

# EXHIBIT A

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. **16-CV-00862 RGK (JCx)** Date April 12, 2016

Title *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers & ZA Central Registry*

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams (Not Present)	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:  
Not Present

Attorneys Present for Defendants:  
Not Present

**Proceedings: (IN CHAMBERS) Order re: Plaintiff’s Motion for Preliminary Injunction (DE 16)**

**I. INTRODUCTION**

On February 26, 2016, Plaintiff DotConnectAfrica Trust (“DCA”) filed a First Amended Complaint (“FAC”) against Defendants Internet Corporation for Assigned Names and Numbers (“ICANN”), and ZA Central Registry (“ZACR”) (collectively “Defendants”) alleging the following claims: (1) Breach of Contract; (2) Intentional Misrepresentation; (3) Negligent Misrepresentation; (4) Fraud & Conspiracy to Commit Fraud; (5) Unfair Competition (Violation of Cal. Bus. & Prof. Code. § 17200); (6) Negligence; (7) Intentional Interference with Contract; (8) Confirmation of IRP Award; (9) Declaratory Relief (that ICANN follow the IRP Declaration and allow the DCA application to proceed through the delegation phase of the process); (10) Declaratory Relief (that the registry agreement between ZACR and ICANN is null and void and that ZACR’s application does not meet ICANN standards); and (11) Declaratory Relief (that the covenant not to sue is unenforceable, unconscionable, procured by fraud and/or void as a matter of law and public policy).

Presently before the Court is DCA’s Motion for Preliminary Injunction. For the following reasons, the Court **GRANTS** the Motion.

**II. STATEMENT OF FACTS**

The following facts are alleged in the Complaint.

Defendant ICANN is the sole organization worldwide that assigns rights to Generic Top-level

Domains (“gTLDs”). In 2011, ICANN approved the expansion of the number of gTLDs available to eligible applicants as part of its 2012 Generic Top-Level Domains Internet Expansion Program (“New gTLD Program”). Examples of gTLDs include .Lat, .Wales, .Africa, and .Swiss. ICANN invited eligible parties to submit applications to obtain the rights to these various gTLDs. ICANN promised to conduct the bid process in a transparent manner, ensure competition, and abide by its own bylaws and the rules set forth in the gTLD Applicant’s Guidebook. In March 2012, Plaintiff DCA submitted an application to ICANN to obtain the rights to the .Africa gTLD. DCA paid ICANN the mandatory application fee of \$185,000. On February 17, 2014, Defendant ZACR also submitted an application for .Africa.

#### **A. Geographic Name Applications and the Governmental Advisory Committee**

ICANN’s Applicant Guidebook contains an overview of the application process. (Bekele Decl., Ex. 3 at 1-3–1-14, ECF No. 17.) After the administrative completeness check, ICANN conducts an initial evaluation of the application. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) During the initial evaluation, ICANN conducts string reviews, which determine whether a gTLD is too similar to existing TLDs. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) The initial evaluation also includes the geographic name evaluation, in which ICANN determines whether an application contains sufficient endorsements, along with determining whether an applicant has the requisite technical, operational, and financial capabilities to operate a gTLD. (Bekele Decl., Ex. 3 at 1-7, ECF No. 17.) Applicants can request an extended evaluation if it fails the initial evaluation. (Bekele Decl., Ex. 3 at 1-11, ECF No. 17.) Applicants who have successfully completed the initial evaluation (and the extended evaluation, if requested) proceed to the delegation stage, which includes executing a registry agreement with ICANN and conducting a pre-delegation technical test to validate information in the application. (Bekele Decl., Ex. 3 at 1-14, ECF No. 17.)

According to ICANN’s policy and procedures, applicants for geographic gTLDs must obtain endorsements from 60% of the national governments in the region and no more than one written objection from the relevant governments or public authorities associated with the region. DCA obtained endorsements of the United Nations Economic Commission for Africa (“UNECA”) in August 2008 and the African Union Commission (“AUC”) in August 2009. In 2010, however, AUC sent a letter informing DCA that it has “reconsidered its approach” and “no longer endorses individual initiatives in this matter related to continental resource.” (FAC ¶ 24, ECF No. 10.) The Guidebook states that a government may withdraw its endorsement only if the conditions of its endorsement have not been satisfied. Contrary to ICANN’s allegations, DCA maintains that the AUC letter did not formally withdraw its endorsement of DCA because AUC did not have conditions on its endorsement.

On behalf of ICANN, InterConnect Communications (“ICC”) performs string similarity and geographic review during the initial evaluation stage of the gTLD application process. ICC explained to ICANN that if the endorsements of regional organizations like AUC and UNECA were not applied toward the 60% requirement, neither DCA nor Defendant ZACR would have sufficient geographic support. (Bekele Decl., Ex. 19 & 23, ECF No. 17.) ICANN decided to accept endorsements from both AUC and UNECA. During its initial evaluation, the ICC was required to inform applicants of any problems with their endorsements. The ICC failed to inform DCA of any such problems. Therefore DCA assumed that its endorsements from AUC and UNECA were sufficient.

In 2011, AUC itself, attempted to obtain the rights to .Africa by requesting ICANN to include .Africa in the list of Top-Level Reserved Names, which would have made .Africa unavailable for delegation under the New gTLD Program. In a March 8, 2012 letter, the ICANN Board Chairman Stephen Crocker explained to AUC that ICANN could not reserve .Africa for AUC’s use. However, Crocker explained, AUC could “play a prominent role in determining the outcome of any application” for .Africa as a public authority associated with the continent by (1) filing one written statement of objection, (2) filing a community objection, or (3) utilizing the Governmental Advisory Committee

(“GAC”) to combat a competing application. (FAC ¶ 69, ECF No. 10.) The Governmental Advisory Committee (“GAC”) is an internal committee that considers applicants and provides advice related to governmental concerns. Under ICANN’s rules, the GAC can recommend that ICANN cease reviewing an application if all of the GAC members agree that an application should not proceed because an applicant is sensitive or problematic. Membership on the GAC is open to representatives of all national governments. AUC became a GAC member in June 2012, apparently on the advice of ICANN.

Because AUC could not obtain .Africa directly through ICANN, AUC contracted with ZACR in March 2014. In exchange for AUC’s endorsement, ZACR would assign to AUC all rights relating to .Africa upon its delegation to ZACR. Subsequently, because of AUC’s interest in ZACR’s application for .Africa, AUC used its influence as a GAC member to campaign against DCA’s application. In June 2013, ICANN accepted the GAC’s advice and rejected DCA’s application for lacking the requisite endorsements. This decision was made amid DCA’s objection that several members of the GAC had conflicts of interest and that Kenya was unrepresented at the GAC meeting. (Bekele Decl., Ex. 24 & 25, ECF. No. 17.) Contrary to ICANN’s contentions, DCA maintains that the lack of unanimous support within the GAC rendered the decision to suspend DCA’s application improper.

DCA further argues that, if ICANN applied the GAC’s rationale for rejecting DCA’s application equally to ZACR, ZACR’s application should have failed as well. Specifically, applying the same standards, ZACR did not have sufficient country specific endorsements to meet ICANN’s requirements: (1) only five of the purported endorsement letters from specific African governments referenced ZACR by name; and (2) ZACR filed support letters in which African governments generally endorsed AUC’s “Reserved Names” initiative without specifically referencing ZACR. ZACR presumably passed the 60% threshold requirement based on the same regional endorsements that the GAC used to derail DCA’s application. Nonetheless, ZACR passed the initial evaluation and entered into the delegation phase with ICANN.

## **B. The Independent Review Process**

As a means to challenge ICANN’s actions with respect to gTLD applications, ICANN provides applicants with an independent review process (“IRP”). The IRP is arbitration comprised of an independent panel of arbitrators. In October 2013, DCA sought an IRP to review ICANN’s processing of its application, including ICANN’s handling of the GAC opinion. In its decision, the IRP Panel found against ICANN as follows: (1) ICANN’s actions and inactions with respect to DCA’s application were inconsistent with ICANN’s bylaws and articles of incorporation; and (2) ICANN should refrain from delegating .Africa and permit DCA’s application to proceed through the remainder of the evaluation process.

DCA asserts that ICANN did not act in accordance with the decision, which was binding. Instead of allowing DCA’s application to proceed through the remainder of the application process (i.e. the delegation phase), ICANN restarted DCA’s application from the beginning and re-reviewed its endorsements. In September 2015, during the second review, ICANN issued clarifying questions regarding DCA’s endorsements, which it did not raise during the initial evaluation of these same endorsements. The DCA requested an extended evaluation, hoping to gain insight on what was wrong with its application. Rather than providing clarification, ICANN merely restated the same questions – allegedly as a pretext to deny DCA’s application – then denied DCA’s application in February 2016. Soon thereafter, ICANN began the process of delegating .Africa to ZACR.

On March 4, 2016, this Court issued a Temporary Restraining Order to prevent ICANN from delegating .Africa to ZACR until the Court decided this present Motion.

## **III. JUDICIAL STANDARD**

“[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). For a court to grant a preliminary injunction, a plaintiff must establish the following: (1) likelihood of success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that the public interest favors injunction. *Id.* at 20.

The Ninth Circuit also employs a “sliding scale” approach to preliminary injunctions. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). This approach uses the same four factors as the *Winter* test, but allows the plaintiff to receive a preliminary injunction in situations where there are “serious questions” going toward the plaintiff’s likelihood of success on the merits, so long as the “balance of hardships tips sharply in the plaintiff’s favor.” *Id.* at 1134-35. The plaintiff must still demonstrate a likelihood of irreparable harm and that public interest favors the injunction. *Id.* at 1135.

## VI. DISCUSSION

DCA seeks a preliminary injunction barring ICANN from issuing the rights to .Africa until this case is resolved. DCA moves for a preliminary injunction based on its Ninth Claim for Declaratory Relief. DCA’s Ninth Claim seeks a judicial declaration that ICANN follow the IRP decision and allow the DCA application to proceed through the delegation phase of the application process. In determining whether relief should be granted, the Court addresses each of the relevant factors for preliminary injunction.

### A. Likelihood of Success on the Merits

#### 1. *The Release Does Not Bar DCA’s Claim at This Time.*

As a preliminary matter, ICANN argues that DCA, by submitting a New gTLD Program application, is bound by the terms in the Applicant Guidebook. These terms include a Release barring applicants from challenging in court any decision made by ICANN. (Bekele Decl. 6-4, Ex. 3, ECF No. 17.) DCA argues, however, that the Release is unenforceable because it violates California Civil Code § 1668, is unconscionable, and was procured by fraud. The Court finds substantial questions as to the Release, weighing toward its unenforceability.

California Civil Code § 1668 finds that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property or another, or violation of law, whether willful or negligent, are against the policy of the law.”

The Release applies to all gTLD applicants and states, in relevant part:

Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN’s . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

(Bekele Decl. 6-4, Ex. 3, ECF No. 17.) On its face, the Release is “against the policy of the law” because it exempts ICANN from *any and all claims* arising out of the application process, even those arising from fraudulent or willful conduct. Cal. Civ. Code § 1668.

ICANN argues that Section 1668 is limited only to agreements involving the public interest,

which the Guidebook is not, and cites to *Tunkl v. Regents of Cal.*, 383 P.2d 441 (Cal. 1963) for support. However, *Tunkl* concerns the validity of a release from liability for negligence, not intentional acts or fraud. Here, the Release waives all liability, not just liability resulting from negligence. Thus, *Tunkl* is distinguishable, and the Court need not determine whether the Release is in an agreement involving the public interest.

ICANN further argues that, if the Release is found to violate Section 1668, the Court should limit its unenforceability to DCA's claims sounding in fraud. ICANN contends that because the request for preliminary injunction is based solely on DCA's Declaratory Relief Claim, which does not sound in fraud, the Release is enforceable as it pertains to this Claim. (Def.'s Opp'n to Mot. for Prelim. Inj. 15:12-14, ECF No. 35.) The Court disagrees. ICANN fails to recognize that the alleged conduct giving rise to this claim is intentional. Specifically, DCA alleges that ICANN intended to deny DCA's application after the IRP proceeding under any pretext and without a legitimate reason. (FAC ¶ 59, ECF No. 10.) DCA claims that "the process ICANN put Plaintiff through was a sham with a predetermined ending – ICANN's denial of Plaintiff's application so that ICANN could steer the gTLD to ZACR." (FAC ¶ 60, ECF No. 10.)

In support, DCA offers the following evidence. ICANN's initial evaluation report in July 2013 stated that DCA's endorsement letters "met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 40, Ex. 27, ECF No. 17.) After the IRP Decision, ICANN performed a second evaluation on the same information originally submitted by DCA. In the second evaluation, however, ICANN found that the endorsement letters did not meet the same criteria applied in the first evaluation, and sent DCA clarifying questions regarding its endorsements. (Bekele Decl. ¶ 24, Ex. 15, ECF No. 17.) The clarifying questions required DCA to submit endorsement letters that "[d]emonstrate[d] 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." (Bekele Decl. ¶ 24, Ex. 15, ECF No. 17.) The discrepancy between the pre-IRP and post-IRP evaluations led DCA to seek further clarification, specifically regarding the standard imposed on the endorsement letters at issue. However, in response, ICANN merely sent the same questions. (Bekele Decl. ¶ 26, Ex. 17, ECF No. 17.) DCA then submitted to an extended evaluation, which allows further review and is available to applicants who failed the initial evaluation. Without further communication, ICANN then issued a final decision that restated that the endorsement letters "did not meet the criteria described in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.) ICANN's conduct thereby rendered DCA's application ineligible for further review. (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.)

The evidence suggests that ICANN intended to deny DCA's application based on pretext. Defendants have not introduced any controverting facts. As such, the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668.

Because the Court finds serious questions regarding the enforceability of the Release due to California Civil Code § 1668, the Court need not address DCA's arguments regarding unconscionability or procurement by fraud.

## 2. *There Are Serious Questions as to the Merits of DCA's Ninth Claim.*

After its review, the IRP Panel declared: (1) "both the actions and inactions of the Board with respect to the application of DCA [] relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN" and (2) ICANN "continue to refrain from delegating the .AFRICA gTLD and permit [DCA's] application to proceed through the remainder of the [New gTLD Program] application process." (Bekele Decl., Ex. 1 ¶ 61, ECF No. 17.) DCA alleges in its Ninth Claim that ICANN failed to follow the IRP Panel's binding order, resulting in ICANN's not properly



considering DCA's application.

After the IRP Decision, ICANN placed DCA at the geographic name evaluation stage of the application process and thereafter determined that DCA lacked the requisite support. (Bekele Decl. ¶ 28, Ex. 18, ECF No. 17.) DCA contends that ICANN violated the IRP Decision by restarting the geographic name evaluation, which it had already passed, rather than permitting the application to resume at the delegation phase. (Pl.'s Mot. for Prelim. Inj. 13:4-5, ECF No.16.) ICANN, however, argues that at the time DCA's application had been initially rejected, the application was still under review at the geographic name evaluation stage, and the evaluation was not yet complete. (Def.'s Opp'n to Mot. for Prelim. Inj. 17:20-22, ECF No. 35.) Accordingly, ICANN maintains that it placed DCA's application at the proper stage of evaluation after the IRP Decision.

Despite ICANN's contention, the evidence presents serious questions pointing in favor of DCA's argument. First, a March 2013 email from ICC to ICANN stated that ICANN needs to clarify AUC's endorsements since AUC properly endorsed both DCA and ZACR. (Bekele Decl. ¶ 30, Ex. 19, ECF No. 17.) Subsequently, ICANN's July 2013 initial evaluation report found that the endorsement letters have "met all relevant criteria in Section 2.2.1.4.3 of the Applicant Guidebook." (Bekele Decl. ¶ 40, Ex. 27, ECF No. 17.) Because ICANN found DCA's application passed the geographic names evaluation in the July 2013 initial evaluation report, the Court finds serious questions in DCA's favor as to whether DCA's application should have proceeded to the delegation stage following the IRP Decision.

ICANN further argues that even if ICANN failed to follow the IRP Decision, the Decision was only advisory, and not binding. The evidence does not provide clear indications on this point. On the one hand, the Panel concluded "that its [Decision] on the IRP and its future [Decision] on the Merits of the case were binding on the Parties." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The Panel explains, "[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding . . . [t]he selection of the [International Dispute Resolution Procedures] as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The Panel opined that if the decision is not binding, then at a minimum, "the IRP should forthrightly explain and acknowledge that the process is merely advisory." (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) The IRP did not provide such explanation or acknowledgment. (Bekele Decl., Ex. 1 ¶ 23, ECF No. 17.) On the other hand, language in the IRP Decision states that the Panel "*recommends* that ICANN continue to refrain from delegating the .Africa gTLD and permit [DCA's] application to proceed through the remainder of the new gTLD application process." (Bekele Decl., Ex. 1 ¶ 149, ECF No. 17 (emphasis added).) It is clear the decision that ICANN violated its bylaws by failing to fairly review DCA's application is binding. However, it is *not* clear whether ICANN was mandated to permit DCA's application to proceed through the remainder of the process. Without extrinsic evidence as a guide, logic dictates that if the "recommendation" is, in fact, non-binding, the Panel's decision that ICANN violated its bylaws (which is undisputedly binding) is rendered ineffectual. Because the IRP is presumably in place to effect dispute resolution, and the IRP provided no explanation or acknowledgment that its decision was merely advisory, the Court finds serious questions on this issue.

