

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jeffrey A. LeVee (State Bar No. 125863)
Erin L. Burke (State Bar No. 186660)
Amanda Pushinsky (State Bar No. 267950)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

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

DOTCONNECTAFRICA TRUST,
Plaintiff,
v.
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, et
al.,
Defendant.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

**ICANN'S RESPONSES TO DCA'S
EVIDENTIARY OBJECTIONS**

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

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

COPY

CONFIRMED COPY
ORIGINAL FILED
Superior Court of California
Central District

AUG 04 2017

Shari R. Gerth, Executive Officer/Clerk
By Haul Sanchez, Deputy

1 Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby
 2 responds to Plaintiff DotConnectAfrica Trust’s (“DCA”) evidentiary objections to the
 3 Declarations of Jeffrey A. LeVee (“LeVee Decl.”), Christine Willett (“Willett Decl.”), Akram
 4 Atallah (“Atallah Decl.”) and Kevin Espinola (“Espinola Decl.”) filed in support of ICANN’s
 5 Motion for Summary Judgment.

LeVee Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
<p>7 ¶ 10: The IRP proceedings 8 initiated by DCA in 2013 took 9 two years. During this time, 10 ICANN produced hundreds of 11 documents, drafted response 12 pleadings and supporting 13 declarations, and participated 14 at the IRP hearing, including 15 putting forth witnesses to 16 testify under oath. ICANN had 17 opposed allowing witnesses to 18 testify at the IRP hearing, but 19 the IRP Panel ordered that the 20 three persons who had 21 submitted declarations must 22 testify at the hearing, and each 23 of those three did testify.</p>	<p>1. Irrelevant (Evid. Code § 403).</p>	<p><u>Relevance.</u> Testimony regarding the IRP proceedings is relevant to show that that the IRP proceeding between ICANN and DCA bore the “formal hallmarks” of a judicial proceeding and thus qualifies as a “quasi- judicial administrative proceeding.” This evidence supports ICANN’s argument that DCA’s entire First Amended Complaint (“FAC”) is barred by the doctrine of judicial estoppel.</p>	
LeVee Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
<p>19 ¶ 13: DCA filed this suit 20 against ICANN on January 20, 21 2016, in Los Angeles County 22 Superior Court. After the 23 Superior Court denied DCA’s 24 request for a temporary 25 restraining order, ICANN 26 timely removed the case to 27 federal court, invoking 28 diversity jurisdiction. On March 1, 2016, DCA moved for a preliminary injunction, which the federal court granted on April 12, 2016 on the basis of an admitted factual error and before DCA admitted in deposition that the entire basis on which the</p>	<p>1. Lacks foundation (Evid. Code § 403.)</p> <p>2. Prejudicial (Evid. Code § 352). This statement is materially misleading because the federal court never determined that the basis of its</p>	<p><u>Foundation.</u> Mr. LeVee laid the foundation for his testimony. Mr. LeVee testified that he is counsel to ICANN. (LeVee Decl. ¶ 1.) As such, he has personal knowledge of the procedural posture and filings of this case.</p> <p><u>Prejudicial.</u> This testimony is not materially misleading nor prejudicial. Mr. LeVee’s declaration simply states the procedural history of this case. Citing to what the</p>	

<p>1 district court had granted the 2 injunction – that the IRP Panel 3 had allowed DCA to skip the 4 geographic review 5 requirement – was false.</p>	<p>6 ruling was the 7 factual error. In 8 fact, the court 9 denied ZACR and 10 ICANN’s motion to 11 reconsider the 12 ruling <i>despite</i> the 13 factual error.</p> <p>14 3. Best evidence 15 rule (Evid. Code § 16 1520). Ms. 17 Bekele’s deposition 18 transcript is the 19 best evidence of 20 her statements. The 21 federal court’s 22 order on DCA’s 23 motion for 24 preliminary 25 injunction is the 26 best evidence of the 27 basis for the court’s 28 ruling on that 29 motion.</p>	<p>30 court <i>mistakenly</i> identified 31 as the Initial Evaluation 32 Report for <i>DCA’s</i> 33 application (which was 34 actually the Initial 35 Evaluation Report for 36 <i>ZACR’s</i> application), the 37 district court asserted that 38 DCA had passed the 39 Geographic Names 40 Review. <i>See</i> Declaration 41 of Ethan Brown in support 42 of DCA’s Motion for 43 Preliminary Injunction, Ex. 44 3 at 2-3. In fact, DCA’s 45 application had not. <i>Id.</i></p> <p>46 <u>Best Evidence.</u> Mr. 47 LeVee’s statement is not 48 offered to prove the 49 contents of a writing. Mr. 50 LeVee’s testimony is based 51 on his personal knowledge 52 of the procedural posture 53 and filings of this case.</p>	
--	--	---	--

19 DECLARATION OF CHRISTINE WILLETT (Exhibit to Levee Declaration)

Willett Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
<p>22 ¶ 2. In my role as Vice 23 President for Operations, I 24 have been responsible for 25 overseeing the evaluation of 26 the 1,930 gTLD applications 27 ICANN received in 2012 as 28 part of ICANN’s New gTLD Program. Those applications are evaluated in accordance with the procedures set forth in the New gTLD Applicant Guidebook (“Guidebook”). A</p>	<p>1. Lacks personal knowledge (Evid. Code § 702). 2. Lacks foundation (Evid. Code § 403).</p>	<p><u>Foundation/Personal Knowledge.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as</p>	

