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Re: DCA v. ICANN, ICDR Case No. 50-20-1300-1083, Response to ICANN's Request to Rehear the Proceedings

Dear Mr. Chairman and Members of the Panel:

DotConnectAfrica Trust ("DCA") respectfully submits that it is neither appropriate nor necessary to rehear and reconsider the procedural matters decided by the original Independent Review Process ("IRP") Panel in August 2014. The Panel issued its final and reasoned Declaration on the IRP Procedure (the "Declaration") after extensive briefing and oral argument from the parties on the procedural matters at issue, including the availability of live witness testimony.

Now, more than six months after the Panel issued its Declaration on the IRP Procedure, ICANN requests that the reconstituted Panel reconsider—"at a minimum"—its decision that it has the authority to permit live witness testimony.[1] ICANN's request for the reconstituted Panel to reconsider the decision of the original Panel is just that—a request for reconsideration (or partial reconsideration) of the original

[1] Letter from Jeffrey LeVee to the IRP Panel, p. 2 (26 Feb. 2015).

Panel's decision—not a request to repeat a portion of the proceedings to ensure that a newly appointed decision-maker is on equal footing with the existing Panel members to decide the merits of the case.

Accordingly, DCA opposes ICANN's request. In DCA's view, as described in more detail below, there are no grounds for repeating any of the proceedings at this time because the procedural issues have been heard and finally decided. Furthermore, there are no grounds for reconsideration because the original Panel properly exercised the discretion granted to it by the ICANN Bylaws, Supplementary Procedures and ICDR Rules, to structure this proceeding in the manner best suited to provide each party the right to be heard and a fair opportunity to present its case.[2]

1. ICDR Rule 11(2) Is Not An Appeal Mechanism

The version of the International Centre for Dispute Resolution Arbitration Rules (the "ICDR Rules") applicable in this proceeding provide for the possibility to repeat "***all or part of any prior hearings***."[3] This IRP is governed by the 2010 version of the ICDR Rules, which were in effect at the time DCA filed its Notice of IRP (as well as at the time ICANN filed its response to DCA's Request for IRP).[4] Article 11(2) of the ICDR Rules provides that—

> *"If a substitute arbitrator is appointed under either Article 10 or Article 11, the tribunal shall determine at its sole discretion whether* ***all or part of any prior hearings*** *shall be repeated."*[5]

Rule 11(2) ensures that a substitute arbitrator—particularly a party-appointed arbitrator—has a sufficient understanding of the proceedings to date, to continue forward on more or less equal footing with the rest

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[2] ICDR Art. 16(1) [Ex. C-M-001].

[3] *See* JAMES HOSKING, ET AL., A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES, Chapter 11: Article 11—Replacement of an Arbitrator ¶ 11.08 (2011) ("The newly constructed tribunal can require the parties to repeat prior hearings, including witness examinations and oral arguments. The newly constituted tribunal has the sole discretion to decide and is likely to consider, but is under no obligation to solicit, the views of the parties.").

[4] ICDR Art. 1(1), [Ex. C-M-001] ("the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.").

[5] ICDR Art. 11(2), [Ex. C-M-001] (emphasis added). *Cf.* International Centre for Dispute Resolution, International Dispute Resolution Procedures, Art. 15(2) (1 June 2104) ("If a substitute arbitrator is appointed under this Article, ***unless the parties otherwise agree*** the arbitral tribunal shall determine at its sole discretion whether ***all or part of the case*** shall be repeated.") (emphasis added).

of the tribunal.[6] For example, in certain cases it may be important for the substitute arbitrator to hear live witness testimony firsthand rather than to rely on a written transcript of a prior proceeding in order to adequately judge the credibility of the witness. Rule 11(2) leaves in the Panel's sole discretion whether and to what extent it is necessary to rehear prior proceedings, reflecting the nearly universal premise that arbitrators should have the discretion to repeat proceedings in the event of a substitution.[7]