For the reasons stated above, the Court finds serious questions going toward the merits of DCA's Ninth Claim.

**B. Likelihood of Irreparable Harm**

As DCA points out, without preliminary relief, DCA will lose the opportunity to fairly have its application reviewed by ICANN. If DCA loses this opportunity, DCA will suffer irreparable harm because .Africa can be delegated only once, and only by ICANN. (Bekele Decl., Ex. 3 Application Terms and Conditions ¶ 3, ECF No. 17.) Further, only one entity can operate .Africa. (Bekele Decl., Ex. 3 at 4-2, ECF No. 17.) DCA has sufficiently demonstrated that, due to the unique nature of .Africa, it will likely suffer irreparable harm without preliminary relief.

Moreover, on March 4, 2016, the Court issued a temporary restraining order precluding ICANN from delegating the rights to .Africa until the Court rules on the present motion. (Order Granting TRO, ECF No. 27.) In that Order, the Court found that without a TRO, ICANN would have immediately delegated the rights to .Africa. (Order Granting TRO, ECF No. 27.) The Court finds no evidence indicating a change in circumstances. It is reasonable to believe that without a preliminary injunction, ICANN will immediately delegate the rights to .Africa to ZACR, causing DCA to suffer irreparable harm.

ICANN argues only that DCA cannot possibly suffer irreparable harm because it seeks compensatory relief. This argument is unavailing. Seeking compensatory damages does not preclude the Court from finding irreparable harm, as the control over .Africa cannot fully be compensated by money. *See Blackwater Lodge & Training Ctr., Inc. v. Broughton*, 2008 U.S. Dist. Lexis 49371 at \*28 (S.D. Cal. 2008) (granting preliminary injunction despite plaintiff seeking monetary relief).

The Court thus finds that without relief, DCA will likely suffer irreparable harm.

**C. Balance of Equities**

The balance of equities tips in favor of granting the preliminary injunction. Without a preliminary injunction, DCA will lose the opportunity to obtain rights to .Africa because ICANN will likely delegate the rights to ZACR prior to the conclusion of this action, and these rights can be delegated only once. DCA has invested much time and money in the application process under the representation that the process would be unbiased and fair. Although DCA may be able to recover certain funds through litigation, such as the application fee, the opportunity to obtain the rights to .Africa would be forever gone. ICANN's position, however, will be no different if it delays delegating the rights to .Africa. Thus, the balance of equities tips sharply in DCA's favor.

**D. The Public Interest Favors Granting Preliminary Injunction**

The public interest favors granting a preliminary injunction. "The public interest analysis for the issuance of a preliminary injunction requires us to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011). Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today's society. The IRP Declaration recognizes that ICANN's function is "special, unique, and publicly important" and ICANN itself "is the steward of a highly valuable and important international resources." (Bekele Decl. ¶ 23.110, Ex. 1, ECF No. 17.)

ICANN argues that a delay in delegating .Africa will prejudice the African community's efforts to participate in the Internet economy and strengthen their technology sectors. (Def.'s Opp'n to Mot. for Prelim. Inj. 20:3-5, ECF No. 35.) The evidence supporting ICANN's argument is a declaration of Moctar Yedaly, the head of the Information Society Division of the AUC's Infrastructure and Energy Department. (Yedaly Decl. ¶ 11, ECF No. 40.) The AUC's relationship with ZACR, and its interest in



preventing the delay of issuing rights to .Africa creates a conflict of interest. Therefore, on this point, the Court accords little weight to the Yedaly Declaration. On balance, the Court finds it more prejudicial to the African community, and the international community in general, if the delegation of .Africa is made prior to a determination on the fairness of the process by which it was delegated.

For the reasons stated, the Court finds the public interest favors granting the preliminary injunction.

**E. Implementing the “Sliding Scale” Approach**

Implementing the Ninth Circuit’s “sliding scale” approach to preliminary injunctions, the Court finds “serious questions” going toward DCA’s likelihood of success on the merits and a balance of hardships that tips sharply in DCA’s favor. *Alliance for the Wild Rockies* at 1131. Additionally, the Court finds that both the likelihood of irreparable injury and the public interest favors the injunction. As such, the Court **GRANTS** a preliminary injunction barring ICANN from delegating the rights to .Africa until this case is resolved.

**VI. CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion for Preliminary Injunction.

**IT IS SO ORDERED.**

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: \_\_\_\_\_  
**Initials of Preparer** \_\_\_\_\_

# EXHIBIT B

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOTCONNECTAFRICA TRUST, ) ICDR CASE NO. 50 117 T 1083 13  
 )  
Claimant, )  
 )  
and )  
 )  
INTERNET CORPORATION FOR ASSIGNED )  
NAMES AND NUMBERS, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**ICANN'S MEMORANDUM REGARDING PROCEDURAL ISSUES**

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For Assigned Names and Numbers

5 May 2014

## INTRODUCTION

1. Pursuant to the Panel’s Procedural Order No. 1 issued on 24 April 2014, the Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits this Brief Regarding Procedural Issues.

## FACTUAL AND PROCEDURAL BACKGROUND

2. This Independent Review proceeding involves an application for a new generic Top Level Domain (“gTLD”) submitted by Claimant DotConnectAfrica Trust (“DCA”). The ICANN Board has accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application should not proceed, and DCA is challenging that decision.

3. ICANN has three “accountability mechanisms” set out in its Bylaws that allow parties affected by an ICANN decision, including a final decision on a gTLD application, to seek some form of review of that decision.<sup>1</sup> One of the accountability mechanisms set forth in ICANN’s Bylaws, the Independent Review Process (“IRP”), provides for “independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”<sup>2</sup> In its fifteen-year history, ICANN has had only one IRP that went to a decision. Specifically, in June 2008, ICANN received its first IRP request, which was filed by

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<sup>1</sup> The three mechanisms are the Ombudsman, the Reconsideration process and the Independent Review process. (ICANN’s Bylaws (“Bylaws”) Art. IV, V.) All applicants for new gTLDs, including DCA, were required to agree in their applications that, in the event they wished to challenge any “final decision made by ICANN with respect to [their] application[s],” that challenge could occur only through the “accountability mechanism[s] set forth in ICANN’s Bylaws.” Generic Top Level Domains Application Terms and Conditions ¶ 6, *available at* <http://newgtlds.icann.org/en/applicants/agb/terms>. ICANN’s Board has publicly stated that this provision was included in the gTLD application because ICANN is “a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits . . . initiated by applicants.” ICANN Board-GAC Consultation: “Legal Recourse” for New gTLD Registry Applicants at p. 2, *available at* <http://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf>.

<sup>2</sup> Bylaws, Art. IV, § 3, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm>.

ICM Registry, LLC (“*ICM IRP*”).<sup>3</sup> That IRP involved extensive discovery and a five-day hearing that included lengthy witness testimony. The IRP wound up costing the parties millions of dollars, and the IRP Panel took over a year and a half to render its declaration.<sup>4</sup>

4. In 2012, after the *ICM IRP*, and as part of its commitment to accountability and transparency, ICANN convened the Accountability Structures Expert Panel (“Experts”),<sup>5</sup> comprised of three world-renowned Experts on issues of corporate governance, accountability, and international dispute resolution to evaluate ICANN’s accountability mechanisms as well as the prior evaluations and modifications of those mechanisms, including the Independent Review process. After significant and substantive research and review of ICANN’s accountability mechanisms, the Experts recommended certain enhancements and refinements to the Reconsideration process and Independent Review process, with a focus on effectiveness, efficiency, ease of access, and expeditious resolution, as well as maintaining and enhancing ICANN's accountability to the community and the global public interest. After extensive analysis, including multiple opportunities for community input of the Expert’s recommendations, ICANN amended its Bylaws with respect to the Independent Review process in order to streamline the proceedings dramatically.<sup>6</sup> Those Bylaws amendments, and the Supplementary

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<sup>3</sup> ICM’s Request for Independent Review Process, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/icm-irp-request-06jun08-en.pdf>.

<sup>4</sup> 19 February 2010 Declaration of Independent Review Panel, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf>.

<sup>5</sup> The experts were Mervyn King S.C., a former Judge of the Supreme Court of South Africa; Graham MacDonald, a Presidential Member of Australia's Administrative Appeals Tribunal; and Richard Moran, a widely known expert on corporate leadership and governance. For more information, *see* Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep>. *See also*, Report by Accountability Structures Expert Panel (ASEP), *available at* <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>

<sup>6</sup> 11 April 2013 Approved Board Resolutions, *available at* <http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d>.



Procedures (“Supplementary Procedures”) that set forth additional procedural rules for IRP proceedings, went into effect on 11 April 2013, six months before DCA filed its Notice of Independent Review.<sup>7</sup> Nonetheless, DCA’s proposal for conducting this IRP proceeding disregards the community-vetted and Board-approved changes to the IRP and/or argues that those changes are “unfair” or somehow inapplicable because this is a quasi-international arbitration.

5. On 9 January 2014, prior to the filing of DCA’s Amended Notice, ICANN explicitly emphasized that the Supplementary Procedures govern this IRP, stating in an email to DCA’s counsel that, in ICANN’s view, the Supplementary Rules bar the filing of supplemental submissions.<sup>8</sup> At no time prior to the initial call with the IRP Panel on 22 April had DCA ever suggested that the amendments to ICANN’s Bylaws and Supplementary Procedures did not apply to these proceedings (which they undoubtedly do).

6. On 15 April 2014, following the constitution of the Panel and in light of DCA’s 13 April 2014 Request for an Emergency Stay, ICANN submitted a procedural proposal aimed at expediting the Panel’s resolution of this IRP. ICANN’s proposal pointed out that, pursuant to the rules governing this proceeding, the parties had concluded their briefing, and the Panel needed only to conduct a hearing pursuant to Article IV, Section 3 of ICANN’s Bylaws before reaching a decision on the merits. ICANN proposed that if the Panel set a hearing date that would allow it to commit to issuing a ruling on the merits by 15 May 2014, the need for any emergency relief would be eliminated because “[a]s a practical matter, [ICANN would] not be in

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<sup>7</sup>Bylaws as Amended 11 April 2013, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm>.

<sup>8</sup>9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied, attached as Ex. 1.

a position to . . . take the final steps that are necessary to delegate the .AFRICA TLD to ZA Central Registry” prior to 15 May.<sup>9</sup>

7. On 17 April 2014, DCA wrote a letter to the Panel objecting to ICANN’s proposal. DCA proposed a schedule that would delay the Panel’s ruling until at least September 2014, eleven months after it filed its Notice of IRP.<sup>10</sup> DCA argued that it had submitted its Amended Notice “on the understanding that opportunities would be available to make further submissions,” failing to mention the 9 January 2014 email from ICANN’s counsel that put DCA on notice that it would not be entitled to further briefing.<sup>11</sup> Without giving any indication of what evidence it planned to submit to refute the arguments and evidence in ICANN’s Response, DCA contended that it “would be highly inappropriate to close the written record already, without further development of the disputed facts that require clarification through additional documentary evidence and/or testimony.”<sup>12</sup> DCA took this position despite the fact that DCA, the Claimant, had the burden of presenting evidence proving its claims at the outset of this case, as required by the Supplementary Procedures that apply to these proceedings.<sup>13</sup>

8. On 20 April 2014, ICANN responded to DCA’s proposal. It noted that DCA’s proposal would severely delay the resolution of this IRP and pointed out that DCA’s proposal

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<sup>9</sup> 15 April 2014 email from Jeffrey LeVee to Babak Barin, Arif Ali, Carolina Cardenas-Soto copied, attached as Ex. 2.

<sup>10</sup> 17 April 2014 letter from DCA to President and Members of the Panel at 8, attached as Ex. 3.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.*

<sup>13</sup> *See* ICDR Rules, Art. 19.1 (“Each party shall have the burden of proving the facts relied on to support its claim or defense.”); Supplementary Procedures ¶ 5 (“All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission.”)

“ignore[d] the significant changes that have been made to the rules for IRPs.”<sup>14</sup> That same day, DCA responded to ICANN’s letter and argued that the Supplementary Procedures “ultimately commit the conduct of the IRP to the discretion of the Panel.”<sup>15</sup> DCA cited to no provision in the Supplementary Procedures giving the Panel such unfettered discretion, since no such provision exists.

9. On 22 April 2013, the parties participated in a telephone conference call (“22 April Call”) with the Panel, during which the parties’ procedural proposals were discussed. Noting the importance of the issues raised by the parties, the Panel requested that the parties submit briefs addressing the issues of: (1) *viva voce* testimony; (2) document requests; (3) additional filings; and (4) the method of hearing, whether telephonic, by video, or in-person.

## **ARGUMENT**

### **I. THIS PROCEEDING IS AN INTERNAL ACCOUNTABILITY MECHANISM CONSTITUTED UNDER AND GOVERNED BY ICANN’S BYLAWS. IT IS NOT AN INTERNATIONAL ARBITRATION.**

10. This proceeding is *not* an arbitration. Rather, an IRP is a truly unique “Independent Review” process established in ICANN’s Bylaws with the specific purpose of providing for “independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.”<sup>16</sup> Although ICANN is using the International Center for Dispute Resolution (“ICDR”) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an “arbitration,” and the Bylaws make clear that that these proceedings are not to be deemed as the equivalent of an “international arbitration.” Indeed, the word “arbitration” does not appear in the relevant portion

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<sup>14</sup> 20 April 2014 letter from ICANN to President and Members of the Panel at 2, attached as Ex. 4.

<sup>15</sup> 20 April 2014 letter from DCA to President and Members of the Panel at 2, attached as Ex. 5.

<sup>16</sup> Bylaws, Art. IV, § 3.1 (emphasis added).

of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels.

11. ICANN's Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws). Indeed, ICANN would be in violation of its Bylaws were it to submit to an IRP conducted in a manner inconsistent with the Bylaws, which is what DCA is suggesting be done. ICANN's Bylaws state that "ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws" and provide for accountability mechanisms to reinforce ICANN's duty to act in consistence with its Bylaws.<sup>17</sup> ICANN should not be called on to violate certain provisions of its Bylaws, while ICANN is simultaneously being called on to explain why ICANN did not violate other provisions of its Bylaws.

12. Article IV, Section 3 of the Bylaws establishes "Independent Review of Board Actions" and addresses such items as the deadline for filing an IRP request, the standard of review to be applied to IRP requests, and the authority of IRP panels. With respect to the procedures governing IRP proceedings, Section 3 both addresses certain procedural issues and provides that "[s]ubject to the approval of the [ICANN] Board, the IRP Provider shall establish operating rules and procedures, *which shall implement and be consistent with this Section 3.*"<sup>18</sup>

13. Pursuant to Section 3, the ICANN Board has approved the use of the ICDR's International Arbitration Rules in IRPs in conjunction with the Supplementary Procedures.

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<sup>17</sup> Bylaws, Art. IV, § 1; *see also* Bylaws, Art. IV, §§ 2-3; Bylaws, Art. V, § 3.1.)

<sup>18</sup> Bylaws, Art. IV, § 8.

However, just as the Bylaws require that the ICDR Rules and the Supplementary Procedures “be consistent” with the IRP procedures set forth in the Bylaws, Paragraph 2 of the Supplementary Procedures requires that “[i]n the event there is any inconsistency between these *Supplementary Procedures and [the ICDR Rules], these Supplementary Procedures will govern.*”<sup>19</sup> In sum, while ICANN has approved the use of the ICDR Rules, it has been clear that those rules are subordinate to the Bylaws and the Supplementary Procedures.

14. As noted above, DCA agreed to abide by the rules of the Independent Review process when it chose to apply for .AFRICA. The Terms and Conditions of the gTLD Applications state:

Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the Application . . . provided that 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.<sup>20</sup>

DCA was neither required nor entitled to apply for .AFRICA. Nor does DCA (or any entity) have any “right” to any particular gTLD. In choosing to apply for a gTLD, DCA limited its recourse to ICANN’s internal accountability mechanisms. In filing an IRP, DCA submitted itself to the rules established by ICANN (following community input) that govern IRPs.

## **II. LIVE WITNESS TESTIMONY IS NOT PERMITTED PURSUANT TO THE RULES GOVERNING THIS PROCEEDING.**

15. Both the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP. Paragraph 4 of the Supplementary Procedures, which governs the “Conduct of the Independent Review,” states:

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<sup>19</sup> ICANN’s Supplementary Procedures for Independent Review Process (“Supplementary Procedures”) ¶ 2 (emphasis added), available at <https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf>.

