORNEY, Charlotte Wasserstein, Eric P Enson, Jones Day, Los Angeles, CA.

JUDGES: Honorable PERCY ANDERSON, UNITED STATES DISTRICT JUDGE.

OPINION BY: PERCY ANDERSON

OPINION

CIVIL MINUTES - GENERAL

Proceedings: IN CHAMBERS -- COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers ("ICANN") (Docket No. 30). ICANN challenges the sufficiency of the First Amended Complaint ("FAC") filed by plaintiff Ruby Glen, LLC ("Plaintiff"). Also before the Court is a Motion to Take Third Party Discovery or, in the Alternative, for the Court to Issue a Scheduling Order ("Motion to Begin

Discovery") filed by Plaintiff (Docket No. 32). Pursuant to *Rule 78 of the Federal Rules of Civil Procedure* and *Local Rule 7-15*, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for November 28, 2016, is vacated, and the matters taken off calendar.

I. Factual and Procedural Background

Plaintiff filed its original Complaint on July 22, 2016. In its [*2] Complaint, and an accompanying Ex Parte Application for Temporary Restraining Order, Plaintiff sought to temporarily enjoin ICANN from conducting an auction for the rights to operate the registry for the generic top level domain ("gTLD") for .web. According to the original Complaint, Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN's procedures required all of the applicants, in what are referred to as "contention sets," to first attempt to resolve their competing claims, but if they could not do so, ICANN would conduct an auction and award the rights to operate the registry to the winning bidder.

According to Plaintiff, one of the competing entities, Nu Dotco, LLC ("NDC") was unwilling to informally resolve the competing claims and instead insisted on proceeding to an auction. Plaintiff alleged in its original Complaint that NDC experienced a change in its

management and ownership after it submitted its application to ICANN but that NDC did not provide ICANN with updated information as required by ICANN's application requirements. On June 22, 2016, Plaintiff requested that ICANN conduct [*3] an investigation regarding the discrepancies in NDC's application and postpone the auction. At least one other applicant seeking to operate the .web registry also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff's original Complaint asserted claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to *California Business and Professions Code section 17200*; and (5) declaratory relief. The Court denied Plaintiff's Ex Parte Application for Temporary Restraining Order on July 26, 2016, and the auction went forward. Plaintiff filed its FAC on August 8, 2016.

According to the FAC, NDC submitted the winning bid in the amount of \$135 million at the auction. [*4] After NDC won the auction, a third-party, VeriSign, Inc. ("VeriSign"), which is the registry operator for the .com and .net gTLDs, announced that it had provided the funds for NDC's bid for the .web gTLD and that it would become the registry operator for the .web gTLD once NDC executes the .web registry agreement with ICANN and, with ICANN's consent, assigns its rights to operate the .web registry to VeriSign.

The FAC asserts the same five claims contained in the original Complaint. Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN's bylaws, Articles of Incorporation, and the ICANN Applicant Guidebook stating, for instance, that ICANN will make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," that ICANN will remain

"accountable to the Internet community through mechanisms that enhance ICANN's effectiveness," and that no contention set will proceed to auction unless there is "no pending ICANN accountability mechanism." Plaintiff's unfair competition and declaratory relief claims allege that a covenant not to sue contained in the ICANN [*5] Application Guidebook is invalid and unlawful under California law. That release states:

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, any withdrawal of 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 [*6] 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.

(FAC ¶ 21, Ex. C § 6.6 (capitalization in original).)

In its Motion to Dismiss, ICANN contends that the FAC fails to state any viable claims because Plaintiff has not plausibly alleged any breaches of ICANN's auction rules, Bylaws, and Articles of Incorporation. ICANN additionally asserts that the covenant not to sue bars all of Plaintiff's claims and that the FAC should be dismissed because Plaintiff has failed to join NDC as an indispensable party. Plaintiff's Motion to Begin Discovery seeks permission to propound third-party discovery directed to NDC and VeriSign prior to the parties participating in the *Federal Rule of Civil Procedure 26(f)* conference.