1	copy of the Guidebook is attached as Exhibit 3 to the declaration of Sophia Bekele Eshete (“Bekele Declaration”).		part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the procedures governing the evaluation of New gTLD applications.	
2				
3				
4				
5	Willett Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
6	¶ 3. In the spring of 2012, Plaintiff DCA and defendant ZA Central Registry (“ZACR”) each submitted applications to operate the .AFRICA gTLD. In doing so, they, like all new gTLD applicants, expressly accepted and acknowledged the Guidebook, including the release and covenant not to sue (“Covenant”) in paragraph 6 of Module 6.	1. Lacks personal knowledge (Evid. Code § 702). 2. Lacks foundation (Evid. Code § 403).	<u>Foundation/Personal Knowledge</u> . Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the procedures governing the evaluation of New gTLD applications, including DCA and ZACR’s applications for .Africa.	
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18	Willett Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
19	¶ 6. In addition, because DCA and ZACR had each applied for a gTLD that represents the name of a geographic region, the Guidebook requires that DCA and ZACR each provide documentation of support or non-objection from at least 60% of the governments in the region. Bekele Decl. Ex. 3 § 2.2.1.4.2. The Guidebook also provides that a Geographic Names Panel operated by a third-party vendor retained by ICANN must verify the relevance and authenticity of an applicant’s documentation of support. <i>Id.</i> §§ 2.4.2,	1. Lacks personal knowledge (Evid. Code § 702). 2. Lacks foundation (Evid. Code § 403).	<u>Foundation/Personal Knowledge</u> . Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of contents of the Guidebook and the actions taken by	
20				
21				
22				
23				
24				
25				
26				
27				
28				

<p>1 2.2.1.4.4. The Geographic Names Panel evaluated the support letters submitted by the applicants pursuant to the criteria set forth in the Guidebook. In particular, section 2.2.1.4.3 of the Guidebook required that letters of support for a geographic name “clearly express the government’s or public authority’s support for or non-objection to the applicant’s application and demonstrate the government or public authority’s understanding of the string being requested and its intended use.” It further requires that a letter of support “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, i.e., entry to a registry agreement with ICANN requiring compliance with consensus policies and payment of fees.” The Geographic Names Panel treated both of these requirements as mandatory for all applicants (including DCA and ZACR).</p>	<p>3. Best evidence rule (Evid. Code § 1520).</p>	<p>the Geographic Names Panel.</p> <p><u>Best Evidence.</u> This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett’s testimony is based on her personal knowledge of ICANN’s procedures to evaluate New gTLD applications, including ICANN’s implementation of the Guidebook’s requirements in reviewing New gTLD applications, including DCA and ZACR’s applications. A true and correct copy of the Guidebook is attached to the Declaration of Sophia Bekele in Support of DCA’s Motion for Preliminary Injunction, dated November 10, 2016.</p>	
<p>22 Willett Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>23 ¶ 7. DCA submitted with its application for .AFRICA (“Application”) what it called a letter of support dated in 2009 (three years earlier) from the African Union Commission (“AUC”). A copy of that letter is attached as Exhibit 6 to the Bekele Declaration. I now understand</p>	<p>1. Lacks foundation (Evid. Code § 403.)</p>	<p><u>Foundation.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as</p>	

<p>1 that, in 2010, DCA had 2 received a letter from the AUC 3 that formally withdrew the 4 AUC's support for DCA's 5 Application for the .AFRICA 6 gTLD. A copy of that letter is 7 attached as Exhibit 7 to the 8 Bekele Declaration. DCA did 9 not submit to ICANN with its 10 Application a copy of the 11 AUC's 2010 letter 12 withdrawing its support for 13 DCA.</p>	<p>2. Best evidence rule (Evid. Code § 1520).</p>	<p>part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including DCA's application for .Africa, the content of that application, and the supporting documentation.</p> <p><u>Best evidence.</u> This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett's testimony is based on her personal knowledge of ICANN's review of DCA's application for .Africa, including information withheld by DCA at the time of its application and subsequent knowledge of the 2010 AUC letter withdrawing the 2009 endorsement. A true and correct copy of the 2010 AUC letter is attached as Exhibit 6 to the Declaration of Sophia Bekele ("Bekele Declaration").</p>	
<p>Willett Declaration</p>	<p>DCA Objection</p>	<p>ICANN's Response</p>	<p>Court's Ruling</p>
<p>21 ¶ 8. DCA also submitted with 22 its Application an August 23 2008 letter from the United 24 Nations Economic 25 Commission for Africa 26 ("UNECA"). A copy of that 27 letter is attached as Exhibit 8 28 to the Bekele Declaration. In September 2015, UNECA wrote in a letter that it was a "United Nation entity [that] is neither a government nor public authority and therefore is not qualified to issue a letter</p>	<p>1. Lacks personal knowledge (Evid. Code § 702).</p> <p>2. Lacks foundation and irrelevant (Evid. Code § 403).</p>	<p><u>Personal Knowledge/ Foundation.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>of support for a prospective applicant,” and that its August 2008 letter was “merely an expression of a view in relation to [DCA’s] initiative and efforts regarding internet governance . . . [and] cannot be properly considered as a ‘letter of support’ within the context of ICANN’s requirements and cannot be used as such.” A true and correct copy of UNECA’s September 2015 letter is attached as Exhibit 10 to the Bekele Declaration.</p>	<p>3. Best evidence rule (Evid. Code § 1520).</p> <p>4. Prejudicial because the statement is materially misleading because it fails to state that DCA specifically identified the purported withdrawal in its</p>	<p>1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including DCA’s application for .Africa and the processing of that application.</p> <p><u>Relevance.</u> Testimony regarding the 2015 letter from UNECA is relevant to show that DCA would not have been able to obtain an updated letter from UNECA that conformed with the Guidebook’s requirements following the IRP Declaration. This evidence supports ICANN’s argument that DCA has no likelihood of success on the merits as to its remaining causes of action.</p> <p><u>Best Evidence.</u> This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett’s testimony is based on her personal knowledge of ICANN’s review of DCA’s application for .Africa, including subsequent knowledge of the 2015 UNECA letter stating that its 2008 letter cannot be considered as a letter of support.</p> <p><u>Prejudicial.</u> This testimony is not materially misleading nor prejudicial. Ms. Willett’s declaration simply states that UNECA wrote a letter in 2015</p>	
--	---	---	--