<sup>20</sup> Top-Level Domain Application Terms and Conditions ¶ 6.



The IRP Panel should conduct its proceedings by electronic means to the extent feasible . . . . In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . ***the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.***<sup>21</sup>

16. Indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to “argument only,” and (2) the phrase stating that “all evidence, including witness statements, must be submitted in advance.” The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony.<sup>22</sup> The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.

17. Paragraph 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that “[i]n the unlikely event that a telephonic or in-person hearing is convened, ***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.***”<sup>23</sup>

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<sup>21</sup> Supplementary Procedures ¶ 4 (emphasis added).

<sup>22</sup> See *Burrell v. McIlroy*, 464 F.3d 853, 860 (9th Cir. 2006) (noting the distinction between “counsel’s argument” and “record evidence”).

<sup>23</sup> *Id.* (emphasis added).

18. While DCA may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard.<sup>24</sup> Despite the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of live witness testimony, DCA attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."<sup>25</sup> However, as discussed above, the Supplementary Procedures provide that "[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR's International Arbitration Rules], these Supplementary Procedures will govern," and the Bylaws require that the ICDR Rules "be consistent" with the Bylaws.<sup>26</sup> As such, the Panel *does not have discretion* to order live witness testimony in the face of the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of such testimony.

19. During the 22 April Call, DCA vaguely alluded to "due process" and "constitutional" concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, "constitutional" protections do not apply with respect to a *corporate accountability mechanism*.

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<sup>24</sup> During the 22 April Call, DCA appeared to contest, for the first time, whether the current version of the Supplementary Procedures apply in this case, contrary to the positions both sides had previously taken. During an initial administrative call with the ICDR on 4 December 2013, DCA requested a copy of the rules governing the IRP proceeding. At that time, ICANN provided DCA with a copy of the current and applicable version of the Supplementary Procedures. Until the 22 April Call, DCA never contested the applicability of those Procedures. In fact, in its 17 April 2014 and 20 April 2014 letters to the Panel, DCA cited to and relied on the current version of the Supplementary Procedures. (*See, e.g.*, Ex. 3 at p. 5 n.13, Ex. 5 at p. 2.)

<sup>25</sup> ICDR Rules, Art. 16.

<sup>26</sup> Supplementary Procedures ¶ 2.

Second, “due process” considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP.<sup>27</sup> And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”<sup>28</sup>

20. The U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses.<sup>29</sup> The Court noted that

[T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; *and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable* . . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.”<sup>30</sup>

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<sup>27</sup> During the 22 April Call, the question of the applicability of the Federal Arbitration Act (“FAA”) was raised. Whether or not the FAA applies here, U.S. case law is clear that parties have the right to tailor their own arbitration procedures. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) (“The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms . . . . The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”) (internal quotation marks and citations omitted.) Similarly, whether or not the California Arbitration Act (“CAA”) applies in this case, the CAA explicitly states that parties are entitled to cross-examine witnesses at hearing *only if* the parties’ agreement does not provide otherwise. Cal. Civ. Proc. Code § 1282.2.

<sup>28</sup> *AT&T Mobility LLC*, 131 S. Ct. at 1748-1749; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (noting that parties “trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”) (quotation marks and citations omitted).

<sup>29</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 648 n.14 (1985).

<sup>30</sup> *Id.* (internal quotation marks and citations omitted) (emphasis added).

21. Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. “*Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.*” It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”<sup>31</sup>

22. In short, even if this were a formal “arbitration,” ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings.

23. DCA argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA to present any written witness statements in support of its position, ICANN would not be entitled to cross examine those witnesses, just as DCA is not entitled to cross examine ICANN’s witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination.

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<sup>31</sup> *Redfern and Hunter on International Arbitration* § 6.08, Blackaby & Partasides (5th ed. 2009) (emphasis added).

**III. DCA HAS NO RIGHT TO SUPPLEMENTAL BRIEFING, AND FURTHER BRIEFING IS NEITHER APPROPRIATE NOR NECESSARY.**

24. DCA has no automatic right to additional briefing under the Supplementary Procedures. Paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. *All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.* Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. *The IRP Panel may request additional written submissions from the party seeking review*, the Board, the Supporting Organizations, or from other parties.<sup>32</sup>

This section clearly provides that DCA's opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the "initial" written submission, but the word "initial" refers to the fact that the Panel "may request additional written submissions," not that DCA has some "right" to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA has twice failed to submit evidence in support of its claims is not justification for allowing DCA a third attempt.

25. Further, as ICANN noted in its 20 April 2014 letter to the Panel, DCA's argument that it submitted its papers "on the understanding that opportunities would be available to make further submissions" is false. ICANN stated in an email to DCA's counsel on 9 January 2014—

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<sup>32</sup> Supplementary Procedures ¶ 5 (emphasis added).



prior to the submission of DCA's Amended Notice—that the Supplementary Rules bar the filing of supplemental submissions absent a request from the Panel.<sup>33</sup>

26. The decision as to whether to allow supplemental briefing is within the Panel's discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA might respond to ICANN's presentation on the merits, DCA has never even attempted to explain what it could say in additional briefing that would refute the materials in ICANN's presentation. Indeed, when DCA filed its request for emergency relief on 28 March 2014, it did not indicate that it had witnesses who could respond to ICANN's briefing; DCA did not even acknowledge that ICANN had submitted its brief. During the 22 April Call, DCA's counsel remained unable to identify a single witness who has specific knowledge regarding the GAC's consideration of DCA's application.<sup>34</sup> The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA has delayed these proceedings substantially, and further briefing would compound that delay.

27. Finally, as ICANN noted in its letter of 20 April 2014, despite DCA's attempts to frame this case as implicating issues “reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,” the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the

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<sup>33</sup> 9 January 2014 email from Jeffrey A. LeVee, Ex. 1.

<sup>34</sup> The only witness DCA counsel identified was Sophia Bekele, DCA's Executive Director, who is not a member of the GAC and therefore almost certainly does not have firsthand knowledge of the GAC's consideration of DCA's application. Nor would Ms. Bekele have firsthand knowledge of ICANN's internal processes for evaluating alleged conflicts of interests of ICANN Board members.

opportunity to submit briefs and evidence regarding that issue. DCA has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing.

**IV. DCA HAS NO AUTOMATIC RIGHT TO DISCOVERY AND HAS NOT DEMONSTRATED ANY NEED FOR DISCOVERY.**

28. Pursuant to the ICDR Guidelines for Arbitrators on Exchanges of Information (“Discovery Rules”), a party must request that a panel order the production of documents. Those documents must be “reasonably believed to exist and to be relevant and material to the outcomes of the case,” and requests must contain “a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case.”<sup>35</sup>

29. As ICANN noted in its 20 April Letter, despite the fact that the Supplementary Rules explicitly state that “[a]ll *necessary evidence* to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission,” DCA did not mention the notion of possible discovery until it served its initial request for emergency relief at the end of March 2014, three months after its served its amended papers and two months after ICANN served its initial papers. To date, DCA has not provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.

30. While ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation. The ICDR has made clear that its Discovery Rules do not contemplate such broad discovery. The

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<sup>35</sup> ICDR Guidelines for Arbitrators Concerning Exchanges of Information § 3(a).

introduction to the rules states that their purpose is to promote “the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.” It notes that:

One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.<sup>36</sup>

31. Finally, during the 22 April Call, the Panel inquired about the possibility of a confidentiality agreement between the parties. Such a confidentiality agreement or protective order would be possible with respect to documents that are otherwise confidential, and where publicly releasing documents would violate existing confidentiality. Further, Article IV, Section 3.20 of ICANN’s Bylaws provides that the “IRP Panel may, in its discretion, grant a party’s request to keep certain information confidential . . . .”<sup>37</sup>

**V. THE PANEL’S DECLARATION IN THIS CASE WILL NOT BE BINDING ON ICANN.**

32. The Panel’s Procedural Order No. 1 did not address the issue of whether its declaration would be binding, an issue that is not in any event a “procedural” issue. However, the issue was discussed at some length during the 22 April Call. Accordingly, ICANN briefly addresses the issue here.

33. The provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel

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<sup>36</sup> ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

<sup>37</sup> Bylaws, Art. IV, § 3.20.

will not be binding on ICANN. Section 3.11 gives the IRP panels the authority to “*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and “*recommend* 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.”<sup>38</sup> Section 3.21 provides that “[w]here feasible, the Board shall *consider* the IRP Panel *declaration* at the Board’s next meeting.”<sup>39</sup> Section 3 never refers to the IRP panel’s declaration as a “decision” or “determination.” It does refer to the “Board’s subsequent action on [the IRP panel’s] declaration[.]”<sup>40</sup> That language makes clear that the IRP’s declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel’s declaration and take whatever action it deems appropriate.

34. This issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel.<sup>41</sup> The *ICM* Panel specifically considered the argument that the IRP proceedings were “arbitral and not advisory in character,” and unanimously concluded that its declaration was “not binding, but rather advisory in effect.”<sup>42</sup> At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN’s Bylaws provided that “IRP shall be

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<sup>38</sup> *Id.*, Art. IV, § 3.11 (emphasis added).

<sup>39</sup> *Id.*, Art. IV, § 3.21 (emphasis added).

<sup>40</sup> *Id.*

<sup>41</sup> Pursuant to Article IV, Section 3.21 of ICANN’s Bylaws, the *ICM* Panel’s declaration has precedential value and is properly considered by this Panel, although that declaration does not bind this Panel in any legal sense. During the 22 April Call, the Panel inquired as to whether a declaration may be non-binding while also having precedential value. In the American context—the legal and semantic context in which ICANN’s Bylaws were drafted—it may. “In the United States, the doctrine of stare decisis has different implications depending on the relationship between the court rendering the judgment and the court that is asked to give the prior judgment precedential effect. When the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions.” 18-134 Moore’s Federal Practice - Civil § 134.02. Thus, ICANN, claimants, and IRP Panels may refer to previous IRP declarations and view them as having precedential effect, but those precedents are not binding on subsequent IRP Panels.

<sup>42</sup> February 2010 Declaration of Independent Review Panel ¶¶ 55, 134.

operated by an international arbitration provider appointed from time to time by ICANN . . . using arbitrators . . . nominated by that provider.”<sup>43</sup> ICM unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel’s declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel’s declaration is not binding on the Board.

**VI. IN-PERSON HEARINGS ARE TO BE HELD ONLY IN “EXTRAORDINARY CIRCUMSTANCES.”**

35. Paragraph 4 of the Supplementary Procedures provides:

*The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary* by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only . . . .”<sup>44</sup>

Similarly, Article IV, Section 3.12 of the Bylaws provides:

*In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened,* the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.<sup>45</sup>

36. During the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.

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<sup>43</sup> *Id.* ¶ 96.

<sup>44</sup> Supplementary Procedures ¶ 4 (emphasis added).

<sup>45</sup> Bylaws, Art. IV, § 3.12 (emphasis added)

ICANN does not believe, however, that this IRP is sufficiently “extraordinary” so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straight forward—limited to whether ICANN’s Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA’s application for .AFRICA—and can, and easily should, be resolved following a telephonic oral argument with counsel and the Panel.

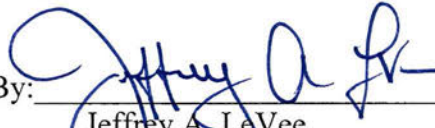
### CONCLUSION

ICANN thanks the Panel for its considerable attention to these issues and looks forward to a swift resolution of these Independent Review proceedings.

Respectfully submitted,

Dated: 5 May 2014

By: \_\_\_\_\_



Jeffrey A. LeVee

Jones Day

Counsel for Respondent ICANN

LAI-3214301v3

# Exhibit 1



**Subject:** RE: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN) 

**From:** Jeffrey LeVee  
Extension: 32572

01/09/2014 02:21 PM

**To:** Carolina Cardenas-Soto, LL.M.

**Cc:** "Ali, Arif", Cindy Reichline, "Eric P. Enson", "Franzetti, Erica", "Walter, Marguerite"

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**History:** This message has been forwarded.

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Carolina:

Thank you for your email. We will look forward to receiving DCA Trust's materials tomorrow.

We do, however, wish to make clear that ICANN disagrees with your suggestion that DCA Trust is free to amend or supplement its claims at any time before the arbitrators are appointed. Accordingly, ICANN reserves its right to argue that any amended or supplemental submission that DCA Trust attempts to submit after tomorrow is barred by the rules that apply to this proceeding.

The ICDR's Supplementary Procedures for ICANN Independent Review Process clearly provide that in the event of any inconsistency between the Supplementary Procedures and the ICDR's International Arbitration Rules, the Supplementary Procedures will govern. The Supplementary Procedures do not provide for any amendments or supplemental submissions. Paragraph 5 of the Supplementary Procedures provides for a different process than the ICDR's rules and requires the initial submission (the Request) to include all necessary evidence to demonstrate Requestor's claims. The IRP Panel may then request additional written submissions.

Further, your email does not accurately capture the language of Article 4 of the ICDR's International Arbitration Rules (even if Article 4 were to apply). At a minimum, Article 4 makes clear that any attempt to amend or supplement is subject to a ruling by the tribunal that the attempt was inappropriate.

In all events, we agree that, if DCA Trust attempts to amend or supplement its submissions, the parties can address to the panel in due course the propriety of the timing of DCA Trust's submissions.


Regards,

Jeff LeVee  
JONES DAY® - One Firm Worldwide  
Telephone: 213.243.2572



# Exhibit 2



**Subject:** Re: ICDR Case 502013001083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN)   
**From:** Jeffrey LeVee  
Extension: 32572  
04/15/2014 03:51 PM  
**To:** Babak Barin  
**Cc:** "Ali, Arif", "Carolina Cardenas-Soto, LL.M. (Cardenasc@adr.org)", C K, "Cindy Reichline (creichline@JonesDay.com)", "Eric P. Enson (epenson@JonesDay.com)", "Franzetti, Erica", "Walter, Marguerite", "Craven, Meredith", "Justice Richard C. Neal (Ret.)"

**Members of the Panel, Ms. Cardenas, and Counsel:**

I am responding further to Ms. Walter's email sent on Sunday, 13 April 2014.

Now that the Panel has been convened, ICANN would very much like to advance to the final resolution of this Independent Review proceeding. While we recognize that DCA has submitted a revised request for emergency relief, we wish to suggest an alternative approach that we think would preserve everyone's rights and be far more expedient for the Panel and the parties.

Inasmuch as the parties have concluded the briefing, and the Panel has been convened, there is only one meaningful step left before the Panel can reach its decision on the merits. These proceedings are governed by Article IV, Section 3 of ICANN's Bylaws. Pursuant to Paragraph 12 of this Section:

"12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

Accordingly, ICANN requests that the Panel decide this week whether to conduct a telephonic or in-person hearing. If the Panel elects to conduct a hearing (and in this instance ICANN believes that a hearing would be useful), ICANN proposes a telephonic hearing since Professor Kessedjian is in Paris and Mr. Barin is in Montreal. We are available to conduct that hearing on April 21 (the date currently set for the administrative call), or we could schedule the hearing later that week.

Importantly, Article IV, Section 3, Paragraph 18 of the ICANN Bylaws provides that "The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review." DCA's initial request was filed in October 2013; accordingly, we have already arrived at (and are about to exceed) this six month time period.

As a result, ICANN is hoping that the Panel will commit to issuing its ruling by 15 May 2014. As a practical matter, ICANN will not be in a position prior to that date to take the final steps that are necessary to delegate the .AFRICA TLD to ZA Central Registry. This would eliminate the need for any emergency relief, it would eliminate the need for two separate hearings and rulings, it would be the most cost-effective approach (consistent with Paragraph 12 above), and it would address DCA's concern that its claims could become moot by virtue of the final delegation of .AFRICA into the root zone.

Thank you for considering this proposal.

Jeff LeVee

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# Exhibit 3

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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation  
for Assigned Names and Numbers (ICANN) – Procedural Proposals**

Dear Mr. President and Members of the Panel,

We write to strongly object to ICANN's proposal set forth in Mr. LeVee's email of 15 April that this case be heard on the merits in the coming week, with no further written submissions by the parties. To put it mildly, this is a truly preposterous position for ICANN to take and emblematic of its treatment of DCA Trust from the outset of the new gTLD application process.

Mr. LeVee's representation that the parties have "concluded the briefing" is incorrect. The parties have each filed only their initial submissions in this proceeding and their respective submissions on emergency relief; the latter being a filing precipitated by ICANN's actions and belated acceptance that Article 37 emergency relief was available to DCA Trust. As we lay out below, the parties' initial submissions hardly provide a basis for the Panel to render a properly informed determination regarding DCA Trust's rights and ICANN's violations of its Articles of Incorporation, Bylaws and applicable law.