II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader [*7] is entitled to relief." *Fed. R. Civ. P. 8(a)*. While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." *Fed. R. Civ. P. 12(b)(6), 8(e)*. The purpose of *Rule 8(a)(2)* is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under *Rule 12(b)(6)*. See, e.g., *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 248-49 (9th Cir. 1997) ("The *Rule 8* standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in *Twombly*, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim

would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." *Twombly*, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." *Id.* at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative [*8] level." *Id.* at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); *Daniel v. County of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.") (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964-65 (internal quotations omitted). In construing the *Twombly* standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

III. Analysis

ICANN [*9] seeks dismissal of the FAC based on, among other things, the covenant not to sue contained in the Application Guidebook. Plaintiff, however, claims that the covenant not to sue is unenforceable because it is void under California law and both procedurally and substantively unconscionable. Specifically, according to Plaintiff, the covenant not to sue violates *California Civil Code section 1668*, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful

injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." *Cal. Civ. Code § 1668, Section 1668* "[o]rdinarily . . . invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence. Furthermore, the statute prohibits contractual releases of future liability for ordinary negligence when 'the 'public interest' is involved or . . . a statute expressly forbids it." *Frittelli, Inc. V. 350 North Canon Drive, LP, 202 Cal. App. 4th 35, 43, 135 Cal. Rptr. 3d 761, 769 (2011)* (quoting *Farnham v. Superior Court, 60 Cal. App. 4th 69, 74, 70 Cal. Rptr. 2d 85, 88 (1997)*). "Whether an exculpatory clause 'covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the [*10] parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts." *Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066, 20 Cal. Rptr. 3d 562, 570 (2004)* (quoting *Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 456, 532 P.2d 97 (1975)*).

The FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence. Nor does Plaintiff allege that ICANN has willfully or negligently violated a law or harmed the public interest through its administration of the gTLD auction process for .web. Nor is the covenant not to sue as broad as Plaintiff argues. Instead, the covenant not to sue applies to:

[A]ll 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, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application.

(FAC ¶ 21, Ex. C § 6.6.) Because the covenant not to sue

only [*11] applies to claims related to ICANN's processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which *California Civil Code section 1668* applies. See *Burnett, 123 Cal. App. 4th at 1066, 20 Cal. Rptr. 3d at 570*. Additionally, the covenant not to sue does not leave Plaintiff without remedies. Plaintiff may still utilize the accountability mechanisms contained in ICANN's Bylaws. (See FAC ¶ 21, Ex. C § 6.6.) According to the FAC, these accountability mechanisms include "an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." (FAC ¶ 23.) Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, *section 1668* does not invalidate the covenant not to sue.¹

1 The Court does not find persuasive the preliminary analysis concerning the enforceability of the covenant not to sue conducted by the court in *DotConnectAfrica Trust v. ICANN, Case No. 2:16-cv-862 RGK (JCx) (C.D. Cal. Apr. 12, 2016)*.

Plaintiff also contends that the covenant not to sue is both procedurally and substantively unconscionable. Under California law, the "party challenging [*12] the validity of a contract or a contractual provision bears the burden of proving [both procedural and substantive] unconscionability." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1347, 182 Cal. Rptr. 3d 235, 247-48 (2015)*. "The elements of procedural and substantive unconscionability need not be present to the same degree because they are evaluated on a sliding scale. Consequently, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude the term is unenforceable, and vice versa." *Id., 182 Cal. Rptr. 3d at 248*.

"The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Id. at 1347-48, 182 Cal. Rptr. 3d at 248*. For purposes of procedural unconscionability, "California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. . .

. In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." *Id.* at 1348, 182 Cal. Rptr. 3d at 249. Importantly, "showing a contract is one of adhesion does not always establish procedural unconscionability." *Id.* at n.9. [*13] In the absence of an adhesion contract, the "circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." *Id.*, 182 Cal. Rptr. 3d at 248-49.

Here, even if the covenant not to sue contained in the Application Guidebook is a contract of adhesion, the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook "is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period," militates against a conclusion that the covenant not to sue is procedurally unconscionable. (FAC ¶ 21, Ex. C, p. 1-2 ("Introduction to the gTLD Application Process").) ICANN is a [*14] non-profit entity that, according to the FAC, "is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation . . ." (FAC ¶¶ 10 & 13.) Plaintiff, for its part, is a sophisticated entity that paid a \$185,000 application fee to participate in the application process for the .web gTLD. (FAC ¶ 1.) Under the totality of these circumstances, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable.