1		application ICANN and has done so on numerous occasions (Evid. Code § 352).	stating that its 2008 letter cannot be considered as a letter of support.	
2				
3				
4		5. Bekele Decl. ¶	<u>Fifth Objection.</u> It is unclear what evidentiary objection DCA intends to make with its fifth objection. Because the 2009 AUC letter failed to conform to the Guidebook's requirements, DCA was required to obtain an updated letter from AUC if it were to rely on a letter from AUC to fulfill the 60% requirement of support or non-objection from government authorities. Regardless of any determination by the GNP as to whether AUC qualifies as a valid endorser, the 2010 AUC withdrawal letter shows that DCA would have been unable to do so.	
5		___, Ex. ___		
6		("Unlike the initial letter of support from the AUC the subsequent letter omitted any official stamp, was not signed by the AUC Chairman, and instead was signed by the Deputy Chairperson).		
7				
8				
9				
10				
11				
12				
13				
14				
15				
16	Willett Declaration	DCA Objection	ICANN's Response	Court's Ruling
17				
18	¶ 9. On June 5, 2013, at the time when ICANN's Board accepted the Government Advisory Committee's ("GAC's") advice objecting to DCA's Application, DCA had not yet passed the Geographic Names Panel review. At that time, the Geographic Names Panel had been in the midst of its review of DCA's Application; it had determined that the support documentation submitted by DCA's, including the letters from the AUC and UNECA, did not meet the criteria set forth in the Guidebook, and was therefore planning to send "clarifying questions" to	2. Best evidence rule (Evid. Code § 1520).	<u>Best Evidence.</u> This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett's testimony is based on her personal knowledge as the Vice President for Operations of the Global Domains Division of ICANN regarding evaluation of New gTLD applications, including DCA's application for .Africa and the processing of that application.	
19				
20				
21				
22				
23				
24				
25				
26				
27		3. Lacks foundation (Evid. Code § 403.)	<u>Foundation.</u> Ms. Willett testified that she is the	
28				

1 DCA. Clarifying questions are
2 sent where support
3 documentation does not meet
4 the criteria set forth in the
5 Guidebook, and they are an
6 accommodation to provide
7 applicants an opportunity to
8 explain/supplement their
9 documentation. However, as a
10 result of the ICANN Board's
11 acceptance of the GAC's
12 advice, DCA's Application
13 was removed from processing,
14 and the clarifying questions
15 were not sent at that time.

Vice President for
Operations of the Global
Domains Division of
ICANN, and that in that
role she has been
responsible for overseeing
the evaluation of
applications received as
part of the New gTLD
Program. (Willett Decl. ¶¶
1-2.) As such, she has
personal knowledge of the
evaluation of New gTLD
applications, including
DCA and ZACR's
applications, and including
ICANN's and the
Geographic Names Panel's
handling of the .Africa
applications following the
GAC advice in 2013.

4. Irrelevant (Evid.
Code § 403).

Relevance. Testimony
regarding the Geographic
Names Panel Review is
directly relevant to DCA's
claim that ICANN
intentionally rejected
DCA's application without
reason.

5. The GNP had
already determined
that UNECA was a
valid endorser.
McFadden Decl. ¶

Fifth Objection. Again, it
is unclear what evidentiary
objection DCA intends to
make with its fifth
objection. Because the
2008 UNECA letter failed
to conform to the
Guidebook's requirements,
DCA was required to
obtain an updated letter
from UNECA if it were to
rely on a letter from
UNECA to fulfill the 60%
requirement of support or
non-objection from
government authorities.
Regardless of any

1			determination by the GNP as to whether UNECA qualifies as a valid endorser, the September 2015 UNECA letter shows that DCA would have been unable to do so.	
2				
3				
4				
5	Willett Declaration	DCA Objection	ICANN's Response	Court's Ruling
6	¶ 10. By July 31, 2015, following the ICANN's Board adoption of the recommendations of the Independent Review Panel in <i>DCA v. ICANN</i> ("IRP Panel"), DCA's Application was returned to processing as the Board directed. DCA's Application was returned to precisely the portion of the review that was pending on the date the Application was removed from processing—the Geographic Names Panel review. As the Geographic Names Panel had been preparing to do when DCA's Application was removed from processing, the Geographic Names Panel issued clarifying questions to DCA on September 2, 2015, regarding the documentation DCA had submitted with its Application. Those clarifying questions are attached as Exhibit 13 to the Bekele Declaration. DCA was given an opportunity to respond to those clarifying questions. Instead of supplementing its documentation, DCA wrote to ICANN on September 28, 2015, taking the position that the documentation that it had submitted with its Application in 2012 was sufficient.	1. Lacks foundation (Evid. Code § 403).	<u>Foundation.</u> Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including ICANN's and the Geographic Names Panel's processing of DCA's application following the IRP Declaration.	
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28	Willett Declaration	DCA Objection	ICANN's Response	Court's Ruling