Other than its application for Article 37 emergency relief, DCA Trust has filed a form notice of arbitration (24 October 2013) and an Amended Notice of Arbitration (10 January 2014). No witness testimony was presented with this initial submission. It was, after all, submitted on the understanding that opportunities would be available to make further submissions in light of the dispute resolution framework that applies to this IRP proceeding.

In its Response to DCA Trust's Notice of IRP (10 February 2014), ICANN put forward certain witness testimony that purports to raise factual issues concerning how the Government Advisory Committee ("GAC") came to render advice against DCA Trust's application for .AFRICA. In particular, ICANN has provided testimony from Ms. Heather Dryden – who is simultaneously both a member of ICANN's Board and the Chair of the GAC – which implies that the GAC advisor for Kenya, Mr. Sammy Buruchara, was not authorized to speak for Kenya when he objected to the proposed advice to quash DCA Trust's application for .AFRICA. Ms. Dryden also refers to additional documentary evidence that she claims shows that Mr. Buruchara in fact supported the issuance of advice against DCA Trust's application, yet neither she nor ICANN have provided this evidence on the ground that it is "confidential."

Under the circumstances, it would be highly inappropriate to close the written record already, without further development of the disputed facts that require clarification through additional documentary evidence and/or testimony. It would be equally inappropriate to hold a summary hearing on the merits in just five days, without ICANN's witnesses being made available for cross-examination by DCA Trust or questioning by the Panel. Indeed, to proceed as ICANN has proposed would result in a gross injustice to DCA Trust, as this proceeding may well be the last opportunity that DCA Trust has to be heard.

Contrary to the assertions in Mr. LeVee's email, ICANN's proposal certainly does not protect DCA's procedural rights, which have already been compromised several times by ICANN's failure to respect the legitimacy of its own administrative proceeding, most recently through ICANN's signature of a Registry Agreement with ZACR in violation of DCA's rights to a legitimate, effective opportunity to be heard in this IRP.

ICANN shortsightedly relies on certain provisions in its Bylaws concerning time and cost efficiency in its IRPs to try to fundamentally alter the IRP framework in order to gain advantage in this IRP. In doing so, however, it ignores other provisions of the Bylaws, the ICDR Rules, and the Supplementary

Procedures, not to mention the integrity of the accountability framework ICANN has created. The three elements of this framework – ICANN’s Bylaws, the ICDR Rules of Arbitration, and ICANN’s Supplementary Procedures for IRPs – all contemplate a meaningful proceeding in which the parties are able to fully develop the factual and legal record, and are not limited to a summary process based on initial pleadings only. While we completely agree that the IRP is meant to be a swift and efficient process, it is in no way meant to be a summary process, and certainly not at the expense of the parties’ right to be heard.

We address the dispute resolution framework below.

### **The Bylaws Provide For A Full, Independent And Objective Review Of ICANN’s Actions**

The Bylaws leave no doubt that the IRP is meant to be a genuine dispute-resolution process administered by an independent third party, and not a mere extension of ICANN’s own decision-making process in which ICANN believes it is free to remake the rules as it goes along. Section IV, Article 3(1) of the Bylaws establishes “a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” The IRP Panel is “charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”<sup>1</sup> Pursuant to Section IV, Article 3(4), the Panel is to apply “a defined standard of review” in assessing the actions of ICANN’s Board.<sup>2</sup>

The Bylaws further provide that, although requests for independent review are limited to 25 pages, parties “may submit documentary evidence supporting their positions *without limitation*.”<sup>3</sup> The IRP Panel has the authority to request additional written submissions, not only from the claimant, but also from the Board, the Supporting Organization, or other parties.<sup>4</sup> The Panel may also hold an in-person hearing if it so chooses.<sup>5</sup> Nor is the Panel limited to declaring whether the Board’s actions were

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<sup>1</sup> Article IV, Section 3(4), ICANN’s Bylaws.

<sup>2</sup> A previous IRP Panel (comprised of Judge Stephen Schwebel, president; Professor Jan Paulsson; and Judge Dickran Tevrizian) confirmed that ICANN Board decisions are to be reviewed based on an objective standard. *ICM Registry LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 February 2010), para. 136 [Ex. C-12 to Amended Notice of IRP].

<sup>3</sup> Art. IV, Sec. 3(5), ICANN’s Bylaws.

<sup>4</sup> Art. IV, Sec. 3(11)(b), ICANN’s Bylaws.

<sup>5</sup> Art. IV, Sec. 3(12).

consistent with its Articles of Incorporation or Bylaws; it also has the power to “recommend 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.”<sup>6</sup> The Panel’s declarations and any action taken by the Board in response to such declarations “are final and have precedential value.”<sup>7</sup> The mere fact that the Panel’s decision is to have precedential effect should put an end to Mr LeVee’s efforts to cut short these proceedings; no determination resulting from the type of proceeding proposed by Mr LeVee could have any sort of precedential value based on a summary, untested record. ICANN’s effort to transform the IRP into a type of summary judgment process without a fully developed record is thus not only inappropriate, but contravenes its own Bylaws.

### **The ICDR Rules Provide Substantial Procedural Rights To The Parties, Including The Right To Document Production**

Moreover, by designating the ICDR Rules of Arbitration as the rules governing the IRP, ICANN has consented to the application of every aspect of those rules except where the Supplementary Procedure expressly derogate from them. Article 16(1) provides that the Panel may conduct the proceeding as it deems appropriate, subject to the Rules, “provided that the parties are treated with equality and that each party has the right to be heard and is given *a fair opportunity to present its case*.”<sup>8</sup> The Panel may decide how many pleadings there will be in addition to the initial statement of claim and statement of defense, and may set the time limits for such submissions.<sup>9</sup>

Moreover, the ICDR Guidelines for Arbitrators on Exchanges of Information – which apply to all proceedings commenced after 31 May 2008<sup>10</sup> – confirm that the IRP Panel has the power to order document production in this proceeding.<sup>11</sup> If the Panel permits, DCA intends to seek documents that are in ICANN’s possession and which would clarify the factual issues in this dispute, including but not

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<sup>6</sup> Art. IV, Sec. 3(11)(e), ICANN’s Bylaws.

<sup>7</sup> Art. IV, Sec. 3(21), ICANN’s Bylaws.

<sup>8</sup> Art. 16(1), ICDR Rules (as Amended and Effective 1 June 2009).

<sup>9</sup> Art. 17(1), ICDR Rules.

<sup>10</sup> ICDR Guidelines for Arbitrators on Exchanges of Information, attached hereto as Annex A.

<sup>11</sup> Art. 3, ICDR Guidelines for Arbitrators on Exchanges of Information, Annex A.



limited to the “confidential” documents on which ICANN relies for its arguments concerning the issuance of the GAC advice against DCA’s application for .AFRICA.<sup>12</sup>

**ICANN’s Supplementary Procedures For The IRP Also Contemplate The Development Of A Full Evidentiary Record And Opportunity For A Hearing**

ICANN’s Supplementary Procedures for the IRP in no way conflict with the parties’ right to develop a full evidentiary record and hold a hearing on the merits, in person or electronically, as provided in the ICDR rules. Article 4 of the Supplementary Procedures commits the timetable of the proceeding to the discretion of the Panel.<sup>13</sup> Article 4 also provides that the Panel may hold a hearing, either by telephone or in person.

Moreover, and contrary to what Mr. LeVee has argued from the outset of this proceeding, Article 5 of the Supplementary Procedures contemplates *multiple submissions* from the parties, and does not limit submissions to the Notice of IRP and response. Under Article 5, the parties’ “*initial* written submissions” are limited to 25 pages. The use of the word “initial” leaves no doubt that multiple rounds of submissions are expected in the IRP. Article 5 further confirms that the Panel may request additional written submissions from the parties, from the Board, the Supporting Organizations, or other parties.

Accordingly, ICANN’s insistence that the parties to this IRP are limited to the written submissions already in the record ignores the ICDR Rules as well as the Supplementary Procedures.

**ICANN’s Invocation Of The Six-Month Aspirational Deadline For The Resolution Of This Dispute Ignores Its Own Role In Delaying This Proceeding**

It should also be noted that the six-month aspirational deadline for a declaration, as referenced in the ICANN Bylaws, Art. IV, Section 3(18), assumes a number of actions on ICANN’s part that were not taken in this case.

First, the Bylaws assume that the petitioner filing an IRP will have access to instructions that tell it what documents constitute an initial filing for an IRP. When DCA filed its Notice of Independent Review Process on 24 October 2013, it did so pursuant to the instructions available on the ICANN and ICDR

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<sup>12</sup> In this regard, we note that Art. 3(b) of the Guidelines provides that the Panel “may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality,” which should alleviate ICANN’s concerns about producing the “confidential documents” on which it relies.

<sup>13</sup> Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process [Ex. C-3 to Amended Notice of IRP].

websites, which simply said that parties interested in filing an IRP should complete the linked pdf form (a one-page document), and the ICDR would contact the petitioner with more information on the process.

DCA was not aware until 2 December 2013 that there was a second page to the Notice form which was not posted, or that the form was expected to be accompanied by a 25-page submission summarizing its complaint.<sup>14</sup> Moreover, even the Supplementary Procedures were unavailable and had to be forwarded by ICANN's counsel to the ICDR itself and then passed along to DCA on 4 December 2013.<sup>15</sup>

The six-month aspirational deadline also assumes that ICANN will have a standing panel in place to be appointed immediately to the IRP panel, which was not the case – and is still not the case. Although the standing panel mechanism was inserted into the Bylaws Art. IV, Section 3(6) on 11 April 2013,<sup>16</sup> between that date and 24 October 2013, ICANN took no steps to create the standing panel. During that six-month period, ICANN also made no effort to ensure that the paperwork and instructions for filing an IRP were up to date. It bears further noting that DCA informed ICANN of its intent to file an IRP in August 2013, before engaging in a Cooperative Engagement Process<sup>17</sup> with ICANN for a period of two months. During those two months, ICANN did not update the Notice of IRP form available online to petitioners, ICANN did not make the Supplementary Rules available to petitioners, and ICANN did not take any steps towards creating a standing panel to expedite the IRP process.

In sum, ICANN cannot justify violating DCA's procedural rights under this IRP based upon an aspirational deadline that ICANN itself has caused to be delayed.

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<sup>14</sup> See Letter from Jeffrey LeVee to Carolina Cardenas-Soto, dated 2 December 2013 (indicating that it is "clear" from the rules that DCA should have filed the two page notice form as well as a 25-page briefing) [Respondent's Ex. – 1 to Response to Request for Emergency Relief].

<sup>15</sup> See Letter from Cindy Reichline to Carolina Cardenas-Soto, dated 4 December 2013 (forwarding the Supplementary Rules to the ICDR, because the Rules web link was inoperative) [Respondent's Ex. – 1 to Response to Request for Emergency Relief]; *see also*, Letter from Carolina Cardenas-Soto to the parties, dated 4 December 2013 (forwarding the Supplementary Rules to the parties) [Respondent's Ex. – 1 to Response to Request for Emergency Relief].

<sup>16</sup> Indeed, while the onus has been on ICANN to establish the standing panel since April 2013, the standing panel mechanism for an IRP was first inserted into ICANN's bylaws in December 2002.

<sup>17</sup> The Cooperative Engagement Process is a negotiation period recommended under the ICANN Bylaws Art. IV, Section 3(14). Parties that do not engage in a CEP process before filing an IRP may be subject to fee-shifting penalties pursuant to the ICANN Bylaws Art. IV, Section 3(16).

**This Dispute Concerns ICANN's Accountability For Internet Governance And Thus Implicates Issues Reaching Far Beyond The Dispute Over .AFRICA**

We further recall – as ICANN would apparently prefer not to do – that the issues at stake in this case reach far beyond the respective rights of the parties as concerns the delegation of .AFRICA. The IRP is the primary means by which ICANN claims to make itself accountable to Internet stakeholders around the world for abiding by its own Bylaws, Articles of Incorporation, and other rules such as, in this case, the new gTLD Guidebook. ICANN's legitimacy and integrity as an institution are currently being debated by the United States Congress, as it considers whether the U.S. government should withdraw or reduce its oversight of ICANN. Of particular relevance here, one concern that has been raised in the context of these discussions is ICANN's vulnerability to undue influence exerted by governments. If ICANN's conduct concerning the application process for .AFRICA is anything to go by, there is good reason to be concerned.

Indeed, the legitimacy of this proceeding should be of paramount concern to ICANN, just as it is to DCA. This proceeding is the first ever IRP proceeding under the New gTLD Program, the first IRP proceeding under the Bylaws as amended in April 2013 pursuant to ICANN's Accountability and Transparency Review, and only the third IRP ever filed against ICANN.

Furthermore, both parties agree that .AFRICA is a unique right, and once it is delegated no adequate remedy will remain for DCA. At the very least, DCA has a right to be properly heard by this IRP panel and not by ICANN as judge, jury and executioner.

*Finally*, we find it particularly galling that, after several requests that ICANN suspend processing of applications for .AFRICA in order to avoid eviscerating DCA's rights in this proceeding, it is only now, and in exchange for DCA giving up its procedural rights in this IRP, that ICANN is willing to offer any assurance that it will not complete delegation of .AFRICA to the only other (government-backed) applicant for .AFRICA, ZACR, before this IRP has come to completion.

Based on the foregoing, DCA respectfully requests that the Panel reject ICANN's request for a summary telephone hearing on the merits of DCA's claims just days from now. We further request that the Panel establish a procedural schedule as follows:

- A telephonic hearing on DCA's request for interim relief on April 22, 2014, unless ICANN confirms in writing that it will not proceed with the delegation of the .AFRICA gTLD until the ICANN Board has considered and implemented the Panel's ruling. DCA also requests that the Panel hear, as scheduled, the parties' submissions on the procedure of the remainder of the IRP during that same hearing. DCA has no objections to this being a telephonic hearing;
- Exchange of simultaneous document requests by the parties on April 25, 2014;

- Simultaneous exchange of documents and any objections to document requests on May 9, 2014;
- DCA's Memorial on the Merits submitted on June 6, 2014;
- ICANN's Counter-Memorial submitted on July 4, 2014;
- A telephonic or video hearing on August 1, 2014; and
- Barring other procedural measures deemed necessary by the Panel, that the Panel attempt to render a decision by September 1, 2014.

We appreciate the Panel's consideration of the foregoing and look forward to working with the Panelists and ICANN to put in place a dispute resolution framework that is appropriate for the rights that are at stake and that will be determined as a result of this IRP process.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Arif H. Ali', written over a horizontal line.

Arif H. Ali

cc: Carolina Cardenas Soto  
Jeffrey LeVee

Enclosures

## Annex A



International Centre  
for Dispute Resolution

## **ICDR GUIDELINES FOR ARBITRATORS CONCERNING EXCHANGES OF INFORMATION**

### ***Introduction***

The American Arbitration Association (AAA) and its international arm, the International Centre for Dispute Resolution<sup>®</sup> (ICDR) are committed to the principle that commercial arbitration, and particularly international commercial arbitration, should provide a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.

While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fairness within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.

The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process. Unless the parties agree otherwise in writing, these guidelines will become effective in all international cases administered by the ICDR commenced after May 31, 2008, and may be adopted at the discretion of the tribunal in pending cases. They will be reflected in amendments incorporated into the next revision of the International Arbitration Rules. They may be adopted in arbitration clauses or by agreement at any time in any other arbitration administered by the AAA.

#### **1. In General**

- a. The tribunal shall manage the exchange of information among the parties in advance of the hearings with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time balancing the goals of avoiding surprise, promoting equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

- b. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority to apply the above standard. To the extent that the Parties wish to depart from this standard, they may do so only on the basis of an express agreement among all of them in writing and in consultation with the tribunal.

**2. Documents on which a Party Relies.**

Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

**3. Documents in the Possession of Another Party.**

- a. In addition to any disclosure pursuant to paragraph 2, the tribunal may, upon application, require one party to make available to another party documents in the party's possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.
  - b. The tribunal may condition any exchange of documents subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

**4. Electronic Documents.**

When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the Tribunal determines, on application and for good cause, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The Tribunal may direct testing or other means of focusing and limiting any search.

**5. Inspections.**

The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

**6. Other Procedures.**

- a. Arbitrators should be receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.

- b. Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

**7. Privileges and Professional Ethics.**

The tribunal should respect applicable rules of privilege or professional ethics and other legal impediments. When the parties, their counsel or their documents would be subject under applicable law to different rules, the tribunal should to the extent possible apply the same rule to both sides, giving preference to the rule that provides the highest level of protection.

**8. Costs and Compliance.**

- a. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.
- b. In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.



