

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

7 Attorneys for Defendant
8 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
9

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

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

DATE: February 2, 2017
TIME: 8:30 a.m.
DEPT: 53

1 **DECLARATION OF CHRISTINE WILLETT**

2 I, Christine Willett, declare the following:

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

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

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

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

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

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

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

16 7. ZACR submitted 41 letters of support with its application, including over thirty
17 letters from individual African governments, and a 2012 letter from the African Union
18 Commission ("AUC"). The AUC is the secretariat for the African Union, in which every African
19 nation except Morocco is a member. DCA submitted six letters of support with its application for
20 .AFRICA ("Application") – one from the AUC, one from the United Nations Economic
21 Commission for Africa ("UNECA"), three from individual African countries, and one from the
22 South African Embassy in Washington, D.C.

23 8. The AUC letter of support that DCA submitted was dated April 27, 2009. A copy
24 of that letter is attached as Exhibit 6 to the Bekele Declaration. I now understand that, in 2010,
25 DCA received a letter from the AUC that formally withdrew the AUC's support for DCA's
26 Application. A copy of that letter is attached as Exhibit 7 to the Bekele Declaration. DCA did not
27 submit to ICANN with its Application a copy of the AUC's 2010 letter withdrawing its support
28 for DCA. Although the 2010 AUC letter indicates that ICANN was copied, the "cc" did not

1 identify any specific person at ICANN, and ICANN has no record of receiving the letter.

2 Inasmuch as the letter was sent two years before ICANN began receiving gTLD applications,
3 ICANN had no “files” set up for any particular application.

4 9. The letter of support from UNECA that DCA submitted with its application was
5 dated August 8, 2008. A copy of that letter is attached as Exhibit 8 to the Bekele Declaration. In
6 September 2015, UNECA wrote in a letter to the AUC that it was a “United Nations entity [that]
7 is neither a government nor public authority and therefore is not qualified to issue a letter of
8 support for a prospective applicant,” and that its August 2008 letter was “merely an expression of
9 a view in relation to [DCA’s] initiatives and efforts regarding internet governance . . . [and]
10 cannot be properly considered as a ‘letter of support’ within the context of ICANN’s
11 requirements and cannot be used as such.” A true and correct copy of UNECA’s September 2015
12 letter is attached as Exhibit 9 to the Bekele Declaration.

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

24 11. By July 31, 2015, following the ICANN Board’s adoption of the recommendations
25 of the Independent Review Panel in *DCA v. ICANN* (“IRP Panel”), DCA’s Application was
26 returned to processing as the Board directed. DCA’s Application was returned to precisely the
27 portion of the review that was pending on the date the Application was removed from
28 processing—the Geographic Names Panel review. As the Geographic Names Panel had been

1 preparing to do when DCA's Application was removed from processing, the Geographic Names
2 Panel issued clarifying questions to DCA on September 2, 2015, regarding the documentation
3 DCA had submitted with its Application. Those clarifying questions are attached as Exhibit 11 to
4 the Bekele Declaration. DCA was given an opportunity to respond to those clarifying questions.
5 Instead of supplementing its documentation, DCA wrote to ICANN on September 28, 2015,
6 taking the position that the documentation that it had submitted with its Application in 2012 was
7 sufficient.

8 12. On October 13, 2015, ICANN issued the Initial Evaluation Report regarding
9 DCA's Application. The Initial Evaluation Report noted that the Application had passed all
10 reviews except for the Geographic Names Panel review. As provided by the Guidebook, the
11 report stated that DCA would have the opportunity to participate in "Extended Evaluation,"
12 which offered DCA additional time to provide the requisite documentation of support or non-
13 objection from African governments. A true and correct copy of the Initial Evaluation Report is
14 attached hereto as **Exhibit A**.