<p>¶ 11. On October 13, 2015, ICANN issued the Initial Evaluation Report regarding DCA’s Application. The Initial Evaluation Report noted that the Application had passed all reviews except for the Geographic Names Panel review. As provided by the Guidebook, the report stated that DCA would have the opportunity to participate in “Extended Evaluation,” which offered DCA additional time to provide the requisite documentation of support or non-objection from African governments. A true and correct copy of the Initial Evaluation Report is attached hereto as Exhibit A.</p>	<p>1. Lacks foundation (Evid. Code § 403). 2. Lacks personal knowledge (Evid. Code § 702).</p>	<p><u>Foundation/Personal Knowledge</u>. Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the evaluation of New gTLD applications, including ICANN’s and the Geographic Names Panel’s processing of DCA’s application following the IRP Declaration.</p>	
<p>Willett Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 12. As part of Extended Evaluation, the Geographic Names Panel again issued clarifying questions to DCA on October 30, 2015, identifying the issues with the documented support submitted by DCA. Those clarifying questions are attached as Exhibit 15 to the Bekele Declaration. DCA was given until January 28, 2016, to supplement its documentation. However, rather than supplementing its documentation, DCA submitted a letter from its counsel and again took the position that the documentation that it had submitted with its Application in 2012 was sufficient.</p>	<p>1. Best evidence rule (Evid. Code § 1520).</p>	<p><u>Best Evidence</u>. This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett’s testimony is based on her personal knowledge as the Vice President for Operations of the Global Domains Division of ICANN regarding the evaluation of New gTLD applications, including ICANN’s and the Geographic Names Panel’s handling of the .Africa applications.</p>	
<p>Willett Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>¶ 13. Notably, nearly identical clarifying questions were sent to ZACR in 2013 when ZACR’s application for .AFRICA was undergoing Geographic Name Review. True and correct copies of the clarifying questions issued to ZACR related to the AUC and UNECA letters are attached hereto as Exhibits B and C. Unlike DCA, ZACR submitted an updated letter from the AUC endorsing ZACR on July 3, 2013. That letter is attached as Exhibit A to Exhibit 2 of the Declaration of Sara Colón (“Colón Decl.”).</p>	<p>1. Lacks foundation (Evid. Code § 403). 2. Lacks personal knowledge (Evid. Code § 702).</p>	<p><u>Foundation/Personal Knowledge</u>. Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of ICANN’s processing of DCA and ZACR’s applications for .Africa during the Geographic Names Review and the contents of the Guidebook.</p>	
<p>Willett Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 14. On February 17, 2016, ICANN issued an Extended Evaluation Report stating that the Geographic Names Panel had determined that DCA had failed to provide the requisite documentation of support or non-objection from relevant governments, despite the extended opportunity to do so. A copy of the Extended Evaluation Report is attached as Exhibit 18 to the Bekele Declaration. As a result, and as provided by the Guidebook, ICANN stopped processing DCA’s Application. (Guidebook at 174 (§ 2.2.1.4.4).)</p>	<p>1. Lacks foundation (Evid. Code § 403). 2. Lacks personal knowledge and speculative (Evid. Code § 702). 3. Best evidence rule (Evid. Code § 1520).</p>	<p><u>Foundation/Personal Knowledge/Speculative</u>. Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of ICANN’s processing of DCA’s application for .Africa, including ICANN’s and the Geographic Names Panel’s handling of the .Africa applications and the contents of the Guidebook. <u>Best Evidence</u>. Ms. Willett’s statement is not</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

		offered to prove the contents of a writing, but is based on her personal knowledge of ICANN's processing of DCA's application for .Africa and including ICANN's and the Geographic Names Panel's handling of the .Africa applications.	
Willett Declaration	DCA Objection	ICANN's Response	Court's Ruling
¶ 15. On March 3, 2016, ICANN's Board adopted a resolution lifting the stay on the delegation of .AFRICA. A true and correct copy of the Board's March 3, 2016 resolution is attached to this declaration as Exhibit D . ICANN is now prepared to delegate the rights to operate .AFRICA to ZACR. However, ICANN has voluntarily stayed the delegation pending the Court's ruling on DCA's Motion for Preliminary Injunction. See Colón Decl. ¶ 2.	1. Best evidence rule (Evid. Code § 1520).	<u>Best evidence</u> . This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett's testimony is based on her personal knowledge as the Vice President for Operations of the Global Domains Division of ICANN regarding the evaluation of New gTLD applications, including DCA and ZACR's applications for .Africa.	
Willett Declaration	DCA Objection	ICANN's Response	Court's Ruling
¶ 16. As described in the concurrently-filed declaration of Akram Atallah, ICANN's Bylaws provide for several accountability mechanisms to ensure that ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. For example, an aggrieved applicant can file a "request for reconsideration," which is a mechanism that asks the ICANN Board to re-evaluate certain Board or staff actions or inactions that the applicant believes have harmed it. In addition, an aggrieved applicant can file a "request	1. Lacks foundation (Evid. Code § 403). 2. Lacks personal knowledge (Evid. Code § 702).	<u>Foundation/Personal Knowledge</u> . Ms. Willett testified that she is the Vice President for Operations of the Global Domains Division of ICANN, and that in that role she has been responsible for overseeing the evaluation of applications received as part of the New gTLD Program. (Willett Decl. ¶¶ 1-2.) As such, she has personal knowledge of the mechanisms that ensure ICANN operates in accordance with its	