# Exhibit 4

## JONES DAY

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April 20, 2014

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Re: ICDR Case 50 2013 00 1083 DotConnect Africa Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN) - Procedural Proposals

Dear Mr. President and Members of the Panel:

On behalf of ICANN, I am responding to DCA's letter of 17 April 2014 and DCA's proposal to extend this matter into August or September. The Panel should decline DCA's transparent attempt to delay the resolution of this matter well beyond the delays that DCA already has caused. Indeed, the schedule that DCA proposes – particularly in light of DCA's request for emergency relief – is truly shocking and demonstrates that DCA is more interested in delay than in a resolution on the merits. If the Panel is thinking of recommending emergency relief of any kind – and ICANN already has explained why it believes that emergency relief is utterly inappropriate here – ICANN remains willing and eager to resolve this proceeding swiftly pursuant to the schedule that ICANN has proposed.

IRP Panel  
April 20, 2014  
Page 2

In the April 17 letter, DCA selectively refers to portions of ICANN's Bylaws and the Supplementary Procedures and argues that the parties should be permitted several more months to take discovery and file further briefs. In so doing, DCA ignores the significant changes that have been made to the rules for IRPs.

DCA's counsel, Mr. Ali, participated in the very first ICANN Independent Review proceeding (referenced in footnote 2 of his letter), a proceeding that involved extensive discovery and a five-day hearing that included extensive witness testimony. That proceeding cost the parties millions of dollars. Not long after the conclusion of that proceeding, ICANN engaged world-renowned governance and dispute resolution experts to evaluate the Independent Review process and make recommendations they thought appropriate given the purpose of such a process.<sup>1</sup> As a result of the experts' recommendations, which followed extensive analysis as well as receipt of public comments from the ICANN community via live presentations and written submissions, ICANN significantly amended the rules that apply to Independent Review proceedings in order to streamline the proceedings dramatically so as to avoid exactly the type of "process" and expense that DCA has proposed. Indeed, DCA's proposal treats these proceedings as if these amendments had not occurred.

Paragraphs 4 and 5 of the Supplementary Procedures that now govern these proceedings are critical to how these proceedings should be managed.<sup>2</sup> Because DCA quotes only selectively from these paragraphs, ICANN provides them here in full (with bolding that refutes some of DCA's particular assertions):

#### 4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the **extraordinary event** that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), **the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.** Telephonic hearings are subject to the same limitation.

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<sup>1</sup> The experts were Mervyn King S.C. former Judge of the Supreme Court of South Africa, Graham MacDonald, Presidential Member of Australia's Administrative Appeals Tribunal, and Richard Moran, a widely known expert on corporate leadership and governance. For more information, see <http://www.icann.org/en/news/in-focus/accountability/asep>.

<sup>2</sup> Section 2 of the Supplementary Procedures states that "[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR's International Arbitration Rules], these Supplementary Procedures will govern." A copy of the Supplementary Procedures are attached to this letter.

IRP Panel  
April 20, 2014  
Page 3

The IRP Panel retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP Panel's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

5. Written Statements.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. **All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP Panel may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

With respect to DCA's various proposals:

1. **IRPs no longer involve cross-examination of witnesses.**

DCA argues on page 2 that it would be "inappropriate to hold a summary hearing on the merits in just five days, without ICANN's witnesses being made available for cross-examination by DCA Trust or questioning by the Panel." However, Paragraph 4 of the Supplementary Procedures, quoted above, makes it clear that hearings, if any, are now limited to "argument only." There is no right to cross-examine witnesses at the hearing (or at any other time).

2. **DCA has no automatic right to discovery and has not demonstrated any need for discovery in all events.**

A party does have the right, pursuant to the ICDR Guidelines for Arbitrators on Exchanges of Information, to request that a panel call for the production of documents. However, those documents must be "reasonably believed to exist and to be relevant and material to the outcome of the case," and requests must contain "a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."<sup>3</sup> DCA provides no indication as to what information it believes those documents might contain and has made no showing that those documents could affect the outcome of this case. The ICDR rules plainly do not entitle DCA to proceed with a vague "fishing expedition" request for any and all documents that DCA somehow believes would "clarify the factual issues in dispute."

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<sup>3</sup> ICDR Guidelines for Arbitrators on Exchanges of Information § 3(a).

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It should also be noted that ICANN's Supplementary Procedures explicitly state that that "[a]ll necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission."<sup>4</sup> DCA's Amended Notice made no reference to documents that DCA either unsuccessfully sought or was in the process of seeking. Indeed, DCA did not even mention the notion of possible discovery until it served its initial request for emergency relief at the end of March 2014, three months after it served its papers and two months after ICANN served its papers.

### **3. Further briefing is neither appropriate nor necessary.**

DCA's interpretation of the Supplementary Procedures is simply false. To repeat, the Supplementary Rules state that: "[a]ll necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission." DCA refers on page 3 of its letter to the fact that there is no page limitation for documentary evidence, but this is quite beside the point that DCA was supposed to have submitted **all** of its evidence at the time of the filing of its Amended Notice.<sup>5</sup> (And, in fact, DCA's Amended Notice was accompanied by two binders full of exhibits.) DCA then states that, when it submitted its papers "on the understanding that opportunities would be available to make further submissions," but ICANN made clear at the outset that it viewed DCA's "understanding" to be absolutely contrary to the rules. ICANN stated in an email to DCA's counsel on 9 January 2014—prior to the submission of DCA's Amended Notice—that the Supplementary Rules barred the filing of supplemental submissions.<sup>6</sup>

In short, the Supplementary Procedures provide clearly that the briefing for this matter has concluded, subject only to the ability of the Panel to request additional written submissions. In that respect, ICANN urges the Panel to rule based on the papers already served, following telephonic oral argument, for the following reasons:

- Despite having received ICANN's response to DCA's Amended Notice on 10 February 2014, DCA has never even **hinted** that it has any meaningful response to ICANN's papers. Indeed, when DCA filed its request for emergency relief on 28 March 2014, DCA did not even reference ICANN's response, much

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<sup>4</sup> Supplementary Procedures § 5.

<sup>5</sup> DCA also argues that the use of the phrase "initial written submissions" in the first section of paragraph 5 assumes the notion that there will be subsequent submissions. But the rest of the paragraph makes clear that any subsequent submission would be at the request of the IRP Panel, not at the whim of one of the parties.

<sup>6</sup> 9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied.

less suggest that DCA had the ability to refute the arguments and evidence contained in the response.

- DCA has delayed these proceedings multiple times, and any request for a further delay as a result of discovery and new briefing (that is proposed to stretch from May to July) is completely contrary to the spirit of the Bylaws and Supplementary Procedures that strongly urge these proceedings to be concluded within six months of when they were initiated. True, ICANN does not yet have a Standing Panel, but the entire spirit of the Bylaws and the Supplementary Rules urges that these proceedings be handled expeditiously. DCA's proposal, by contrast, would delay these proceedings until at least August 2014.
- These proceedings are for the benefit of the entire ICANN community, not merely DCA. The community – which includes the competing applicant for .AFRICA – is entitled to a swift resolution as is expressly (and repeatedly) urged in the Bylaws and Supplementary Procedures.

4. **The issues in this proceeding are limited in scope and are not complicated.**

Despite DCA's suggestion that "the issues at stake in this case reach far beyond the respective rights of the parties as concerns the delegation of .AFRICA" (letter at p. 7), in fact, the **only** issue in this proceeding is whether ICANN violated its Bylaws or Articles of Incorporation in its handling of DCA's application for .AFRICA. And on this issue, the evidence could not be more clear:

- At the time it submitted its application, DCA did not present the requisite evidence of support of at least 60% of the nations of Africa, nor has DCA ever indicated that it could present such evidence;
- the Governmental Advisory Committee ("GAC") properly issued "consensus advice" to block DCA's application;
- ICANN properly followed that GAC advice (and there was no rationale to do otherwise); and
- none of the ICANN Board members who voted on this issue had conflicts of interest.

The papers that the parties already have submitted, including the voluminous exhibits, demonstrate these facts clearly, and no discovery or further briefing would aid the Panel in

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reaching its conclusion. And while DCA objects that ICANN is trying to “transform the IRP into a type of summary judgment process” (letter at p. 4), the IRP process is **supposed** to be limited in scope and process, and this is particularly true where the evidence is unambiguous as to what occurred.

5. **ICANN will not agree to stay the delegation of .AFRICA.**

Finally, ICANN has already stated that it will not agree to refrain from delegating the .AFRICA TLD to ZA Central Registry. ICANN has urged the Panel to hear the matter on the merits in order to issue a decision by 15 May 2014 because ICANN will not, as a practical matter, conclude the delegation process by that date. But the notion urged by DCA that ICANN should voluntarily refrain from the delegation until September 2014 would result in severe prejudice to ICANN and ZA Central Registry, and that would be true even if DCA had viable claims, which it clearly does not.

For this reason, ICANN again urges the Panel to set a schedule for this proceeding that is expeditious, that recognizes that great delays that have occurred as a result of DCA’s conduct, and that conforms with the spirit of these proceedings.

Respectfully submitted,

/s/

Jeffrey A. LeVee

cc: Ms. Carolina Cardenos-Soto  
Arif H. Ali, Esq.

# Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

### 1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.



ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

## 2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

## 3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

#### 4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

#### 5. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

#### 6. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

## 7. Interim Measures of Protection

An IRP PANEL may recommend 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 IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

## 8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

## 9. Declarations

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

## 10. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

## 11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.


## 12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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**Subject:** RE: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation for Assigned Names and Numbers (ICANN)   
**From:** Jeffrey LeVee 01/09/2014 02:21 PM  
Extension: 32572  
**To:** Carolina Cardenas-Soto, LL.M.  
**Cc:** "Ali, Arif", Cindy Reichline, "Eric P. Enson", "Franzetti, Erica", "Walter, Marguerite"  
**Bcc:** amy.stathos, elizabeth.le

---

Carolina:

Thank you for your email. We will look forward to receiving DCA Trust's materials tomorrow.

We do, however, wish to make clear that ICANN disagrees with your suggestion that DCA Trust is free to amend or supplement its claims at any time before the arbitrators are appointed. Accordingly, ICANN reserves its right to argue that any amended or supplemental submission that DCA Trust attempts to submit after tomorrow is barred by the rules that apply to this proceeding.

The ICDR's Supplementary Procedures for ICANN Independent Review Process clearly provide that in the event of any inconsistency between the Supplementary Procedures and the ICDR's International Arbitration Rules, the Supplementary Procedures will govern. The Supplementary Procedures do not provide for any amendments or supplemental submissions. Paragraph 5 of the Supplementary Procedures provides for a different process than the ICDR's rules and requires the initial submission (the Request) to include all necessary evidence to demonstrate Requestor's claims. The IRP Panel may then request additional written submissions.

Further, your email does not accurately capture the language of Article 4 of the ICDR's International Arbitration Rules (even if Article 4 were to apply). At a minimum, Article 4 makes clear that any attempt to amend or supplement is subject to a ruling by the tribunal that the attempt was inappropriate.

In all events, we agree that, if DCA Trust attempts to amend or supplement its submissions, the parties can address to the panel in due course the propriety of the timing of DCA Trust's submissions.

Regards,

Jeff LeVee  
JONES DAY® - One Firm Worldwide  
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# Exhibit 5

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**Re: ICDR Case 50 2013 00 1083 DotConnectAfrica Trust (DCA Trust) vs. Internet Corporation  
for Assigned Names and Numbers (ICANN) – Procedural Proposals**

Dear Mr. President and Members of the Panel,

DCA writes in response to ICANN's letter of today's date concerning the scope of the IRP. We also briefly address ICANN's categorical refusal to stay processing of ZACR's application for .AFRICA until this proceeding has concluded.

*First*, it is telling that ICANN's representations as to the scope of this proceeding focus exclusively on ICANN's Supplementary Procedures. As their title indicates, the Supplementary Procedures only



supplement – and do not replace – the ICDR Rules, which, along with associated guidelines, govern this proceeding. These rules ensure DCA’s right to be fully heard in this proceeding. That right includes the ability to submit a full written submission on the merits of its claims; the right to the documents on which ICANN relies for its defenses; and the right to test ICANN’s witnesses. What ICANN may have intended and what the legal consequences are of the dispute resolution mechanism that ICANN put in place are for the Panel to decide, not for ICANN to dictate.

The Panel should be guided first and foremost by the text of the ICDR Rules and Supplementary Procedures – as opposed to ICANN’s current, self-serving gloss on those rules. The Supplementary Procedures and the ICDR Rules, moreover, ultimately commit the conduct of the IRP to the discretion of the Panel. In exercising such discretion, the Panel should be guided by the cardinal principle set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body. The principles of fairness and equality set out in the ICDR Arbitration Rules, which have not been derogated from by ICANN, prohibit ICANN from unilaterally altering the substance of the rules that apply to this proceeding now that DCA has invoked the IRP.

*Second*, the Supplementary Procedures do not materially deviate from the rights established under the ICDR Rules, except with respect to the 25-page limit on the parties’ “initial written submissions” and the requirement that hearings be limited to “argument only.”

In particular, and in contrast to what ICANN claims, the Supplementary Procedures provide that:

- There will be “initial written submissions” by each party of no more than 25 pages. The word “initial” confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many and how long the additional written submissions should be (Art. 5);
- “All necessary evidence should” be included with the claimant’s initial written submission. The use of the word “should,” and not “shall,” confirms that it is desirable but not required that all necessary evidence be included with the Notice of IRP (Art. 5). Thus, nothing precludes the claimant from adducing additional evidence to rebut ICANN’s defences, as DCA intends to do;
- The IRP Panel may request additional written submissions from either party, or from third parties, as necessary to render a decision in the matter (Art. 5); and
- As ICANN observes, in the event of an in-person or telephonic hearing, witness statements must be provided in advance and the hearings “shall be” limited to “argument only” (Art. 4). This provision does not expressly prohibit cross-examination of witnesses, however, or their questioning by the Panel. Indeed, it would be highly improper for a party to be allowed to submit witness testimony that could not then subsequently be tested, whether by opposing counsel or the

Panelists. It seems impossible and implausible that this is what ICANN intended or what any Panel could allow. Untested witness testimony is ultimately not worth the paper on which it is written.

The Supplementary Procedures are silent on the issue of document production. The ICDR Rules and Guidelines are the only rules applicable to this issue, giving DCA – and ICANN, should it so desire – the right to seek documents from the other party. The fact that the Supplementary Procedures say nothing about document production should be viewed as allowing document requests to be propounded by the parties, especially where, as here, critical information potentially dispositive of the outcome of these proceedings lies in ICANN possession, custody and control.

The fact that ICANN’s counsel in this case has consistently opposed the operation of the very rules set up by ICANN for the IRP is irrelevant. We understand that ICANN would prefer to avoid the kind of full hearing on the merits that took place in ICM Registry, no doubt because ICANN lost that case. But, even assuming it were true, as ICANN suggests, that it amended the Supplementary Procedures in order to prevent any other party from successfully challenging its actions, the Supplementary Procedures do not restrict the IRP in the manner, or to the extent, that ICANN now argues.

*Third*, we note that, notwithstanding ICANN’s argument that it engaged experts to amend the Supplementary Procedures in order to prevent proceedings such as that in the ICM Registry case, ICANN’s own evidence shows that these experts were engaged to conduct a review of all of ICANN’s accountability mechanisms, including requests for reconsideration and the role of the office of the ombudsman.<sup>1</sup> The need to hold ICANN accountable to its stakeholders has been a recurrent issue for ICANN. Contrary to what ICANN suggests in its letter, the review of ICANN’s accountability procedures appears to have been motivated as much by concerns about providing for genuine accountability as by any concerns about costs, much less concerns about an excess of due process for IRP claimants.<sup>2</sup> In fact, ICANN committed to carrying out reviews of its accountability procedures every three years.<sup>3</sup> The fact that ICANN’s accountability procedures have undergone revisions is irrelevant to the question of the scope of this IRP. The text of the Supplementary Procedures is simply not as restrictive as ICANN would wish in this case.

*Fourth*, while ICANN claims that delaying the delegation of .AFRICA in order to allow for the full hearing and evaluation of the parties’ claims and defences would cause it “severe prejudice,” it does not

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<sup>1</sup> See <http://www.icann.org/en/news/in-focus/accountability/asep> (cited by ICANN in footnote 1 to its letter of 20 April).

<sup>2</sup> See <https://community.icann.org/display/ATRT2/Mandate>.

<sup>3</sup> *Id.*

even attempt to substantiate that claim. It is difficult to see how ICANN would be prejudiced by waiting a few months in order to allow its own IRP process to proceed according to the rules it has chosen. On the contrary, ICANN's alleged commitment to transparency and accountability would be at far greater risk of harm if ICANN were to succeed in imposing a truncated, summary proceeding on DCA and the Panel in this matter.

Nor should the Panel be persuaded to quash DCA's rights in this proceeding in favour of the alleged right of ZACR to obtain full rights to operate .AFRICA before the IRP is complete. ICANN has consistently behaved as if ZACR's rights trumped those of DCA. It is this very conduct that lies at the basis of DCA's claims: it is not for ICANN to decide, for reasons of political expediency or otherwise outside the rules laid down in its Bylaws, Articles of Incorporation, and the new gTLD Guidebook, that one applicant "deserves" a domain name more than another.

