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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 MARK
MCFADDEN 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 MARK MCFADDEN**

2 I, Mark McFadden, declare the following:

3 1. I am the Principal IP and DNS Specialist at InterConnect Communications
4 (“ICC”), and I have held this position since 2011. I am currently based in and reside in the
5 United Kingdom. I make this declaration in support of ICANN’s opposition to the motion for
6 preliminary injunction that DotConnectAfrica Trust (“DCA”) has filed in this Court. I have
7 personal knowledge of the matters set forth herein and am competent to testify thereto if called as
8 a witness.

9 **ICC’s Role In ICANN’s New gTLD Program**

10 2. In 2011, ICANN and the ICC entered into a contract pursuant to which the ICC
11 agreed to provide certain services to ICANN in conjunction with ICANN’s New gTLD Program.
12 The contract was amended at various times, including in March 2012. As relevant to this
13 litigation, the ICC agreed in the contract to be one of the two Geographic Names Evaluation
14 Panels pursuant to Module 2 of the Applicant Guidebook (“Guidebook”) that ICANN had
15 adopted for the New gTLD Program. ICANN also engaged the Economist Intelligence Unit
16 (“EIU”) to perform Geographic Names Evaluation services.

17 3. The Geographic Names Evaluation Panels were tasked with reviewing all applied-
18 for gTLD strings to determine whether each string is a geographic name. In addition, the
19 Geographic Names Evaluation Panels were responsible for verifying the relevance and
20 authenticity of all supporting documentation that each applicant submitted pursuant to the
21 requirements of Section 2.2.1.4 and Section 2.3.1 of the Guidebook. Ultimately, ICANN
22 received over 1,900 applications, and the ICC and EIU conducted a geographic names review for
23 each of the strings, with the ICC conducting roughly one-third of the reviews, and the EIU
24 conducting the other two-thirds. The ICC and EIU adopted the same protocols and standards for
25 conducting the geographic names review, which were published on ICANN’s website.

26 4. In order to obtain a gTLD that constituted the name of a geographic region,
27 pursuant to Section 2.2.1.4.2 of the Guidebook, an applicant was required to have the support of
28 sixty (60) percent of the governments in that region. ICANN received many gTLD applications

1 that constituted geographic regions or geographic names, and the ICC and EIU were tasked with
2 determining if the applications had the requisite support.

3 **DCA and ZACR's Applications for .AFRICA**

4 5. ICANN received two applications for the string .AFRICA, one submitted by DCA
5 and the other submitted by the entity now known as ZACR.¹ The ICC was designated by ICANN
6 as the Geographic Names Evaluation Panel to evaluate the .AFRICA applications. Because there
7 are 54 countries in Africa, any application for .AFRICA required the support of at least 33
8 countries in Africa, or the support of an organization that represented at least 33 countries in
9 Africa. Each of the two applicants for .AFRICA submitted various purported letters of support
10 from various countries in Africa as well as from the African Union Commission ("AUC"), and
11 DCA also submitted a purported letter of support from the United Nations Economic Commission
12 for Africa ("UNECA"). (ZACR did not submit a letter from UNECA.) However, the ICC
13 determined in October 2012 that nearly all of the letters of support for both applications were
14 insufficient – including the two AUC letters and the UNECA letter submitted by DCA – because
15 they did not include the specific language that was required in the Guidebook (discussed below).

16 6. ICANN initially took the position that letters of support from the AUC and
17 UNECA should not even count toward the 60 percent requirement. The ICC conducted further
18 research on the AUC and UNECA, and we expressed our view to ICANN in March 2013 that
19 both the AUC and UNECA were qualified to speak on behalf of the countries they represented
20 and, thus, verified letters of support from those entities should count toward the 60 percent
21 requirement. Following our recommendation, ICANN agreed that verified letters of support from
22 the AUC and UNECA should count toward the 60 percent requirement, but only if those letters
23 contained the language required in the Guidebook.