<p>1 for independent review,” a 2 unique process set forth in 3 ICANN’s Bylaws that asks 4 independent panelists to 5 evaluate whether an action of 6 ICANN’s Board was 7 consistent with ICANN’s 8 Articles of Incorporation and 9 Bylaws. Bekele Decl., Ex. 4 10 (Bylaws, Art. IV, §§ 2-3). 11 DCA could have filed, but did 12 not file, a reconsideration 13 request or a request for an 14 independent review process 15 (“IRP”) related to the 16 clarifying questions issued to 17 it, or to the determination that 18 DCA had failed the 19 Geographic Names Review.</p>	<p>3. Best evidence rule (Evid. Code § 1520).</p>	<p>Articles of Incorporation, Bylaws, policies and procedures.</p> <p><u>Best Evidence.</u> This testimony is not offered to prove the contents of a writing. Rather, Ms. Willett’s testimony is based on her personal knowledge as the Vice President for Operations of the Global Domains Division of ICANN regarding the mechanisms that ensure ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. A true and correct copy of excerpts of ICANN’s Bylaws can be found at Bekele Decl., Ex. 3.</p>	
--	---	--	--

DECLARATION OF AKRAM ATALLAH (Exhibit to Levee Declaration)

Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
<p>¶ 2. ICANN is a California not-for-profit public benefit corporation. ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability and integrity. As set forth in the version of ICANN’s Bylaws relevant to this dispute (“Bylaws”), ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the DNS.</p>	<p>1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>3. Best Evidence Rule (Evid. Code § 1520)</p>	<p><u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of ICANN’s mission and functions.</p> <p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of ICANN’s</p>	

1	Declaration of Sophia Bekele Eshete (“Bekele Decl.”), Ex. 4		mission and Bylaws. A true and correct copy of excerpts of ICANN’s Bylaws is in the record (Bekele Decl., Ex. 3.)	
2	(Bylaws, Art. I, § 1). ICANN’s amended Bylaws became effective October 1, 2016 and DCA does not contend that the amended Bylaws are relevant to this dispute.			
3				
4				
5				
6	Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
7	¶ 3. The essential function of the DNS is to convert the numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as “USCOURTS.GOV” and “ICANN.ORG.” The “.GOV” and “.ORG” in these addresses, just like the more well-known “.COM,” are referred to as top-level domains (“TLDs”). ICANN is solely responsible for evaluating potential TLD operators and recommending that TLDs be added to the DNS. No government entity or regulatory scheme governs ICANN’s decisions in that respect.	1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702) 3. Improper Option Testimony (Evid. Code §720)	<u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of the function of the DNS, ICANN’s responsibilities related to TLDs, and the lack of government and regulatory governance. <u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, of the function of the DNS, ICANN’s responsibilities related to TLDs, and the lack of government and regulatory governance.	
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23	Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
24	¶ 4. Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS in order to promote consumer choice and competition. The New gTLD Program (“Program”), launched in 2012, constitutes	1. Lacks Foundation (Evid. Code § 403) 2. Lacks Personal Knowledge (Evid. Code § 702)	<u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has	
25				
26				
27				
28				

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>ICANN’s most ambition expansion of the Internet’s naming system. The Program’s goals include enhancing competing and consumer choice, and enabling the benefits of innovation via introduction of new generic TLDs (“gTLDs”), including both new ASCII gTLDs and new non-ASCII, internationalized domain name gTLDS. It resulted in the submission of 1,930 applications for new gTLDs, including DCA’s and ZA Central Registry’s (“ZACR;s”) applications for the .AFRICA gTLD.</p>	<p>3. Improper Opinion Testimony (Evid. Code §702)</p> <p>4. Speculation (Evid. Code § 702)</p>	<p>personal knowledge of TLD expansion and the New gTLD Program.</p> <p><u>Opinion Testimony</u>: Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, of TLD expansion and the New gTLD Program.</p> <p><u>Speculation</u>. Mr. Atallah’s own understanding of TLD expansion and the New gTLD Program is not speculative, but a subject Mr. Atallah has personal knowledge of.</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 5. A number of “Advisory Committees” advise ICANN’s Board on various topics described in the ICANN Bylaws. The Governmental Advisory Committee (“GAC”) has members composed of national governments and distinct economies as recognized in the international fora, including the Unites States, and its purpose is 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 agreement or where they may affect public policy issues.” Bekele Decl., Ex. 4 (Bylaws, Art. XI § 2.1).</p>	<p>1. Lacks Foundation (Evid. Code § 403)</p> <p>2. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>3. Speculation (Evid. Code § 702)</p> <p>4. Best Evidence Rule (Evid. Code §</p>	<p><u>Foundation/Personal Knowledge</u>. Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of the Advisory Committees that advise ICANN’s Board, including the GAC.</p> <p><u>Speculation</u>. Mr. Atallah’s own understanding of the ICANN Bylaws and the role of GAC is not speculative, but a subject Mr. Atallah has personal knowledge of.</p> <p><u>Best Evidence</u>. Mr. Atallah’s statement is not</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	1520)	offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the Advisory Committees that advise ICANN’s Board. A true and correct copy of excerpts of ICANN’s Bylaws is in the record (Bekele Decl., Ex. 3.)	
Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
¶ 6. ICANN’s Bylaws provide for several accountability mechanisms to ensure that ICANN operates in accordance with its Articles of Incorporation, Bylaws, policies and procedures. <i>See</i> Bekele Decl., Ex. 4 (Bylaws, Arts IV-V). For example, an aggrieved applicant can file a “request for reconsideration,” which is a mechanism that asks the ICANN Board to re-evaluate certain Board or staff actions or inactions that the applicant believes have harmed it. <i>Id.</i> (Bylaws, Art. IV, §2). In addition, an aggrieved applicant can file a “request for independent review,” a unique process set forth in ICANN’s Bylaws that asks independent panelists to evaluate whether an action of ICANN’s Board was consistent with ICANN’s Articles of Incorporation and Bylaws. <i>Id.</i> (Bylaws, Art. IV, §3).	<p>1. Best Evidence Rule (Evid. Code § 1520)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p> <p>3. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>4. Speculation (Evid. Code § 702)</p> <p>5. Improper</p>	<p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the accountability mechanisms provided by ICANN’s Bylaws. A true and correct copy of excerpts of ICANN’s Bylaws is in the record (Bekele Decl., Ex. 3.)</p> <p><u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of the accountability mechanisms provided by ICANN’s Bylaws.</p> <p><u>Speculation.</u> Mr. Atallah’s own understanding of the ICANN Bylaws is not speculative, but a subject Mr. Atallah has personal knowledge of.</p>	