"Substantive unconscionability is not susceptible of precise definition. It appears the various descriptions--unduly oppressive, overly harsh, so one-sided as to shock the conscience, and unreasonably favorable to the more powerful party--all reflect the same standard." *Grand Prospect Partners*, 232 Cal. App. 4th at 1349, 182 Cal. Rptr. 3d at 249 (citations omitted). "[U]nconscionability turns not only on a 'one sided' result, but also on an absence of 'justification' for it."

Walnut Producers of Cal. v. Diamond Foods, Inc., 187 Cal. App. 4th 634, 647, 114 Cal. Rptr. 3d 449, 459 (2010) (quoting *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982)).

Plaintiff contends that the covenant not to sue is substantively unconscionable because of the one-sided limitation on an applicant's ability to sue ICANN without limiting ICANN's ability to sue an applicant. Plaintiff additionally asserts that the issue of the substantive unconscionability of the covenant not to sue is not susceptible [*15] to resolution at this stage of the proceedings because the FAC does not allege any facts providing a justification for ICANN's inclusion of the covenant not to sue in the Application Guidebook. The Court disagrees. The nature of the relationship between applicants such as Plaintiff and ICANN, and the justification for the inclusion of the covenant not to sue, is apparent from the facts alleged in the FAC and the FAC's incorporation by reference of the Application Guidebook. Without the covenant not to sue, any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue. As a result, the Court concludes that the covenant not to sue is not substantively unconscionable.

Conclusion

For all of the foregoing reasons, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to *California Civil Code section 1668*. Because the covenant not to sue bars Plaintiff's [*16] entire action, the Court dismisses the FAC with prejudice. The Court declines to address the additional arguments contained in ICANN's Motion to Dismiss. Plaintiff's Motion to Begin Discovery is denied as moot. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

JUDGMENT

Pursuant to the Court's November 28, 2016 Minute Order granting the Motion to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers

("ICANN"), which dismissed all of the claims asserted by plaintiff Ruby Glen, LLC ("Plaintiff"),

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that ICANN shall have judgment in its favor against Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED, AND

DECREED that Plaintiff take nothing and that ICANN shall have its costs of suit.

IT IS SO ORDERED.

DATED: November 28, 2016

/s/ Percy Anderson

Percy Anderson

UNITED STATES DISTRICT JUDGE

EXHIBIT M

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Resources

[About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)

[Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

[Accountability \(/resources/accountability\)](#)

[Governance \(/resources/pages/governance-2012-02-25-en\)](#)

[Groups \(/resources/pages/groups-2012-02-06-en\)](#)

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[Complaints Office \(https://www.icann.org/complaints-office\)](#)

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As amended 8 December 2011

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<p>ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)</p>	<p>Section 1. MISSION</p>
<p>Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)</p>	<p>The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN (Internet Corporation for Assigned Names and Numbers)") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN (Internet Corporation for Assigned Names and Numbers):</p>
<p>Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)</p>	<ol style="list-style-type: none"> 1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are <ol style="list-style-type: none"> a. Domain names (forming a system referred to as "DNS (Domain Name System)"); b. Internet protocol ("IP (Internet Protocol or Intellectual Property)") addresses and autonomous system ("AS (Autonomous System ("AS") Numbers)") numbers; and c. Protocol (Protocol) port and parameter numbers.
<p>Policy (/resources/pages/policy-01-2012-02-25-en)</p>	<ol style="list-style-type: none"> 2. Coordinates the operation and evolution of the DNS (Domain Name System) root name server system.
<p>Public Comment (/public-comments)</p>	<ol style="list-style-type: none"> 3. Coordinates policy development reasonably and appropriately related to these technical functions.
<p>Root Zone (Root Zone) KSK Rollover (/resources/pages/ksk-rollover-2016-05-06-en)</p>	<p>Section 2. CORE VALUES</p>
	<p>In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):</p>

(Advisory Committee) and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.