*Finally*, ICANN has repeatedly brought attention to the fact that DCA has not submitted a rebuttal to ICANN's Response to DCA's Notice of IRP in order to argue that DCA is incapable of providing such a rebuttal. There is no basis for making such an inference. DCA will provide its rebuttal according to the procedures set forth in the ICDR Rules, the Supplementary Procedures, and the Panel's decision on the procedural schedule in this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Arif H. Ali', written in a cursive style with a long horizontal line extending to the right.

Arif H. Ali

cc: Carolina Cardenas Soto  
Jeffrey LeVee

# EXHIBIT C

# **NEW gTLD DRAFT APPLICANT GUIDEBOOK-VERSION 2: ANALYSIS OF PUBLIC COMMENT**

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### Sources:

**Mexico City Meeting Transcripts**  
GNSO 28 Feb. 2009  
Public Forum 5 March 2009

**Public Comments Postings**  
18 February to 13 April 2009

## Miscellaneous Comments

### I. Key points

- Use of defined terms in the new gTLD registry agreement should be clear.

### II. Summary of Comments

**Terminology Clarifications Needed—e.g. “Registry” and “Registry Operator”.** These terms seem to sometimes be interchangeable in the agreements and in the entire guidebook, but more clarity and care when they are used is needed – i.e. “registry operator” can mean an entity ICANN enters a contract with, but also can mean the “registry operator” that is a third party back-end provider. The terminology has implications when talking about whether that registry operator is also a registrar in the TLD. *A. Kinderis, GNSO Transcript at 80 (28 Feb. 2009).*

**Certain Prohibitions.** ICANN could implement an anti-warehousing requirement as well as prohibitions against self-dealing in all registrar and registry agreements, including secondary dealings by accredited registries and registrars with agents holding a financial interest. In addition, ICANN should prohibit registries and registrars from engaging in the mass registration of domain names for financial gain of the accredited party and adopt a mechanism to cancel, after appropriate warning, accreditation of a registrar when violations of safeguards are validated. *AT&T (13 April 2009).*

### III. Analysis and Proposed Position

Use of defined terms will be clarified in v.3 of the Applicant Guidebook. In all cases where these terms are used in the agreement the entity intended to be covered is the entity entering the agreement with ICANN (even though that entity might subcontract substantial aspects of the operation of the registry to a third-party "back-end operator").

ICANN's registry and registrar agreements permit ICANN to impose a prohibition on domain speculation or warehousing by registries and registrars, but the details of such a rule would require significant study and discussion and should be addressed through ICANN's bottom-up policy development process. Any such policy would also have the benefit of applying equally to new and existing registries.

## Terms and Conditions (Module 6)

### I. Key points

- It is unfair to applicants to allow ICANN to deny an application for any or no reason.

### II. Summary of Comments

**Fairness to applicants.** ICANN has the option to unilaterally deny an application at any time, but it appears that if ICANN offers an applicant a Registry Agreement of ICANN's choice, the applicant must sign it and has no right to walk away for whatever reason. This seems unenforceable. *NCUC (13 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 13 April 2009)*. *L.Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*.

**Specific comments on application terms and conditions.** None of the matters INTA raised in Module 6 of version 1 were acted upon in version 2. INTA incorporates by reference its comments on Module 6, version 1 in their entirety and requests consideration of them by ICANN. Para. 1: oral statement must be confirmed in writing, and there should be a clear process for recording or documenting discussions outside the written application process; the phrase "reflect negatively" needs clarification/definition; Para 2: applicant must make full disclosure of all corporate relationships and any other gTLD applications, and a corporate entity should not be allowed to submit more than one application at a time for a particular gTLD; Para. 3: ICANN should be able to reject an application where the applicant intentionally submitted or provided fraudulent information, and no application refund should be issued. Para. 4: There should be notice and cure in the case where an applicant's fees are not received in a timely manner; a late fee should not be grounds for cancelling the application; Para. 6: ICANN has not justified the requirement that an applicant release ICANN from all claims and waive any rights to judicial action and review; this paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability. Para. 7: Applicants should be notified before ICANN treats as "nonconfidential" information that the applicant submits as "confidential"; Para. 8: ICANN should require the applicant to keep its personal identifying information current and up to date, with updates required within a reasonable period of time after information has changed. Para. 9: ICANN should not have perpetual, unlimited rights to use an applicant's name and/or logo in ICANN public announcements; the right to use should be limited to announcements relating exclusively to the applicant's application. *INTA (8 April 2009)*.

**Application terms and conditions suggestions.** In provision 1 add the qualifier "to the best of applicant's knowledge"; and amend phrase to read "or willful omission of material information"; provision 6, release of claims against ICANN, is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the

part of ICANN or its affiliated parties.; provision 11b should be amended to exclude any part of the application designated by the applicant as “confidential” without the express written permission of the applicant. *Go Daddy (13 April 2009)*.

**Application procedure—limited rights.** Applicants are strongly limited in their rights by agreeing with the application procedure. This is in conflict with the goal to create a clear, uncontested procedure for gTLD applications, since the final outcome of the procedure is at ICANN’s sole discretion. *SIDN (14 April 2009)*.

**Applicant’s permission to ICANN (paragraph 9).** This should be limited to use of the Applicant’s name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo. *Microsoft (Guidebook, 13 April 2009)*.

**Confidential information.** Will ICANN treat as confidential applicant material that is clearly and separately marked as confidential (please answer Yes or No)? *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. Microsoft supports the version 2 position that applicant response to security and financial questions will be considered confidential and will not be posted. *Microsoft (Guidebook, 13 April 2009)*.

**ICANN exclusion of liability.** The exclusion of ICANN liability in clause 6 of the Terms and Conditions provides no leverage to applicants to challenge ICANN’s determinations to a recognized legal authority. If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open. *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. *D. Allen (Module 6, 13 April 2009)*. The covenant not to challenge and waiver in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety. *Microsoft (Guidebook, 13 April 2009)*.

### **III. Analysis and Proposed Position**

Prospective applicants cannot appropriately be offered any reassurances that ICANN will enter into a registry agreement with them, otherwise this undermines the purpose and intent of a rigorous application review. Further, ICANN must retain this right to evaluate applicants up to the point of entry into a registry agreement. Under its Bylaws ICANN’s actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants. The other specific comments and suggestions on the application terms and conditions will be considered by ICANN in the preparation of version 3 of the Applicant Guidebook.



**Registrar Affiliate—100,000 Limit is Arbitrary.** ICANN should explain the basis of the 100,000 names figure. A percentage of the name space would make more sense. E.g., if the namespace only had 200,000 names then that would make the registry's subsidiary the largest registrar in that namespace, probably not a good idea. *M. Neylon, Blacknight Solutions (13 April 2009).*

# EXHIBIT D

## [gTLD-terms]

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### New gTLD Comments by Leap of Faith Financial Services Inc. (November 23, 2008)

- To: gTLD-guide@xxxxxxxxxx
- Subject: New gTLD Comments by Leap of Faith Financial Services Inc. (November 23, 2008)
- From: George Kirikos <gkirikos@xxxxxxxxxx>
- Date: Sun, 23 Nov 2008 17:06:58 -0800 (PST)

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#### Comments on New gTLD Applicant Guidebook

Submitted By: George Kirikos  
Company: Leap of Faith Financial Services Inc.  
Company URL: <http://www.leap.com/>  
Date: November 23, 2008

If any other individuals or organizations wish to endorse or build upon the comments below, please feel free to do so by referencing our company name and the date of our comments that we've submitted to ICANN.

#### A. Introduction

We oppose the introduction of new gTLDs by ICANN, as the negative externalities (e.g. phishing, consumer confusion, and defensive registration costs, domain abuse) imposed upon others would outweigh the benefits. They threaten the stability and security of the entire internet. Given that ICANN has decided to go ahead with new gTLDs despite these grave concerns by my company and many other companies and stakeholders on the internet, in order to appease a small minority of groups that wish to profiteer at the expense of others, it is our position that any new gTLDs must be carefully introduced in such a manner that the costs of those negative externalities are fully internalized and borne by the applicants. Thus, the only applications that should be accepted by ICANN are those few which will be a net benefit to the broader internet.

Competition should have the effect of decreasing prices for registrants. However, ICANN has accepted contracts with VeriSign and other gTLD registries that have led to the exact opposite for consumers. This represents a fundamental failure by ICANN that appears to be exacerbated by the current draft guidebook. Modifications are clearly required to repair these flaws before any final document, otherwise it would behoove the Department of Commerce to discontinue its Joint Project Agreement with ICANN

Throughout the draft document, ICANN refers to the policy development

work conducted by ICANN's GNSO. The GNSO does not properly reflect the interests of internet stakeholders, as it has been captured and twisted by the the registry and registrar constituencies ("the contracted parties") who have been given undue voting power (double weighting) compared to other constituencies. Thus, we dispute that there is any consensus at all for new gTLDs. Instead, the policy development process has been co-opted to favour a minority of special interest groups who wish to profiteer from their introduction. That minority includes ICANN itself, which presents itself to the public as a non-profit organization, but whose own spending, as documented through the IRS Form 990 disclosure statement (available through Guidestar.org for free), demonstrate extravagant growth in spending to benefit insiders and disregard for accountability. Until ICANN gets its own house in order, to reflect prudent spending and a policy making body that reflects more than just insiders, it should refrain from dramatic policy changes such as the introduction of new gTLDs that threaten the stability and security of the internet.

## B. Module 1

1. Under 1.1.2.2, it is unclear what portions, if any, of the applications will be made public, besides merely the list of applications. Transparency and accountability demand that the entire application be made available for public scrutiny. Organizations applying for a new gTLD are consuming a valuable resource that belongs to the public, not a private resource, and thus public disclosure should be mandatory, just like broadcasting license applications, etc.

2. Under 1.1.2.3, it is not disclosed how the "panels of independent evaluators" will be chosen or accredited. In particular, since these evaluators are secret, there is a lack of transparency and accountability into conflicts of interests that will undoubtedly occur in the evaluation process. The panelists should be disclosed to the public for scrutiny. The USPTO, for example, discloses fully the names of staff that review US trademark applications, thus demonstrating that full disclosure works.

3. Under 1.1.2.5, ICANN recognizes that proposed registry services will play a part in new gTLD applications, thus opening up the potential for Trojan Horses in new gTLD applications to threaten registrants in old gTLDs like dot-com. Equal treatment clauses exist in current gTLD agreements. For example, Section 3.2.b) of the .com registry agreement states:

<http://www.icann.org/en/tlds/agreements/verisign/registry-agmt-com-01mar06.htm>

"ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

Thus, it is imperative that ICANN not accept any new gTLDs that could affect existing gTLDs. This can be accomplished by renegotiating existing gTLD contracts to remove these equal treatment clauses. Alternatively, ICANN can create a framework for standardized contracts amongst all new gTLDs, so that these Trojan Horses are entirely eliminated (i.e. there would need to be broad consultation amongst the entire community before any changes are made to the universal standardized contracts.

As another alternative, ICANN can create a new class of gTLDs called

"broad consumer gTLDs" (or "large gTLDs") that reach a cumulative number of registrations equal to 100,000 or some other selected number to be decided by the GNSO and ICANN. These broad consumer gTLDs (like .com, .net, .org) would not be able to assert their equal treatment clauses due to their size (or in other words, "small gTLDs" would have more flexible contracts without affecting registrant rights in "large gTLDs", as the size difference would be a "substantial and reasonable cause" under existing registry contract language).

If a large number of applications exist for small gTLDs, frankly the public does not have the time or the inclination to review each one in order to ascertain whether those applications will impact existing registrants in large gTLDs through Trojan Horses. ICANN should recognize this reality, and plan for it accordingly by putting in safeguards from the start.

4. Under 1.1.5, the next application round should not begin until 1 year AFTER new gTLDs actually become operational, so that the community can gauge their impact. It is an undeniable fact that previous introductions of new gTLDs have been utter failures, imposing negative externalities that far exceed their benefits in most cases (except perhaps for the sponsored gTLDs). There is no reason to believe that failure is not going to be the reality once again. Indeed, the only difference this time appears to be that ICANN appears to be permitting massive failure through disorderly and haphazard introduction of new gTLDs, focusing more on volume rather than quality. Adding time before a future round allows the gathering of empirical evidence to document whether this time was any different. Benchmarks should be established in advance to ensure that ICANN does not simply "declare success" (as it usually does in its boiler-plate press releases) despite universal evidence to the contrary. It is important that ICANN actually learn from past mistakes and adjust its processes, rather than simply making bigger mistakes at the expense of the security and stability of the internet.

5. Under 1.2.1, the eligibility requirements appear to be overly broad. ICANN has a history of allowing dubious applicants to become registrars from companies associated with spam or fronts for criminal entities. The standards for entry into the root, a more serious obligation than that of a registrar, should be set much higher than that for registrars, to take into account the potential damage that can take place by allowing malevolent entities direct access to the root. These standards should include at a minimum civil and criminal background checks on its management and major shareholders.

6. Under 1.2.2.1, history has shown that open gTLDs (like .biz or .info) have been failures. Open gTLDs should not be permitted at this time, and should be deferred until future rounds.

7. Under 1.2.2.2, the "Contract Execution and Post-Delegation" language must be made stronger. ICANN routinely approves all material changes to community-based applications. This represents a reward for "bait-and-switch" applications, whereby the applicants promise one thing, but then after their applications are accepted, devolve into something very different from what they initially promised. Severe financial and other penalties (including mandatory redelegation or tendering to other prospective registry operators) need to be in place to ensure that applicants live up to their contractual obligations, and not be rewarded for these kinds of games.

8. As per our concern under point B.5 above, the required documents

under 1.2.3 for "proof of good standing" are insufficient. Malevolent entities will most assuredly create brand new shell corporate entities that have no history in self-selected jurisdictions in order to mask themselves. Given ICANN's history in certifying registrars that later proved themselves to be shams, higher standards are demanded in order to protect the public. Financial statements of newly formed special-purpose companies will be insufficient to detect iffy applications.

9. Under 1.2.3.5, the "documentary evidence of ability to fund ongoing basic registry operations for then-existing registrants for a period of three to five years in the event of registry failure" is obviously insufficient, as the number of "then-existing registrants" is ZERO! Reference needs to be made to the projected number of registrants within the applications, and furthermore funds need to be held in escrow by a recognized third party, or some other form of security bond should be in place.

10. Also under 1.2.3.5 the bond or escrow of funds to "fund ongoing basic registry operations" is far too small a bond given the negative externalities that can be created by a malevolent registry operator that supports phishing, spam, TM infringement and other cybercrime. The bond or level of insurance needs to be much higher in order to act as a deterrent to criminal organizations. Something on the order of USD \$10 million would seem to be appropriate, either as insurance or a security bond, to ensure that registry operators do not simply wash their hands of ICANN and walk away from their gTLD obligations after abusing the rest of the internet. The "documentation of outside funding commitments" also needs to be strengthened beyond simply "documentation" -- security bonds or insurance are stronger than simply words that can be altered. ICANN has no real means to assess the creditworthiness of these outside sources of funding, nor means of enforcing their financial commitments.

Insurance is a market-based solution, given that high risk entities (e.g. folks with dodgy histories) will face higher premiums from insurers than safe entities (e.g. established companies or communities). Good entities are rewarded, and bad entities are punished. Insurers can place their own restrictions on their clients (e.g. mandating certain procedures and safeguards) that act as an extra layer of protection beyond what ICANN is able to police. Given ICANN's poor history in policing registry operators (e.g. VeriSign's SiteFinder) and registrars (too many to list!), it's clear that these extra safeguards from insurance companies are essential.

If registry operators offer 10 year registrations, clearly 3 to 5 years of funding or bonding are insufficient to meet their contractual obligations.

11. Under 1.2.5, we remain concerned that applicants will tweak their agreements to favour themselves, as per our concern above in B.3, thereby creating Trojan Horses that affect registrants in other gTLDs. The need for universal standard agreements that cannot be altered except through well publicized long processes with actual written notice to all existing gTLD registrants, so that they can make informed public input, is essential.

12. Under 1.3, we are very concerned that IDNs can and will be used for phishing, TM infringement, consumer confusion and malevolent purposes. Strong safeguards must be in place to prevent these activities. Indeed, it was once talked about that existing gTLD registrants would see IDN

gTLDs bundled with their existing domains (either through NS-names or DNAMEs). For instance, example.com would be able to resolve, at no extra charge, example.kappa-omicron-mu, where ".kappa-omicron-mu" represents a Greek IDN equivalent to .com. ICANN appears to instead have disregarded what would have been beneficial to the public and registrants, and even to registry operators in being able to add value without extra costs. Instead, it will cause companies to face increased costs through either explicit defensive registrations costs or other negative externalities. Bundled IDNs, at no extra costs to existing gTLD registrants, should be strongly encouraged, in order to promote an international domain name system, and to also prevent a split-root, thereby ensuring security and stability.