1		Opinion Testimony (Evid. Code §702)	<u>Opinion Testimony</u> : Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, of the accountability mechanisms provided by ICANN’s Bylaws.	
2				
3				
4				
5				
6				
7	Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
8	¶ 7. The Bylaws provide for the IRP panel to issue a written determination “declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and “ recommend[ing] 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.” Bekele Decl., Ex. 4 (Bylaws, Art. IV, §3.11). The ICANN Board then considers and acts on the determination. <i>Id.</i> (Bylaws, Art. IV, §2).	1. Best Evidence Rule (Evid. Code § 1520)	<u>Best Evidence</u> . Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the provisions in ICANN’s bylaws relating to the IRP Panel and the ICANN Board’s consideration of an IRP Panel determination. A true and correct copy of excerpts of ICANN’s Bylaws is in the record (Bekele Decl., Ex. 3.)	
9		2. Lacks Foundation (Evid. Code § 403)	<u>Foundation/Personal Knowledge</u> . Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of ICANN’s bylaws relating to the IRP Panel and the ICANN Board’s consideration of an IRP Panel determination.	
10		3. Lacks Personal Knowledge (Evid. Code § 702)		
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				
26				
27				
28		4. Speculation (Evid. Code § 702)	<u>Speculation</u> . Mr. Atallah’s own understanding of	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<p>5. Improper Opinion Testimony (Evid. Code §702)</p>	<p>ICANN's bylaws relating to the IRP Panel and the ICANN Board's consideration of an IRP Panel determination is not speculative, but a subject Mr. Atallah has personal knowledge of.</p> <p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, about ICANN's bylaws relating to the IRP Panel and the ICANN Board's consideration of an IRP Panel determination.</p>	
Atallah Declaration	DCA Objection	ICANN's Response	Court's Ruling
<p>¶ 8. I am informed and believe that proper to the opening of the New gTLD Program application period, only one IRP had resulted in a written determination, <i>ICM Registry, LLC v. ICANN</i>. The <i>ICM</i> Panel declared that the determinations of the IRP panels were not binding on ICANN's Board. Attached hereto as Exhibit E is a true and correct copy of an excerpt of the Final Declaration of the <i>ICM</i> Panel.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p> <p>3. Lacks Personal Knowledge (Evid. Code § 702)</p>	<p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, that only one IRP had resulted in a written determination prior to the opening of the New gTLD Program.</p> <p><u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of past IRP written declarations.</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<p>4. Lack of Completeness (Evid. Code § 356)</p> <p>5. Best Evidence Rule (Evid. Code § 1520)</p>	<p><u>Lack of Completeness.</u> Evidence Code § 365 merely states, in relevant part, that “[w]here part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party[.]” Mr. Atallah’s declaration references an excerpt from an IRP Final Declaration by the <i>ICM</i> panel. DCA’s objection does not go to admissibility. At most, DCA should offer any other portions of the referenced declaration it feels should be considered, which it has not done here.</p> <p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of past IRP written declarations. A true and correct copy of an excerpt of the Final Declaration of the <i>ICM</i> Panel is in the record (Declaration of Akram Atallah in Support of ICANN’s Opposition to DCA’s Motion for Preliminary Injunction (“Atallah Decl.”), Exhibit E.)</p>	
Atallah Declaration	DCA Objection	ICANN’s Response	Court’s Ruling