2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 6(1)(b) of this Article, prior to any final Board action.

3. After taking action on any policy subject to this Section, the Board shall publish in the meeting minutes the reasons for any action taken, the vote of each Director voting on the action, and the separate statement of any Director desiring publication of such a statement.

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN (Internet Corporation for Assigned Names and Numbers) actions and periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action of ICANN (Internet Corporation for Assigned Names and Numbers) may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN (Internet Corporation for Assigned Names and Numbers) policy (ies); or

b. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;

b. determine whether a stay of the contested action pending resolution of the request is appropriate;

c. conduct whatever factual investigation is deemed appropriate;

d. request additional written submissions from the affected party, or from other parties; and

e. make a recommendation to the Board of Directors on the merits of the request.

4. ICANN (Internet Corporation for Assigned Names and Numbers) shall absorb the normal administrative costs of the reconsideration process. It reserves the right to recover from a party requesting review or reconsideration any costs which are deemed to be extraordinary in nature. When such extraordinary costs can be foreseen, that fact and the reasons why such costs are necessary and appropriate to evaluating the Reconsideration Request shall be communicated to the party seeking reconsideration, who shall then have the option of withdrawing the request or agreeing to bear such costs.

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within thirty days after:

a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a preliminary report or minutes of the Board's meetings; or

b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or

c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

6. All Reconsideration Requests must include the information required by the Board Governance Committee, which shall include at least the following information:

a. name, address, and contact information for the requesting party, including postal and e-mail addresses;

b. the specific action or inaction of ICANN (Internet Corporation for Assigned Names and Numbers) for which review or reconsideration is sought;

c. the date of the action or inaction;

d. the manner by which the requesting party will be affected by the action or inaction;

e. the extent to which, in the opinion of the party submitting the Request for Reconsideration, the action or inaction complained of adversely affects others;

f. whether a temporary stay of any action complained of is requested, and if so, the harms that will result if the action is not stayed;

g. in the case of staff action or inaction, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies);

h. in the case of Board action or inaction, a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act;

i. what specific steps the requesting party asks ICANN (Internet Corporation for Assigned Names and Numbers) to take-i.e., whether and how the action should be reversed, cancelled, or modified, or what specific action should be taken;

j. the grounds on which the requested action should be taken; and

k. any documents the requesting party wishes to submit in support of its request.

7. All Reconsideration Requests shall be posted on the Website..

8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so

long as (i) the requests involve the same general action or inaction and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction.

9. The Board Governance Committee shall review Reconsideration Requests promptly upon receipt and announce, within thirty days, its intention to either decline to consider or proceed to consider a Reconsideration Request after receipt of the Request. The announcement shall be posted on the Website.

10. The Board Governance Committee announcement of a decision not to hear a Reconsideration Request must contain an explanation of the reasons for its decision.

11. The Board Governance Committee may request additional information or clarifications from the party submitting the Request for Reconsideration.

12. The Board Governance Committee may ask the ICANN (Internet Corporation for Assigned Names and Numbers) staff for its views on the matter, which comments shall be made publicly available on the Website.

13. If the Board Governance Committee requires additional information, it may elect to conduct a meeting with the party seeking Reconsideration by telephone, e-mail or, if acceptable to the party requesting reconsideration, in person. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

14. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

15. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN (Internet Corporation for Assigned Names and Numbers) staff, and by any third party.

16. To protect against abuse of the reconsideration process, a request for reconsideration may be dismissed by the Board Governance Committee where it is repetitive, frivolous, non-substantive, or otherwise abusive, or where the affected party had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. Likewise, the Board Governance Committee may dismiss a request when the requesting party does not show that it will be affected by ICANN (Internet Corporation for Assigned Names and Numbers)'s action.

17. The Board Governance Committee shall make a final recommendation to the Board with respect to a Reconsideration Request within ninety days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final

recommendation and its best estimate of the time required to produce such a final recommendation. The final recommendation shall be posted on the Website.

18. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken.

19. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:

- a. the number and general nature of Reconsideration Requests received;
- b. the number of Reconsideration Requests on which the Board Governance Committee has taken action;
- c. the number of Reconsideration Requests that remained pending at the end of the calendar year and the average length of time for which such Reconsideration Requests have been pending;
- d. a description of any Reconsideration Requests that were pending at the end of the calendar year for more than ninety (90) days and the reasons that the Board Governance Committee has not taken action on them;
- e. the number and nature of Reconsideration Requests that the Board Governance Committee declined to consider on the basis that they did not meet the criteria established in this policy;
- f. for Reconsideration Requests that were denied, an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
- g. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

20. Each annual report shall also aggregate the information on the topics listed in paragraph 19(a)-(e) of this Section for the period beginning 1 January 2003.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.

3. Requests for such independent review shall be referred to an Independent Review Panel ("IRP"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.

4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN (Internet Corporation for Assigned Names and Numbers) ("the IRP Provider") using arbitrators under contract with or nominated by that provider.

5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.

6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.

7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN (Internet Corporation for Assigned Names and Numbers) so directs, the IRP Provider shall establish a standing panel to hear such claims.

8. The IRP shall have the authority to:

a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;

b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

9. Individuals holding an official position or office within the ICANN (Internet Corporation for Assigned Names and Numbers) structure are not eligible to serve on the IRP.

10. In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.

11. The IRP shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

13. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on the Website when they become available.

14. The IRP may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.

Section 4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

1. The Board shall cause a periodic review of the performance and operation of each Supporting Organization (Supporting Organization), each Supporting Organization (Supporting Organization) Council, each Advisory Committee (Advisory Committee) (other than the Governmental Advisory Committee (Advisory Committee)), and the Nominating Committee by an entity or entities independent of the organization under review. The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN (Internet Corporation for Assigned Names and Numbers) structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

These periodic reviews shall be conducted no less frequently than every five years, based on feasibility as determined by the Board. Each five-year cycle will be computed from the moment of the reception by the Board of the final report of the relevant review Working Group.

The results of such reviews shall be posted on the Website for public review and comment, and shall be considered by the Board no later than the second

scheduled meeting of the Board after such results have been posted for 30 days. The consideration by the Board includes the ability to revise the structure or operation of the parts of ICANN (Internet Corporation for Assigned Names and Numbers) being reviewed by a two-thirds vote of all members of the Board.

2. The Governmental Advisory Committee (Advisory Committee) shall provide its own review mechanisms.

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.

2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.

3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.

4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names and Numbers) budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in Section 2 of Article IV or the Independent Review Policy set forth in Section 3 of Article IV have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies,

clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;
2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));
4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts-of-interest and confidentiality policies.

Section 4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

1. No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations

(Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

2. ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.

3. Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.

4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.

5. The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns. Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE VI: BOARD OF DIRECTORS

Section 1. COMPOSITION OF THE BOARD

The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board") shall consist of sixteen voting members ("Directors"). In addition, five non-voting liaisons ("Liaisons") shall be designated for the purposes set forth in

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 May 26,
6 2017, I served a copy of the within document(s):

7 **DECLARATION OF JEFFREY A. LEVEE IN SUPPORT OF ICANN'S MOTION FOR
8 SUMMARY JUDGMENT**

- 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.

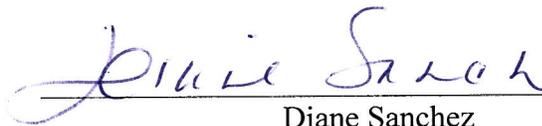
16 Ethan J. Brown
17 ethan@bnsklawgroup.com
18 Sara C. Colón
19 sara@bnsklawgroup.com
20 Rowennakete "Kete" Barnes
21 kete@bnsklaw.com
22 BROWN NERI & SMITH LLP
23 11766 Wilshire Boulevard, Suite 1670
24 Los Angeles, California 90025
25 Telephone: (310) 593-9890
26 **VIA PERSONAL SERVICE**

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1230 Rosecrans Ave, Suite 690
Manhattan Beach, CA 90266
(310) 307-4556
(310) 307-4570 fax
dkesselman@kbslaw.com

VIA EMAIL ONLY

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 May 26, 2017, at Los Angeles, California.

25
26 
27 _____
28 Diane Sanchez