24 7. Accompanying its application, DCA submitted a letter of support from the AUC
25 dated August 27, 2009. Accompanying its application, ZACR submitted a letter of support from
26 the AUC dated April 4, 2012.² I am now aware that the AUC also wrote a letter to DCA in April

27 ¹ DCA's original application actually was for the string .DOTAFRICA, but ICANN allowed DCA
28 to change the application to .AFRICA.

² The AUC submitted additional letters of support for ZACR on July 3, 2013, and September 29,

1 2010 purporting to withdraw its August 2009 endorsement of DCA. My understanding is that
2 DCA did not submit the actual April 2010 letter to ICANN with its gTLD application, and this
3 letter was not brought to my attention until recently. The ICC was not aware of the AUC's
4 purported withdrawal letter and did not consider the letter in its evaluation of DCA's application.

5 8. Pursuant to section 2.2.1.4.3 of the Guidebook, a government may withdraw its
6 support for a gTLD application at any time in the application process. The procedure required by
7 ICANN and adopted by the ICC was to disregard any letter of support that was subsequently
8 withdrawn, and no longer accept the letter as part of an applicant's required 60 percent support.³
9 If the ICC had been aware of the purported withdrawal of the AUC's letter to DCA, even if the
10 August 2009 letter had contained language sufficient under the Guidebook (which it did not), the
11 ICC would have issued clarifying questions to DCA explaining that DCA no longer had the
12 support from the AUC, and requiring DCA to submit an updated letter.

13 9. Unaware of the AUC's withdrawal letter to DCA, the ICC followed a documented
14 evaluation process with respect to DCA and ZACR's letters of support whereby each letter was
15 evaluated for required criteria pursuant to the Guidebook. In particular, section 2.2.1.4.3 of the
16 Guidebook required that letters of support for a geographic name "clearly express the
17 government's or public authority's support for or non-objection to the applicant's application and
18 demonstrate the government's or public authority's understanding of the string being requested
19 and its intended use." It further required that a letter of support "demonstrate the government's or
20 public authority's understanding that the string is being sought through the gTLD application
21 process and that the applicant is willing to accept the conditions under which the string will be
22 available, i.e., entry into a registry agreement with ICANN requiring compliance with consensus
23 policies and payment of fees." The ICC determined in early 2013 that none of the letters of
24 support submitted by DCA or ZACR from the AUC or UNECA contained language that was

25 _____
(continued...)

26 2015.

27 ³ The ICC has encountered other situations where letters of support have been withdrawn, and in
28 each instance, the ICC removed the letter as documentation of support and issued clarifying questions to
the applicant asking the applicant to provide additional documentation of support.

1 sufficient under this section of the Guidebook.

2 10. Specifically, Section 2.2.1.4.3 had very specific requirements for each of the
3 letters of support. Those requirements were part of the policy making process that developed the
4 Guidebook over a course of several years, and they were there to ensure that any letter of support
5 was legitimate, authoritative, and demonstrated that the governmental entity understood precisely
6 what it was supporting. DCA's letters from the AUC and UNECA failed to show that the
7 governmental entities understood the process of the new gTLD program, and they also failed to
8 show the governmental entity's understanding that the applicant (DCA) would have to abide by
9 ICANN consensus policy and be responsible for any related fees. Indeed, in our judgment, the
10 letters that DCA submitted from the AUC and UNECA were not even close to conforming to the
11 very specific requirements in the AGB; indeed, the two letters were drafted before the
12 requirements in the Guidebook were even available to applicants.

13 11. The ICC adhered to an ICANN policy whereby the ICC was not permitted to
14 contact any governmental authority that had submitted a letter of support for an applicant.
15 Rather, the required procedure for a noncompliant letter was to direct "clarifying questions" to the
16 applicant so that the applicant could contact the governmental authority to obtain an updated
17 letter. Accordingly, the ICC determined that it needed to send clarifying questions to both DCA
18 and ZACR (because the letter that ZACR submitted from the AUC was also deficient under the
19 Guidebook). However, just as the ICC was planning to send clarifying questions to DCA in the
20 Spring of 2013, ICANN's Board voted to stop processing DCA's application following receipt by
21 the Board of consensus advice from ICANN's Governmental Advisory Committee (the "GAC")
22 recommending that DCA's application should not proceed. As a result, on June 7, 2013, ICANN
23 advised the ICC to discontinue work on DCA's application.