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>¶ 9. To my knowledge, ICANN has never represented that IRPs are binding. Instead, ICANN has consistently argued that IRP declarations are not binding.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p> <p>3. Hearsay (Evid. Code § 1200, et seq.)</p>	<p><u>Opinion Testimony</u>: Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, that ICANN has consistently argued that IRP declarations are not binding.</p> <p><u>Foundation</u>. Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has knowledge of ICANN’s past and present representations with regard to IRPs.</p> <p><u>Hearsay</u>. Mr. Atallah’s testimony is not hearsay as no “statement” is offered to prove the truth of the matter stated. Rather, the testimony represents Mr. Atallah’s testimony of events that he perceived during his employment with ICANN.</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 10. In the case of the DCA IRP, the DCA Panel declared that its decision would be binding on ICANN’s Board. But the question of whether the Panels declaration was or was not legally binding became a moot issue once ICANN’s Board elected to adopt all of the DCA Panel’s recommendations, contrary to the representation in</p>	<p>1. Lacks Foundation (Evid. Code § 403)</p>	<p><u>Foundation</u>. Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has knowledge of the DCA IRP Panel’s decision and the ICANN Board’s election to adopt</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<p>Plaintiff's Motion for Preliminary Injunction.</p>	<p>2. Best Evidence Rule (Evid. Code § 1520)</p> <p>3. Improper Opinion Testimony (Evid. Code §702)</p> <p>4. Hearsay (Evid. Code § 1200, et seq.)</p>	<p>the DCA Panel's recommendations.</p> <p><u>Best Evidence.</u> Mr. Atallah's statement is not offered to prove the contents of a writings. Mr. Atallah's testimony is based on his personal knowledge of the DCA IRP Panel's decision and the ICANN Board's election to adopt the DCA Panel's recommendations. A true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting the <i>DCA</i> Panel's recommendations is in the record (Atallah Decl., Exhibit F.)</p> <p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, of the DCA Panel's decision and the ICANN Board's election to adopt the DCA Panel's recommendations.</p> <p><u>Hearsay.</u> Mr. Atallah's testimony is not hearsay as no "statement" is offered to prove the truth of the matter stated. Rather, the testimony represents Mr. Atallah's testimony of events that he perceived during his employment with ICANN.</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN's Response</p>	<p>Court's Ruling</p>

<p>¶ 11. Specifically, on July 9, 2015, the <i>DCA</i> Panel issued its Final Declaration. Bekele Decl. Ex. 1. The <i>DCA</i> Panel determined that ICANN’s Board had violated ICANN’s Articles of Incorporation and Bylaws by accepting the GAC’s consensus advice that Plaintiff’s application for .AFRICA (“Application”) should not proceed. The <i>DCA</i> Panel therefore recommended that “ICANN continue to refrain from delegating the .AFRICA gTLD and permit [Plaintiff]’s application to proceed through the remainder of the new gTLD application process.” Bekele Decl., Ex. 1 ¶ 149.</p>	<p>1. Best Evidence Rule (Evid. Code § 1520)</p> <p>2. Lacks Personal Knowledge (Evid. Code § 720)</p>	<p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the <i>DCA</i> IRP Panel’s Final Declaration and recommendation. A true and correct copy of the IRP Panel’s Declaration is in the record (Bekele Decl., Ex. 1.)</p> <p><u>Personal Knowledge.</u> Mr. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal knowledge of the <i>DCA</i> IRP Panel’s Final Declaration and recommendation.</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 12. ICANN’s Board promptly considered and adopted each of the <i>DCA</i> Panel’s recommendations. On July 16, 2015, the Board resolved to “continue to refrain from delegating the .AFRICA gTLD,” “permit [Plaintiff’s] application to proceed through the remainder of the new gTLD application process,” and “reimburse <i>DCA</i> for the costs of the IRP.” Attached hereto as Exhibit F is a true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting the <i>DCA</i> Panel’s recommendations.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p>	<p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, that the ICANN Board adopted each of the <i>DCA</i> Panel’s recommendations.</p> <p><u>Foundation.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has knowledge of the ICANN Board’s</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<p>3. Best Evidence Rule (Evid. Code § 1520)</p>	<p>consideration and adoption of the DCA IRP Panel’s recommendations and the ICANN Board’s resolution.</p> <p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the ICANN Board’s consideration and adoption of the DCA IRP Panel’s recommendations and the ICANN Board’s resolution. A true and correct copy of ICANN Board Resolutions 2015.07.16.01-05, adopting the <i>DCA</i> Panel’s recommendations is in the record (Atallah Decl., Exhibit F.)</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 13. In the event ICANN is permitted to delegate the .AFRICA gTLD to ZACR, a transfer or assignment of the gTLD in the future would still be possible, feasible and consistent with ICANN’s previous conduct. In fact, over forty gTLDs have had their registry contracts transferred from one registry operator to a different registry operator, <i>i.e.</i>, transferred for operation by a different registry operator than the operator when the registry contract was initially executed. These transfers have occurred for a number of reasons, and transfers are not limited to situations where a registry’s contract with ICANN was expiring.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p>	<p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, that a transfer of the .AFRICA gTLD post-delegation would be possible.</p> <p><u>Foundation/Personal Knowledge.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As such, he has personal</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<p>3. Speculation (Evid. Code § 702) 4. Lacks Personal Knowledge (Evid. Code § 702)</p>	<p>knowledge of the possibility of a transfer or assignment of the .AFRICA gTLD after delegation and of the existence of other gTLDs that have had their registry contracts transferred.</p> <p><u>Speculation.</u> Mr. Atallah’s own understanding of the possibility of a transfer or assignment of the .AFRICA gTLD after delegation and the existence of other gTLDs that have had their registry contracts transferred is not speculative, but a subject Mr. Atallah has personal knowledge of.</p>	
<p>Atallah Declaration</p>	<p>DCA Objection</p>	<p>ICANN’s Response</p>	<p>Court’s Ruling</p>
<p>¶ 14. Nor is there any truth to DCA’s argument in its Motion (at p. 12) that “the U.S. government’s ties with ICANN ceased” and therefore “the current procedure for gTLD re-delegation is uncertain.” In fact, nothing about the recent transition of the Internet Assigned Numbers Authority (“IANA”) functions from the United States government to ICANN has any effect whatsoever upon the fact that it is possible to transfer the rights to operate a new gTLD from one registry operator to another, post-delegation.</p>	<p>1. Improper Opinion Testimony (Evid. Code §702)</p> <p>2. Lacks Foundation (Evid. Code § 403)</p>	<p><u>Opinion Testimony:</u> Mr. Atallah is not giving opinion testimony. Even if he were, Mr. Atallah is qualified to testify, based on his knowledge and experience demonstrated by his testimony at ¶ 1, that the transition of the IANA functions from the U.S. government to ICANN has not had any effect on the possibility to transfer the operation rights of a new gTLD from one registry operator to another, post-delegation.</p> <p><u>Foundation.</u> Mr. Atallah laid the foundation for his testimony. Atallah testified that he is the President, Global Domains Division, for ICANN (Atallah Decl. ¶ 1.) As</p>	