This does not mean, however, that Rule 11(2) is intended to be an appeal mechanism for final decisions. Absent some sort of impropriety on the part of the arbitrator who was replaced that can be remedied by the substitute arbitrator, there is no rationale under Article 11(2) to reconsider final decisions. ICANN has not suggested any sort of impropriety on the part of Justice Neal. It simply is dissatisfied with what was decided by all of the members of the Panel that included Justice Neal and is now opportunistically seeking to revisit the procedural framework that was put in place in a detailed reasoned decision based on extensive written and oral submissions by the parties. Not only would it now be improper—both as a matter of general principle, but also as a matter of the application of the ICDR Rules—to revisit the procedural framework for these proceedings, it would also be inefficient.

For these reasons, DCA submits that ICANN's request for the Panel to reconsider a final declaration on procedure is inappropriate. The Panel members are on nearly equal footing with respect to the merits of the dispute. Each member of the reconstituted Panel will have had the benefit of reviewing all of the written submissions prior to the hearing on the merits and each member of the Panel will be afforded the opportunity to hear oral argument and witness testimony (to the extent there is any) live. As the IRP has

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[6] *See* HOSKING, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES at ¶ 11.11 ("Clearly a replacement arbitrator needs an opportunity to address and personally consider prior witness testimony and cross examination. Merely consulting hearing transcripts and prior submissions poses problems of interpretation, denies the newly installed arbitrator and equal opportunity to weigh the credibility of such evidence and/or testimony and is a second-best solution."). *See also* GARY BORN, 2 INTERNATIONAL COMMERCIAL ARBITRATION 1954 (2014) (explaining why a tribunal might repeat a portion of a proceeding for the benefit of a substitute arbitrator) ("It bears emphasis that the process of rehearing evidence and submissions is costly and time-consuming, and contradicts the basic purposes of the arbitral process; only where this is required as a matter of procedural fairness should it be ordered. On the other hand, where witness credibility is important, or where a new member of the tribunal has important questions that he or she would have raised during the proceedings and that cannot otherwise be addressed, then it is necessary to repeat the relevant portions of the proceedings. The precise nature and mechanics of such repetition should lie within the arbitrators' discretion.").

[7] GARY BORN, 2 INTERNATIONAL COMMERCIAL ARBITRATION 1952 (2014) (describing the institutional and national law origins of the premise of allowing repetition following a substitution ("Article 15 of the 2010 UNCITRAL Rules provides that, where 'an arbitrator is replaced, the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the tribunal decides otherwise.' Similarly, the 2012 ICC Rules permit the arbitral tribunal to decide 'if and to what extent prior proceedings shall be repeated' before the reconstituted tribunal. Most other institutional rules contain comparable provisions.").

not yet proceeded to the hearing on the merits, DCA submits that rehearing the non-merits phase of the case is neither appropriate at this juncture nor in the interest of due process.

2. There Are No Grounds for Reconsideration

Even if Rule 11(2) provided for reconsideration of final decisions (and we believe it does not in the present circumstances), it was entirely appropriate for the Panel to structure this proceeding so as to assure both parties a full and fair opportunity to present their case and be heard. Although the Supplementary Rules provide that an "in-person hearing shall be limited to argument only,"[8] the Bylaws also require ICANN to act in a manner that ensures transparency and accountability.[9] As you know, the original Panel interpreted the Supplementary Procedures in light of those mandatory commitments. The Panel was entirely within its mandate to conduct the arbitration so as to balance the efficiency and expediency sought by ICANN with the right of applicants to be heard.