15 13. As part of Extended Evaluation, the Geographic Names Panel again issued
16 clarifying questions to DCA on October 30, 2015, identifying the issues with the documented
17 support submitted by DCA. Those clarifying questions are attached as Exhibit 13 to the Bekele
18 Declaration. DCA was given until January 28, 2016, to supplement its documentation. The
19 clarifying questions specified that both the AUC and UNECA letters failed the Guidebook's
20 fourth criterion. However, rather than supplementing its documentation, DCA submitted a letter
21 from its counsel and again took the position that the documentation that it had submitted with its
22 Application in 2012 was sufficient.

23 14. Notably, nearly identical clarifying questions were sent to ZACR in 2013 when
24 ZACR's application for .AFRICA was undergoing Geographic Name Review. True and correct
25 copies of the clarifying questions issued to ZACR relating to the AUC and UNECA letters are
26 attached hereto as **Exhibits B and C**. Unlike DCA, ZACR submitted an updated letter from the
27 AUC endorsing ZACR on July 3, 2013, which provided ZACR with the requisite support of 60%
28 of the governments of Africa and allowed ZACR to pass Geographic Names Review. A true and

1 correct copy of that letter is attached hereto as **Exhibit D**. Had DCA been able to obtain an
2 updated, fully satisfactory letter from the AUC, it too would have passed Geographic Names
3 Review. In that instance, contention resolution would have proceeded in accordance with
4 Guidebook procedures; and, had the AUC not expressed a preference for one applicant over
5 another, the contention may have been resolved by way of an auction between the two parties.

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

12 16. On March 3, 2016, ICANN's Board adopted a resolution lifting the stay on the
13 delegation of .AFRICA. A true and correct copy of the Board's March 3, 2016 resolution is
14 attached to this declaration hereto as **Exhibit E**.

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

27 18. There is nothing in the Guidebook that prevents an applicant for a new gTLD from
28 assigning intellectual property rights to a third party. Accordingly, that ZACR intends to assign

1 certain rights to the AUC upon delegation of .AFRICA does not violate any terms of the
2 Guidebook. The AUC itself could have applied for .Africa. There is no basis to assert that any
3 assignment of rights to the AUC was improper.

4 19. Both DCA and ZACR submitted standard (meaning, not community-based)
5 applications for the .AFRICA gTLD. Even if the applicants intend to operate the .AFRICA
6 gTLD on behalf of the African community, they are not obligated to submit a "community"
7 application for the gTLD. A "community" application is a special application available under the
8 Guidebook that requires an application to meet heightened criteria; and, if a community
9 application prevails in Community Priority Evaluation, that application is given priority over all
10 other applications in the contention set. Here, neither DCA nor ZACR submitted, nor were
11 required to submit, a community application.

12 20. DCA's preliminary injunction papers refer to a "sunrise" period that involves the
13 period when a registry first begins to operate. The "sunrise" period is not intended to allocate
14 premium names to the highest bidder. Rather, it is a compulsory protection mechanism
15 prescribed by ICANN to assist trademark owners in obtaining their corresponding domain names.
16 These trademark owners are given preference during the initial stages of the domain name launch.

17 21. A "registrar" is an entity that sells domain name subscriptions to consumers. This
18 is in contrast to a "registry" which is the entity that operates the gTLD. In nearly all situations, it
19 is permissible for a gTLD registry operator to also act as registrar. ICANN has allowed such
20 "cross-ownership" of TLDs since 2010. The ICANN Registry Agreement compels registry
21 operators to deal with all registrars in a fair and equitable manner, and ICANN has compliance
22 mechanisms in place to monitor cross-ownership. Thus, ZACR cannot provide preferential
23 treatment or access to its own registrar; instead, ZACR (like any gTLD registry) must treat all of
24 its registrars equally and on the same terms.

25 //

26 //

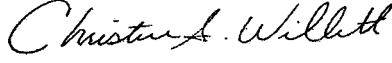
27 //

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

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

Executed this 19th day of January 2017, in Los Angeles, California.



Christine A. Willett

NAI-1502391633