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<p>3. Speculation (Evid. Code § 702) 4. Lacks Personal Knowledge (Evid. Code § 702)</p> <p>5. Best Evidence Rule (Evid. Code §1520)</p>	<p>such, he has knowledge of the transition of functions from the U.S. government to ICANN and the possibility of transferring operation rights for a new gTLD from one registry operation to another post-delegation.</p> <p><u>Speculation.</u> Mr. Atallah’s own understanding of the transition of functions from the U.S. government to ICANN and the possibility of transferring operation rights for a new gTLD from one registry operation to another post-delegation is not speculative, but a subject Mr. Atallah has personal knowledge of.</p> <p><u>Best Evidence.</u> Mr. Atallah’s statement is not offered to prove the contents of a writing. Mr. Atallah’s testimony is based on his personal knowledge of the transition of functions from the U.S. government to ICANN and the possibility of transferring operation rights for a new gTLD from one registry operation to another post-delegation.</p>	
--	---	--	--

DECLARATION OF KEVIN ESPINOLA (Exhibit to Levee Declaration)

Espinola Declaration	DCA Objection	ICANN’s Response	Court’s Ruling
<p>¶ 2. ICANN and its community developed the New gTLD Applicant Guidebook (“Guidebook”) as part of a years-long, bottom-up multistakeholder process during which numerous</p>	<p>Irrelevant (Evid. Code § 350)</p>	<p><u>Relevance.</u> Testimony regarding the development of the Guidebook is relevant to show how the Guidebook was developed over time and the information made available</p>	

1	versions were published by ICANN for public comment and revised, in part based on comments received. In total, six versions of the Guidebook were published for public comment.		to the public for comment.	
2				
3				
4				
5	Espinola Declaration	DCA Objection	ICANN's Response	Court's Ruling
6	¶ 3. In the April 15, 2011 version of the Guidebook ("April 2011 Guidebook"), language was added to Section 6 of Module 6 of the Guidebook ("Covenant Not to Sue") making explicit that: "[an] applicant may utilize any accountability mechanism set forth in ICANN's Bylaws for [the] purposes of challenging any final decision made by ICANN with respect to the application." Attached hereto as Exhibit K is a true and correct copy of Module 6 of the April 2011 version of the Guidebook, which was published with a redline, showing changes made from the prior version of the Guidebook.	Irrelevant (Evid. Code § 350)	<u>Relevance</u> . Testimony regarding Module 6 of the Guidebook is relevant to show 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.	
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18	Espinola Declaration	DCA Objection	ICANN's Response	Court's Ruling
19	¶ 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	Irrelevant (Evid. Code § 350)	<u>Relevance</u> . Testimony regarding the development of Module 6 of the Guidebook is relevant to show the development of the New gTLD Applicant Guidebook, and the considerations behind including the Covenant Not To Sue in Module 6 of the Guidebook.	
20				
21				
22				
23				
24				
25				
26				
27				
28				

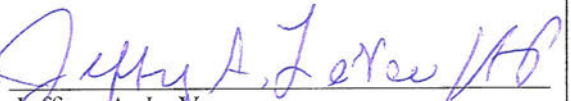
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

how to protect 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.

Dated: August 4, 2017

Jones Day

By:


Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

PROOF OF SERVICE

I, Grace M. Directo, declare:

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

ICANN’S RESPONSES TO DCA’S EVIDENTIARY OBJECTIONS

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Ethan J. Brown, Esq.
 Sara C. Colón, Esq.
 Rowenakete “Kete” Barnes, Esq.
 BROWN NERI & SMITH LLP
 11766 Wilshire Boulevard, Suite 1670
 Los Angeles, CA 90025
 Phone: 310-593-9890
 Email: ethan@bnsklawgroup.com
 sara@bnsklawgroup.com
 kete@bnsklaw.com

David W. Kesselman, Esq.
 Kesselman Brantly Stockinger LLP
 1230 Rosebrans Avenue, Suite 690
 Manhattan Beach, CA 90266
 Phone: 310-307-4556
 Fax: 310-307-4570
 Email: dkesselman@kbslaw.com

VIA EMAIL ONLY

VIA PERSONAL SERVICE

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage

1 meter date is more than one day after date of deposit for mailing an affidavit.

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

4 Executed on August 4, 2017, at Los Angeles, California.

5 

6
7 Grace M. Directo

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28