13. Under 1.3.1, there is no incentive to for applicants to be truthful in documenting what the string translates to in English, thereby informing their competitors and others. This incentive needs to be countered by severe financial and other penalties (including removing the gTLD entirely) at any time, including after any string contention time has elapsed. It is more likely that any gTLDs that slip through the cracks will be discovered after the gTLD has entered the root, rather than during the application process, and procedures need to be in place to remove these offending gTLDs for cause.

14. Under 1.5.1, the gTLD Evaluation Fee is far too small, as it does not recognize the negative externalities imposed upon others, and the degree of profiteering that will take place to abuse registrants of not only its own gTLDs, but those of other gTLDs. In an age where individual domain names in sunrise periods (e.g. .asia, .mobi, etc.) routinely are 5 figures for just one domain, it is clear that an entire gTLD should cost significantly more. This can either be reflected in a higher gTLD Evaluation Fee (perhaps \$1 million), or additional fees once an application is accepted (i.e. before an accepted gTLD is allowed to resolve by entering the root), or higher annual ongoing fees, or a combination of all of the above. This ensures that frivolous and malevolent gTLDs do not become the norm, as six-figures is hardly a disincentive to criminals or profiteers in this day and age. Negative externalities are certainly in the millions and tens of millions of dollars per new gTLD, and these need to be internalized through direct costs upon new gTLD operators, in order to protect the public.

15. Also under 1.5.1, the Registry Services Review Fee should be considerably higher, given the equal treatment clauses previously discussed in B.3. A \$50,000 fee would be willingly paid by the operator of a Mickey Mouse gTLD that no one cares about (and thus is not watching closely), in order to create a bad precedent that can be used by a large gTLD such as .com, .net or .org. Until these linkages between contracts which can encourage Trojan Horses are broken once and for all, ICANN needs to proceed with caution. We've already seen twice that registry operators have tried to introduce tiered-pricing into their contracts (once 2 years ago, and once again through this draft guidebook which eliminates price controls, see further below), despite the huge outrage of the public. It's clear that they will not stop in their attempts to abuse registrants and thus safeguards must be in place to block their future attempts.

16. Under 1.5.2, it's ridiculous that ICANN would even consider payments by credit cards to be acceptable, given the ability of people to do chargebacks months after a transaction. Only irrevocable forms of payments should be allowed, namely wire transfers. Any cheques (which should be discouraged) should be certified, and any actions dependent on payment should await funds having fully cleared (which in the case

of international cheques might be weeks or even months).

17. Under 1.5.5, refunds should not be available. Applications for a new gTLD are a serious matter, and shouldn't be a game of trial and error, with refunds if unsuccessful.

18. In general, the "Cost Considerations" accompany document should not consider past sunk costs. Those are mostly irrelevant at this point. What is far more significant is not the actual cost of reviewing an application, but the negative externalities cost on the public. These negative externalities are far higher than any application review costs, and must be considered in the process. This is basic economics. A bridge would not be approved in a certain area if the costs imposed on a neighbourhood or the environment were too high. Similarly, all these "new gTLDs to nowhere" similarly need to consider the negative economic costs imposed upon others, besides simply the profiteering of the applicants and other insiders.

## C. Module 2

1. Under 2.1.1.1, ICANN explicitly recognizes that the introduction of new gTLDs can and will cause user confusion and loss of confidence in the DNS. Despite this, ICANN has trumpeted to the world that thousands of new gTLDs are coming, which will cause chaos. The costs imposed upon others by this chaos need to be imposed squarely upon prospective gTLD registry applicants, and not society. Just as domain tasting, which imposed huge externalities upon others, was mitigated through the imposition of fees, similarly new gTLDs which bring externalities to a much higher order of magnitude must have fees that will mitigate the costs imposed upon others. Thus, we reiterate our comments in section B. above, if ICANN goes ahead at all with new gTLDs despite the widespread opposition to them.

We do not believe that an algorithmic approach alone is sufficient in determining string similarity. It must be open to human review. Algorithmic approaches have not stopped spam or other abuses, as machines cannot perfectly account for all possible scenarios. Abusers will adapt, and think of things that the original algorithm designers had not considered. By its very nature, any algorithm will not be perfect -- it's a case of garbage in, garbage out.

One can already notice an error in the algorithm designed for "visual similarity." It's obvious the designers of this draft document are imperfect, as they have not appeared to consider "aural similarity" (i.e. strings which sound alike when spoken aloud). Given the proliferation of voice interfaces to the internet, it is clear that visual similarity alone is an insufficient standard.

Furthermore, other forms of similarity can exist that ICANN appears to have not consider. Visually impaired people who read in Braille rely upon touch, for example, and one should obviously consider how a new gTLD might be confusingly similar to an existing gTLD based upon a system of touch like Braille.

Other user interfaces besides touch and voice exist or might exist in the future (e.g. neural interfaces; I'll leave it as an exercise for staff and the community to enumerate others), and it is imperative that string similarity criteria consider proactively all these new interfaces, instead of rushing to introduce new gTLDs in a haphazard manner and leave it to future society to deal with all the problems that will ensue.



2. Under 2.1.1.2, ICANN's hypocrisy in regards to externalities imposed upon others is revealed in all its glory, as it reserves all of its trademarks and trade names from being registered by other applicants. This goes to the heart of why new gTLDs are a bad thing, as they impose costs upon others. ICANN seeks to lower its own policing costs by ensuring that no one else can register names that it feels are important to itself, yet denies that same right to all others. This utter hypocrisy demonstrates to all that new gTLDs should not be permitted, by ICANN's own behaviour in trying to protect itself. ICANN might say in some forums or media or press releases how great new gTLDs are, but one can see their true beliefs by the length of the reserved names list in this section of the draft.

Because millions of other organizations do not get the same protection that ICANN is receiving, it is clear that the case for new gTLDs is a weak one. At a minimum, before new gTLD applications are considered, ICANN should allow anyone to add to that reserved list, for a small fee of say a one time blocking fee of \$10 per name. That is \$10 more than ICANN is paying to block its most favoured terms. Any prospective applicant that wishes to register a prospective new gTLD that is on this expanded reserved list must then negotiate individually with the organization(s) who have bought the \$10 block. Until all the blocking rights are purchased by the relevant applicant, the applicant shall be barred from proceeding further with that new gTLD. Blocking rights should be renewed annually without cost increase, and of course be transferred by private agreement. Multiple blocking rights to the same string should be permitted (e.g. if multiple companies don't wish .ABC to be available, they can each pay \$10 to block the name; if someone desires the string, they need to negotiate with each holder separately, each of which has the right to refuse to give up its blocking rights).

3. Under 2.1.1.3, ICANN recognized that new gTLDs might cause instability of the DNS. Not only should reviews be undertaken during the application process, but should continue even after a new gTLD is approved. Mistakes made during the application process (and ICANN has demonstrated a history of making mistakes) must be able to be corrected later, instead of acting as precedents that institutionalize and make standard bad prior decisions.

4. Under 2.1.1.3.2 , reference is made yet again to visual similarity. We reiterate our comments in C.1 above that aural, Braille and other emerging forms of similarity need also be considered. E.g. .calm would be aurally similar to .com, and should not be permitted.

5. Under 2.1.2, we reiterate our previously stated concern from above (B.3) of proposed registry services that might trigger the equal treatment clauses of existing gTLDs, thereby creating Trojan Horse stealth precedents that can be used to affect existing registrants in large gTLDs such as .com, .net or .org.

6. Under 2.1.2.1, it is clear that ICANN is rushing forward with new gTLDs despite concerns that applicants might not have deployed an actual registry in the past, or have any operational experience of expertise. Third-parties contractors should be certified as having the technical background, and applicants should either have the technical background themselves or have contracts in place with those certified contractors.

The financial capability questions need to be very carefully constructed to ensure that malevolent entities face enormous obstacles

to securing a gTLD (they've already demonstrated they can operate a registrar for years under ICANN's nose with no repercussions). This would require performance bonds or insurance, as discussed earlier in this document (B.10). Applicants and major shareholders should also undergo thorough background checks, as previously discussed. Past bankruptcies, frauds, criminal or civil judgements, and other negative behaviour should weigh strongly against prospective applicants.

7. Under 2.1.3 and 2.2.3, we repeat our concerns from point C.5 regarding triggering of equal treatment clauses for new registry services.

8. Under 2.1.4, we reiterate our objection to refunds.

9. Under 2.3, there are no repercussions listed for violating conflicts of interest, or having contacts with parties one is supposed to keep away from. These repercussions need to be made explicit.

10. Under the Attachment to Module 2, page A1, we are concerned that language like "Within that framework, applicant's responses will be evaluated against the criteria in light of the proposed model." leaves the application process wide open for abuse and gaming. In particular, incentives will exist for applicants to lie or pretend to be something they are not when proposing a new gTLD, in order to get more relaxed "subjective" treatment. For example, an applicant might pretend to be in financial need or targeting a very small group of end users, in order to get special treatment, but later on do a bait-and-switch, and use the more relaxed review to its advantage. Saying that the "criteria should be flexible" encourages false applications to take place.

11. Under the Attachment to Module 2, page A2, ICANN again talks about safeguards for registrants. They talk the talk, but do not walk the walk, given that this draft contract itself opens up the 2-year old issue of tiered pricing for existing gTLD registrants, due to the lack of pricing controls in these draft agreements. People without any interest in new gTLDs will be negatively affected, despite flowery language by ICANN that its showing balance and looking out for registrants. This is an organization that has approved perpetual price increases for monopolistic and oligopolistic registry operators in an environment of declining technology costs. We put forward the position that ICANN's demonstrated incompetence in creating safeguards for registrants should preclude it from introducing new gTLDs, until such time as it creates those safeguards. Indeed, if it does not create those safeguards, the Department of Commerce should not renew the Joint Project Agreement with ICANN.

12. Under the Attachment to Module 2, page A3, financial questions should not be kept confidential. Criminal and other background checks should also be authorized in these applications and conducted by the reviewers or their agents.

13. Under the Attachment to Module 2, page A6, the contacts should provide additional details such as passports, national ID or SSN numbers, etc., to ascertain their identity and permit relevant background checks. Major shareholders should also be disclosed and reviewed (i.e. top of page A7) with sufficient details to allow for background checks. Since there can be issues of direct vs. indirect control (e.g. a shareholder might simply be another shell company, that is eventually owned by another individual), the application must take this into account. Furthermore, groups of individuals operating under a common purpose can individually be less than 15%, but due to that

common purpose should still be disclosed, e.g. a legal partnership, etc.

14. Under the Attachment to Module 2, page A9, we once again repeat our objections to registry services that act as a Trojan Horse to trigger the equal treatment clauses in existing gTLDs.

15. Under the Attachment to Module 2, page A11, the lifecycle of a registration should require the redemption grace period, for the protection of registrants. Furthermore, an applicant failing question 31 (abusive registrations) should not be allowed to proceed further. The standard for "meets expectations" must be kept high.

16. Under the Attachment to Module 2, page A13, wildcarding of nameservers (question 35) ala SiteFinder or any other scheme should not be permitted.

17. In general, I expect that many prospective gTLD registry operators will simply cut and paste answers provided by others in the relevant sections, and thus many of the answers "demonstrating competence" will be a sham, as they were simply copied from other applicants. Applicants must substantiate their answers with evidence that they will actually do what they propose, instead of promising the world in their applications, and then delivering substantially less after they actually get approval.

#### D. Module 3

1. As per our comment in C.3 above, we believe a Dispute Resolution Procedure is insufficient, and that instead a blocking mechanism that allows any organization to add to the list of reserved names, just as ICANN protects its own favoured names (both trademarks and names that it does not have trademarks rights), should be adopted before any new gTLDs are introduced.

2. Alternatively, an Ascension Allocation Method, as previously described at:

<http://forum.icann.org/lists/new-gtlds-pdp-comments/msg00005.html>

whereby applicants for .string must first demonstrate ownership and control of string.com, string.net, string.org, and other existing gTLDs first, before being allowed to ascend from the 2nd level to the top level, should be adopted instead. This provides a market-based allocation method, and allows successful owners of 2nd-level domains to ascend accordingly, minimizing the impact upon others.

3. All objections and responses should be public in their entirety (unlike the UDRP whereby only the decision of the panel is public).

4. Under 3.4.3, the language "The parties to a dispute resolution proceeding are encouraged but not required to participate in a cooling off period to determine whether the dispute can be resolved by the parties." This should be added to the UDRP (i.e. non-mandatory mediation).

5. Under 3.4.4, the language "Neither the panelists, the DRSP, ICANN, nor their respective employees, Board members, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures." obviously in cases of fraud or negligence,

ICANN and the others should be held accountable in court, so the language needs to reflect this reality. The dispute resolution process is not the ultimate arbiter, as the courts can and will hold ICANN and others accountable if there is a miscarriage of justice. Indeed, ICANN should prepare a contingency fund for the massive potential litigation that may occur for not having thought through properly the introduction of new gTLDs.

#### E. Module 4

1. We repeat our prior concerns (see C.1) that visual similarity alone is insufficient for determining string similarity.

2. Under 4.3, auctions alone are insufficient mechanisms for allocating gTLDs, as they do not address the negative externalities imposed upon others. ICANN cannot be trusted to use the auction proceeds in a financially responsible manner, given what has been revealed in its IRS Form 990 disclosures, whereby ICANN's budget and staff compensation has been exploding to unreasonably high levels. Any proceeds should be used on a dollar-for-dollar basis to reduce ICANN fees for existing gTLD registrants, thereby refunding partially the externalities that ICANN is imposing upon society. Debacles like the ICANN Fellowship Project, whereby ICANN pays the travel expenses and provides stipends to people around the world in order to have an audience for its meaningless public meetings around the world (that would otherwise be poorly attended, and could instead be provided through remote participation) should not create new precedents for even grander debacles that ICANN and its insiders hope to fund through auction proceeds. Financial prudence in these tough economic times means not funding white elephants, but instead rebating the fees back to domain registrants.

3. In the "Resolving String Contention" commentary document, once again references are made to visual similarity alone, which are insufficient (see C.1 above).

4. In the "Resolving String Contention", bidders during any auction must place a bidding deposit of large enough size to ensure that no fraudulent bids take place (in which case the auctions would be replayed, but the deposit forfeited to the other bidders). It's unclear that the current mechanism adequately addresses this, given the short time frames discussed (bank letters of credit or other instruments might be required before the auctions). We've seen spectrum auctions, for example, where bidders defaulted, e.g.

[http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-08-2207A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-2207A1.pdf)

#### F. Module 5

1. We reiterate our previously submitted comments in regards to tiered pricing, as submitted at:

<http://forum.icann.org/lists/gtld-transition/msg00000.html>

Due to the equal treatment clauses in existing gTLD contracts, and the removal of price controls, the Base Agreement represents a Trojan Horse that can be used by existing gTLD registry operators to engage in tiered pricing.

ICANN staff who oversaw the drafting of this base agreement should be fired, as they demonstrate either a) utter disregard for the protection of registrants, ignoring the outcome of a debate from 2 years ago when

the same contractual flaws existed in the .biz/info/org draft agreements, or b) incompetence for not understanding the interconnectedness of existing gTLD contracts that would be impacted by these new draft contracts, if adopted, or c) both. ICANN's Board should investigate who was responsible, and hold them accountable, otherwise what little credibility they have remaining will be eliminated, given this shocking disregard for past Board decisions. This is the equivalent of ICANN staff allowing SiteFinder or other past contentious issues to be in the base agreement, and should be treated as such, namely a grave breach of the public trust. I cannot overstate the level of outrage that exists from people who have informed themselves of the implications of this base agreement.

2. Under 5.1, the language "All successful applicants are expected to enter into the agreement substantially as written" is another Trojan Horse that permits variances to be introduced through stealth. The word "substantially" should be stricken from the language, and instead there should be focus on a universal standard contract. ICANN should not be a make-work project for lawyers who need to review every single deviation from a standard contract. Instead, there is contractual and economic efficiency in ensuring that only one universal contract applies to everyone. Think of the chaos if every registrar had a different contract with ICANN, for example, and multiply that by orders of magnitude in a world with many gTLDs. Some in ICANN appear to desire that chaos, perhaps for job security in the equivalent of digging holes, i.e. reviewing contract changes that are not desired by the broad community. With a universal standard contract, the opportunities to play games are reduced, as attempts to make changes will be noticed by the broad community of stakeholders. It would be like trying to modify the UDRP -- everyone would notice.

