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13 NAMES AND NUMBERS

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ORIGINAL FILED
Superior Court of California
County of Los Angeles

DEC 21 2016

Sherri R. Carter, Executive Officer/Clerk
By: Cristina Grijalva, Deputy

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

16 DOTCONNECTAFRICA TRUST,

17 Plaintiff,

18 v.

19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS, et
21 al.,

22 Defendant.

CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

ICANN'S RESPONSES TO DCA'S
EVIDENTIARY OBJECTIONS TO
THE DECLARATION OF K.
ESPINOLA

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

RESERVATION ID: 1611115174199

1 Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hereby
 2 responds to Plaintiff DotConnectAfrica Trust's ("DCA") evidentiary objections to the Declaration
 3 of Kevin Espinola ("Espinola Decl."), filed in support of ICANN's Opposition to Plaintiff's
 4 Motion for Preliminary Injunction.
 5

Espinola Declaration	DCA Objection	Response	Court's Ruling
<p>7 ¶2: ICANN and its community 8 developed the New gTLD 9 Applicant Guidebook 10 ("Guidebook") as part of a 11 years-long, bottom-up 12 multistakeholder process during 13 which numerous versions were 14 published by ICANN for public 15 comment and revised, in part 16 based on comments received. In 17 total, six versions of the 18 Guidebook were published for 19 public comment.</p>	<p>1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702) 3. Best Evidence Rule (Evid. Code § 1520)</p>	<p><u>Foundation/Personal Knowledge.</u> Mr. Espinola testified that he has served as outside counsel for ICANN and that in that position he assisted in the development of ICANN's New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge regarding the development of the New gTLD Applicant Guidebook.</p> <p><u>Best Evidence:</u> Mr. Espinola's testimony is not offered to prove the content of a writing, but rather as evidence regarding how the Guidebook was developed over time. Indeed, this portion of Mr. Espinola's testimony does not even reference the contents of a document.</p>	
Espinola Declaration	DCA Objection	Response	Court's Ruling
<p>26 ¶3: In the April 15, 2011 27 version of the Guidebook 28 ("April 2011 Guidebook"), language was added to Section 6 of Module 6 of the Guidebook</p>	<p>1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702)</p>	<p><u>Foundation/Personal Knowledge.</u> Mr. Espinola testified that he has served as outside counsel for</p>	

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<p>(“Covenant Not to Sue”) making explicit that: “[an] applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for [the] purposes of challenging any final decision made by ICANN with respect to the application.” Attached hereto as Exhibit K is a true and correct copy of Module 6 of the April 2011 version of the Guidebook, which was published with a redline, showing changes made from the prior version of the Guidebook.</p>	<p>3. Improper Opinion Testimony (Evid. Code §§800-803) 4. Best Evidence Rule (Evid. Code § 1520)</p>	<p>ICANN and that in that position he assisted in the development of ICANN’s New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge regarding the development of the New gTLD Applicant Guidebook, including language added to Module 6 in 2011 and when information was made available to the public for comment..</p> <p><u>Improper Lay Opinion:</u> This testimony is not opinion. However, even if it could be construed as such, Mr. Espinola is qualified to testify, based on his knowledge and experience demonstrated by his testimony in ¶ 1, as to the language added to Module 6 of the Guidebook in 2011.</p> <p><u>Best Evidence:</u> Mr. Espinola's testimony is not offered to prove the content of a writing, but rather as evidence regarding the development of the Guidebook, and the information made available to the public for comment. A true and correct copy of the referenced document is attached as Exhibit K to Mr. Espinola's declaration.</p>	
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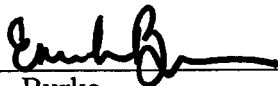
Espinola Declaration	DCA Objection	Response	Court's Ruling
<p>¶4: As ICANN has stated publicly, ICANN is a not-for-profit public benefit corporation and anticipated that, absent a broad waiver and limitation of liability in the Guidebook's terms and conditions, the over 1,900 applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, which would imperil the successful implementation of the New gTLD Program. Accordingly, ICANN carefully considered how to protect the New gTLD Program from such challenges, and the Covenant Not to Sue in the Guidebook was deemed appropriate in light of these considerations.</p>	<ol style="list-style-type: none"> 1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702) 3. Speculation (Evid. Code § 702) 4. Hearsay (Evid. Code § 1200, et seq.) 5. Improper Opinion Testimony (Evid. Code §702) 	<p><u>Foundation/Personal Knowledge.</u> Mr. Espinola testified that he has served as outside counsel for ICANN and that in that position he assisted in the development of ICANN's New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge regarding the development of the New gTLD Applicant Guidebook, and the considerations behind including the Covenant Not To Sue in Module 6 of the Guidebook.</p> <p><u>Speculation/Improper Lay Opinion:</u> This testimony is not speculative, nor is it opinion. Mr. Espinola is qualified to testify, based on his knowledge and experience demonstrated at ¶ 1, regarding the development of the New gTLD Applicant Guidebook, and the considerations behind including the Covenant Not To Sue in Module 6 of the Guidebook.</p> <p><u>Hearsay:</u> DCA does not identify which portion of Mr. Espinola's testimony it considers hearsay; however, as described above, Mr.</p>	

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		Espinola's testimony is based on his personal knowledge.	
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Dated: December 21, 2016

Jones Day

By: 
Erin L. Burke

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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 December
6 21, 2016, I served a copy of the within document(s):

7 **ICANN'S RESPONSES TO DCA'S EVIDENTIARY OBJECTIONS TO THE**
8 **DECLARATION OF K. ESPINOLA**

- 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
forth below.
- 11 by placing the document(s) listed above in a sealed Federal Express envelope and
12 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery
Service agent for delivery.
- 13 by personally delivering the document(s) listed above to the person(s) at the
14 address(es) set forth below.
- 15 by transmitting via e-mail or electronic transmission the document(s) listed above
16 to the person(s) at the e-mail address(es) set forth below.

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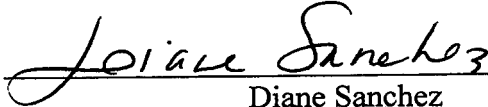
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Via Email & Federal Express

22 *Via Email & Federal Express*

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

25 Executed on December 21, 2016, at Los Angeles, California.

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27 
28 Diane Sanchez