The thoughtfulness with which the original Panel approached these issues is evident in the Declaration on the IRP Procedure. The Panel considered two rounds of detailed pleadings and engaged the parties in an extended oral hearing before issuing its decision. The Panel did not, as ICANN claims, grant DCA "the equivalent of a lawsuit" in permitting DCA to adequately present its case.[10] An equivalent lawsuit filed by DCA against ICANN in a California court would include extensive discovery, public hearings and a lengthy appeals mechanism. Instead, the Panel recognized that each party has a right to a fair and equal opportunity to present its case within the framework created by ICANN, including the ability to obtain a meaningful remedy. This is a right that, if denied, would render the extensive and non-negotiable series of litigation waivers and releases to which ICANN binds all applicants for new gTLDs unconscionable and subject ICANN to numerous lawsuits—a result ICANN surely does not want.[11]

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[8] The Supplementary Procedures do not however, as ICANN asserts on page 2 of its letter, limit the hearing to "closing argument." *Compare* Letter from Jeffrey Levee to the Panel, 2 (26 February 2015) ("Here, the Panel exceeded its authority under the Supplementary Procedures when it held in its 14 August Order that it could "order" live testimony of witnesses despite the Panel's acknowledgment that ***the Supplementary Procedures expressly limit any closing argument to argument only***.") (emphasis added) *with* Supplementary Rules, Art. 4 (2011) ("the ***in-person hearing*** shall be limited to ***argument only***") (emphasis added) [Ex. C-003].

[9] ICANN Bylaws, Arts. I §§ 2 (7) & (10), III § 1, IV § 1, [Ex. C-010]; ICANN Articles of Incorporation, Art. 4 [Ex. C-009].

[10] Letter at 6 ("DCA is correct that it cannot file suit against ICANN with respect to its application, but that does not mean that it should get the equivalent of a lawsuit as an alternative.").

[11] *See, e.g.*, *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916 (9th Cir. 2013) [Ex. C-M-034]; *Pokorny v. Quixtar, Inc.*, 601 F.3d 987 (9th Cir. 2010) [Ex. C-M-032]; *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 16 Cal. Rptr. 3d 296 (2004) [Ex. C-M-036] (each holding that adhesive dispute resolution mechanisms that impose non-mutual burdens and are

Finally, this Panel has already considered one reconsideration request from ICANN and found that there is nothing in the Bylaws, the Supplementary Procedures or the ICDR Rules that grants the Panel the authority to reconsider its decisions.[12]

3. DCA Will Stipulate to No Live Witness Testimony During the Hearing on the Merits

DCA submits that there is no reason for the reconstituted Panel and the parties to expend valuable time and resources repeating the procedural hearings when DCA does not intend to seek the Panel's leave to cross-examine ICANN's witnesses. DCA is prepared to stipulate to no live witness testimony during the hearing on the merits in this IRP if the Panel accepts the testimony as presented and gives it all due weight and consideration.

DCA understands ICANN to be agreeable to this given its request and its confidence that permitting witnesses to testify would not result in any finding adverse to ICANN.[13] Although DCA questions ICANN's assertion, DCA is prepared to agree to no live witness testimony at this stage of the IRP, having had the benefit of document production and the opportunity to present additional evidence with its memorial on the merits. DCA believes the evidence it has submitted with its memorial, including the witness statement of DCA's Founder and Executive Director Ms. Sophia Bekele, strongly support its claims. Furthermore, now the parties are on more or less equal footing with each party having had the opportunity to submit witness statements and respond in writing to the facts alleged in the opposing party's statements.

Although DCA will stipulate to no live testimony during the hearing on the merits in this IRP, DCA proposes that each party's witnesses be present at, or available by telephone during, the hearing to

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not mutually binding are unconscionable and are either unenforceable under California law or must be amended by the court to strike the unconscionable provisions).

[12] *See generally DotConnectAfrica Trust v. ICANN*, Decision on ICANN's Request for Partial Reconsideration, ICDR Case No. 50 2013 001083 (4 June 2014).

[13] Letter from Jeffrey LeVee to the IRP Panel, p. 4 (26 Feb. 2015).

answer any questions the Panel may have.

Sincerely,

Arif H. Ali

cc: Jeffrey LeVee
Carolina Cardenas-Venino