24 **ZACR's Revised AUC Letter**

25 12. The ICC did send clarifying questions to ZACR, and following that, the AUC
26 submitted a revised endorsement letter for ZACR on July 3, 2013. The ICC determined that the
27 revised letter satisfied all required criteria in the Guidebook. Thus, the ICC concluded that ZACR
28 had passed the Geographic Names Review by obtaining the requisite 60 percent support. The

1 ICC did not rely on any of the other letters of support that ZACR submitted with its application in
2 2012.

3 **DCA's Post-IRP Application**

4 13. I understand that DCA challenged, via an "Independent Review Procedure" under
5 ICANN's Bylaws, the decision of the ICANN Board to accept the GAC's consensus advice that
6 DCA's application should not proceed. After the IRP issued its declaration in DCA's favor in
7 July 2015, ICANN directed the ICC to resume processing DCA's application in order to
8 determine if DCA's application could pass the Geographic Names review, which is exactly where
9 DCA's application had been prior to the time the Board voted in 2013 to accept the GAC's
10 advice. In September 2015, the ICC sent DCA the clarifying questions we had determined in
11 2013 to be necessary before discontinuing work on DCA's application. The questions explained
12 that both the AUC and UNECA letters submitted in support of DCA's application did not comply
13 with section 2.2.1.4.3 of the Guidebook, and we requested updated letters of support.

14 14. I am now aware that UNECA wrote a letter dated July 20, 2015 in which UNECA
15 stated that it is neither a government nor a public authority and therefore is not qualified to issue a
16 letter of support under the Guidebook. This letter also was not brought to my attention until very
17 recently. The ICC did not consider this letter in its evaluation of DCA's application; however, as
18 noted above, the ICC already had determined that the original UNECA letter from 2008 – written
19 four years before DCA submitted its application and before ICANN had even posted the first
20 draft of the Guidebook – did not contain the information required by the Guidebook, and we
21 required DCA to provide an updated letter.

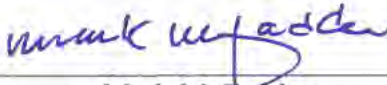
22 15. In response to the clarifying questions that the ICC sent to DCA in September
23 2015, DCA took the position that its original documentation of support submitted with its
24 application in 2012 was sufficient, and DCA provided no additional or updated letters of support.
25 Because DCA's existing letters of support were noncompliant, the ICC concluded that DCA had
26 not passed Geographic Names Review. DCA elected to participate in "Extended Evaluation,"
27 which entailed sending clarifying questions again to give DCA additional time to provide the
28 requisite documentation of support. The ICC sent DCA the extended evaluation clarifying

1 questions on October 30, 2015. In response, DCA again took the position that its original
2 application was sufficient and that it did not need to submit any additional letters of support.
3 Thus, the ICC determined that DCA had failed to provide the requisite documentation of support
4 or non-objection for the .AFRICA gTLD.

5 16. The ICC treated all gTLD applications equally, including DCA and ZACR's
6 applications for .AFRICA. Both applications initially had letters of support from the AUC and/or
7 UNECA. The ICC recommended that both of those entities be viewed as authorized to provide
8 an official endorsement on behalf of the countries in Africa that each represented, and ICANN
9 ultimately agreed. The ICC then evaluated each letter for required criteria pursuant to the
10 Guidebook, and determined that all three of the initial letters (two from the AUC and one from
11 UNECA) were not sufficient under the terms of the Guidebook. The ICC conducted its
12 evaluation not knowing whether the AUC or UNECA still endorsed any application and not
13 knowing the views of AUC or UNECA as to whether they were authorized to speak for the
14 countries on the African continent that they purported to represent. ZACR was able to provide an
15 updated letter of support compliant with the Guidebook, and it passed the Geographic Names
16 Review; DCA did not provide updated letters of support compliant with the Guidebook, and as a
17 result, DCA's application failed the Geographic Names Review.

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

20 Executed this 7th day of December 2016, in CHEPSTOW, United Kingdom.

21 
22 _____
23 Mark McFadden