3. On page 5-2 (top), it states "If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN and submit updated information. This includes applicant specific information such as changes in financial position and changes in ownership or control of the applicant." I would call this the ICANN "License to Lie" provision, because there are no explicit negative repercussions for applicants. It is clear that financial and other penalties must be part of the process, explicitly in the applications and in all contracts. Otherwise, we will have bait-and-switch applications that are encouraged by ICANN due to the lack of penalties.

4. On page 5-2 (and elsewhere), self-certification is insufficient, given that applicants will embellish their applications. This is especially important in the area of registry continuity. It's human nature to lie, and it's certain that some applicants will do so, especially when there's money involved.

5. Under 5.2.2, all bonds or other instruments must be irrevocable, so that letters of credit that exist on Day 1 are not yanked on Day 2.

6. Section 2.9 of the Proposed Draft New gTLD Agreement, namely "Transparency of Pricing for Registry Services," is ridiculous, and does not protect registrants from price increases. As we previously stated in F.1 and elsewhere, this would have the impact of introducing tiered pricing like .tv into existing gTLD registries like .com, via the equal treatment clauses. The entire base agreement needs to be completely rethought in light of this type of interaction with existing gTLD agreements. It's perfectly "transparent" to publish that Hotels.com will cost \$1 billion/yr to renew, Games.com will cost \$50

million/yr, Yahoo.com \$100 million, Google.com \$3 billion/yr, and so on. The level of protection to the registrants, though, is absolutely zero, demonstrating once again ICANN staff's utter incompetence, and its capture by registry operators who only have fantasies of the type of language that ICANN put into these drafts. An inquiry by the ICANN Board should be undertaken immediately.

7. Fees in Article 6 are far too low. In particular, minimum fees of \$75,000/yr do not begin to adequately reflect the negative externalities imposed upon others by each of these new gTLDs. The bar needs to be set high to discourage frivolous and even criminal use of new gTLDs that would undermine the security and stability of the DNS. The 5% registry level fees should also be replaced with a fixed dollar value per domain, reflecting externalities, otherwise free domains (e.g. used for tasting) would be encouraged. It is much easier to account for costs given that a zone file can be downloaded and the actual number of domains counted, rather than attempting to audit actual revenues (which can be open to accounting manipulation).

Note that the language in Section 6.1 explicitly mentions "average annual price", indicating that ICANN acknowledges and perhaps even encourages tiered pricing in these new gTLDs, and through the equal treatment clause, in existing gTLDs that might wish to copy these contractual terms into their current contracts with ICANN.

8. Section 7.2 regarding notice of changes is a disaster waiting to happen. If there are 500 new gTLDs, all attempting to modify their contracts, it will be impossible for the public to adequately review them all. Given the equal treatment clauses, all one needs is one Mickey Mouse gTLD to have a term approved, and that can then be copied into large gTLDs like .com affecting tens of millions of registrants. The need for a single universal standard contract is clear.

9. Section 8.1 anticipates litigation against new gTLDs that could affect the financial stability of ICANN. Obviously this should be a factor arguing against massive expansion of the new gTLD arena, especially if "weak" operators are approved who would not adequately indemnify ICANN. ICANN has not adequately disclosed the size of the potential legal liabilities that could be imposed upon it due to the actions of its new gTLD operators, or its failure to properly manage them.

The explanation in the draft summary of changes document that "ICANN's indemnification rights in Section 8.1 were simplified and appropriately scaled to reflect the nature of the revised agreement and the expectation that new registry relationships will be cooperative and flexible" is amusing to say the least, given its naivety. Given them an inch and they'll take a mile. ICANN should be writing its draft contracts based on reality, not on the basis of fantasy and false hopes, especially given the historic behaviour of registry operators (e.g. SiteFinder, attempts to bring in tiered pricing in the past, etc.).

10. Section 8.4 does not adequately take into account the contingency that the Department of Commerce will not renew the JPA, in which case it must assign its contracts to the DoC. The language should be altered to reflect this reality. Indeed, the Department of Commerce should proactively review the entire implications of these new agreements that ICANN is undertaking, to ensure that there are no other problems.

11. Section 8.5 states "Irrespective of the provisions of Article 7,

ICANN and Registry Operator may at any time and from time to time enter into bilateral amendments and modifications to this Agreement negotiated solely between the two parties." This represents an affront to ICANN's purported goals of transparency and accountability, when they explicitly permit themselves to enter into contractual amendments that are not reviewed by the public. This section obviously needs to be reviewed.

12. Section 8.6 ("No Third-Party Beneficiaries") appears regularly in ICANN's contracts, and represents a repudiation of any rights that registrants have in ensuring just treatment, and should be reviewed. Registrants have rights that need to be acknowledged and strengthened, and once again ICANN has presented us with one-sided agreements that protect only the registry operators at the expense of the registrants.

13. In the Consensus Policies document, section 1.4 does not permit the price of registry services to be regulated in order to protect registrants. This indicates once again that ICANN is not doing its job.

14. In the Registry Performance specs, the maximum renewal period of ten (10) years is insufficient to protect registrants, in particular given the lack of any pricing controls. Longer renewal periods need to be adopted, and inserted into .com, .net and .org, in order to give existing registrants price certainty now and into the future. Registrants should not be subject to their domains being seized by registries who unilaterally raise prices to exorbitant levels, in effect allowing "eminent domain" of domain names by a private registry operator for its own benefit. This naked abuse of power must be stopped.

15. Given the rampant abuse in prior new gTLDs, the "Rights protection mechanisms requirements" are inadequate and appear to be an afterthought, instead of being a high priority of ICANN. To deter abuse, we suggest that there be a system of address verification by registries in new gTLDs, similar to what exists in some current ccTLDs, in order to stem the tide of domain name abuse. No domain would resolve until a mailed PIN code was entered into a central system, so that the registrant is verified. This would ensure a higher degree of registrant WHOIS accuracy, reducing abuse from those who routinely use fake WHOIS. This should eventually be adopted into existing gTLDs as a universal standard, with financial penalties to registrars who permit fake registrations above a certain level.

16. Section 4.1 of the Base Agreement creates 10 year terms, which would allow VeriSign and other existing gTLD operators to attempt the same under equal treatment clauses. The term should be reduced to what VeriSign already gets, instead of reopening another can of worms.

17. The new Section 4.2 does not permit ICANN to raise registry fees. Such protection is needed in the new language, lest it be inserted into existing gTLD contracts through the equal treatment clauses.

18. Section 8.4 (Change of Control), should require ICANN approval, particularly in regards to situations where a change of control will lessen competition, thwarting ICANN's stated goals. Example, owners of .shop and .store might decide to merge, and lessen competition between themselves, thereby hurting registrants. Any change of control should require public input, and should permit public tender for redelegation to occur to other parties.

1. Section 1 needs to discuss explicit financial and other penalties for applicants to submit false and inaccurate applications. The slap on the wrist that they "will reflect negatively on this application" is obviously insufficient to deter people.

2. Section 3's refund policy is very unclear, and in particular seems to leave the door open for full refunds in all cases of refusal. It must be made clear that full refunds should not be the norm by tweaking the language.

3. Section 6 demonstrates ICANN is concerned about protecting itself from court challenges. It's unclear whether such language is able to be enforced, though. If ICANN showed equal regard for the protection of registrants, as it demonstrates protection of itself in this section, it might have greater respect in the community.

4. Section 7 gives ICANN the right to not publish "confidential" information. These are private actors attempting to usurp for themselves public resources, namely gTLDs, and the level of disclosure should be complete disclosure, including financials. Indeed, it is often public scrutiny that catches falsehoods in financial documents that incompetent staff routinely misses.

#### H. Final Thoughts

In conclusion, the draft new gTLD process leaves much to be desired. We reserve the right to make additional comments on future drafts, including in areas that we have not already commented (given the length of the documents, it's possible we may have overlooked a few issues that will come to light later).

ICANN should not proceed with new gTLDs. In the event they ignore the views of the public and introduce them despite this opposition, much greater safeguards are required to protect registrants, not only in the new gTLDs, but in existing gTLDs that would be affected under the equal treatment clauses. Furthermore, the negative externalities imposed upon others by new gTLDs need to be internalized upon applicants through much higher fees and standards of behaviour, in order to ensure that only those new gTLDs that are operated as a net benefit to society, instead of a drain on society, go forward.

We look forward to reviewing the next set of draft document which will hopefully address the concerns of our company and those of other stakeholders.

Sincerely,

George Kirikos  
<http://www.leap.com/>

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# EXHIBIT E

# JONES DAY

Contact Information Redacted

Contact Information Redacted

Contact Information Redacted

October 12, 2015

VIA EMAIL AND FEDEX

Scott Donahey  
Contact Information Redacted

Hon. Charles N. Brower  
Contact Information Redacted

Mark Kantor  
Contact Information Redacted

Re: Dot Registry and ICANN—ICDR Case No. 01-14-0001-5004

Dear Chairman Donahey and Members of the Panel:

On behalf of ICANN, we provide this response to the questions that the Panel posed in Procedural Order No. 8. The numbering corresponds to the Procedural Order. ICANN also takes this opportunity to attach the Final Declaration of the IRP panel in *Vistaprint Ltd. v. ICANN*, issued on 9 October 2015.

(a) ICANN is a California nonprofit public benefit corporation. As such, the local law to which ICANN is subject is California law. This includes Cal. Corp. Code §§ 5110-6910, which are the California statutes that specifically govern nonprofit public benefit corporations, and which, among other things, impose certain regulatory requirements on nonprofit public benefit corporations.<sup>1</sup> In addition, by virtue of its Articles of Incorporation (“Articles”), ICANN has committed to “carrying out its activities in conformity with relevant principles of international law and applicable international conventions.”<sup>2</sup> ICANN has interpreted this statement previously as requiring ICANN generally to conform its conduct to relevant principles of international law and international conventions, but certainly not as dictating that ICANN is subject to all international laws and conventions in a literal sense.

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<sup>1</sup> See, e.g., Cal. Corp. Code § 5913 (imposing certain regulatory requirements on the sale of a nonprofit public benefit corporation’s assets).

<sup>2</sup> Articles of Incorporation (“Articles”), ¶ 4 (Ex. C-6).

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We are not aware of any principles of California or international law that are directly relevant to the determination of the sole issues within the scope of this IRP—whether ICANN’s Board acted in conformance with ICANN’s Articles and Bylaws in determining not to intervene in decisions made as part of the normal course of the administration of the New gTLD Program and, specifically: (1) declining to reconsider the CPE Panels’ Reports regarding Dot Registry’s Applications; and (2) declining to take other action with respect to those Reports.<sup>3</sup>

As for the Panel’s question regarding “due process,” ICANN is a nonprofit corporation, not a government entity or actor, and neither California nor relevant international law imposes any sort of “due process” requirement on ICANN with respect to its determinations regarding the delegation of specific new gTLDs.<sup>4</sup> In any event, inasmuch as the Bylaws and Articles do not create “due process” rights on behalf of gTLD applicants, it is not within the scope of this IRP to determine whether Dot Registry was accorded “due process” in the processing of its applications.

That said, the design of the New gTLD Program was intended to ensure, insofar as possible, fair and equal treatment of new gTLD applicants. In accordance with ICANN’s Articles and Bylaws, and with considerable community input, ICANN’s Board approved the New gTLD Applicant Guidebook (“Guidebook”), which set forth publicly-available, universally-applicable rules for the evaluation of new gTLD applications. New gTLD applicants specifically affirmed<sup>5</sup> when they submitted their applications that they understood that they would be subject to the Guidebook’s rules (including the rules for community priority evaluation), and that there was no guarantee that they would ultimately be awarded their applied-for new gTLD (much less be awarded community priority over other applicants for the same new gTLD).

Finally, the Panel also asked whether the language in ICANN’s Articles regarding “relevant principles of international law”<sup>6</sup> means that “relevant principles of international arbitration” apply to IRPs. The substantive and procedural rules governing IRPs are laid out in ICANN’s Bylaws and the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”). The Supplementary Procedures provide that IRPs will be governed by the Supplementary Procedures and also the ICDR’s International Arbitration Rules (“ICDR Procedures”). As such, general principles of international dispute resolution apply to IRPs only insofar as those principles are incorporated into the ICDR Procedures. However, to the extent that there is any inconsistency between the (i) ICDR Procedures (and any relevant

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<sup>3</sup> See, e.g., Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”).

<sup>4</sup> See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (the Constitution’s due process protections are limited to “state action”).

<sup>5</sup> Guidebook § 1.2.6 (Ex. C-5); *id.* Module 6.

<sup>6</sup> Articles ¶ 4 (Ex. C-6).



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principles of international dispute resolution they may incorporate) and (ii) the Supplementary Procedures, the Supplementary Procedures govern.<sup>7</sup>

(b) Article IV, Section 3.4 of the Bylaws establish a defined standard of review for IRP panels to apply in determining whether ICANN's Board acted in conformance with ICANN's Articles and Bylaws.<sup>8</sup> That standard of review requires IRP panels to focus on three factors:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>9</sup>

The plain language of this standard restricts the IRP panel's assessment of the Board's "due diligence and care" to an assessment of whether the Board's action was taken in reliance on a "reasonable amount of facts."<sup>10</sup> Neither California nor international law is relevant to either that specific definition or the standard of review more generally.

ICANN was not required to establish any internal corporate accountability mechanism, but it chose to do so voluntarily. California non-profit public benefit corporations, such as ICANN, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>11</sup> Pursuant to this explicit authority, ICANN established the Independent Review process, as well as the procedures and standard of review, that would govern that process.

This prescribed standard of review is not inconsistent with other provisions of ICANN's Bylaws, including those provisions requiring ICANN to operate "to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."<sup>12</sup> ICANN has previously quoted to this Panel the holding of the IRP panel in *Booking.com*, which expressed the same view:

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<sup>7</sup> Supplementary Procedures ¶ 2 ("In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.") (Ex. C-3).

<sup>8</sup> Bylaws Art. IV, § 3.4 (Ex. C-1).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

<sup>12</sup> Bylaws Art. III, § 1 (Ex. C-1).



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[T]here can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws—or, the parties agree, with the Guidebook.<sup>13</sup>

This defined standard review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board in determining whether ICANN’s Board acted in conformity with ICANN’s Articles and Bylaws.

The Panel asks whether any relevant legal principles would prevent ICANN’s Board from delegating certain authority to ICANN staff or to third-party experts such as the EIU. As an initial matter, ICANN notes that any challenges to the Board’s delegation of authority via the Guidebook are long since time-barred because the Guidebook was published in 2012, and IRP challenges to Board decisions must be filed within 30 days of the posting of the minutes of the Board meeting reflecting the challenged Board action or inaction.<sup>14</sup> In any event, there are no relevant legal principles preventing such delegation. To the contrary, California law expressly provides for corporate boards to delegate managerial functions.<sup>15</sup> Here, ICANN’s Board properly exercised its independent judgment in determining that the day-to-day management of the New gTLD Program should be delegated to ICANN staff (which amounts to nearly 340 staff members), and that the thousands of expert evaluations required as part of the New gTLD Program should be delegated to third parties with the requisite expertise and resources to properly conduct those evaluations, expertise that the Board knew it did not have.

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<sup>13</sup> *Booking.com* Final Declaration ¶ 108 (Ex. R-5); *see also Vistaprint* Final Declaration (“[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”) (Ex. R-8).

<sup>14</sup> Bylaws, Art. IV, § 3.3; *Booking.com* Final Declaration (“[T]he time has long since passed for *Booking.com* or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of [a Guidebook procedure] . . . [I]f *Booking.com* believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.”) (Ex. R-5); *Vistaprint* Final Declaration ¶ 172 (“[T]he Panel does agree with ICANN that the time for challenging the Guidebook’s [procedures]—which w[ere] developed in an open process and with extensive input—has passed.”) (Ex. R-8).

<sup>15</sup> Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”)



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For example, one of the evaluations performed on each of the 1,930 New gTLD Applications was a string similarity review, which used an algorithm, among many other things, to test whether applied-for new gTLDs were visually similar to either existing TLDs or other applied-for new gTLDs.<sup>16</sup> It was plainly reasonable for ICANN's Board to determine that this extremely technical task was properly delegated to a third-party with expertise to conduct such tasks. The same, equally justifiable, determination was made with respect to a number of other application review processes, including, among others, financial reviews and community priority evaluations.

(c) California law does not discuss the legal effect of a "declaration" as the term is used in ICANN's Bylaws; indeed, we are not aware of any other corporation in the United States (or elsewhere) that has adopted such a unique process. Instead, the term is defined by the context of the Bylaws, which make clear that ICANN's Board is required to "review[]" and "consider" the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.<sup>17</sup> This is precisely what happened in the only three IRPs that have gone to a final declaration prior to *Vistaprint*: in the *ICM*, *Booking.com*, and *DotConnectAfrica* IRPs, the Board promptly reviewed and ultimately determined to adopt the relevant portions of the panels' declarations.<sup>18</sup> The IRP Panel's declaration in *Vistaprint* was issued last Friday. ICANN's Board will promptly review and consider that declaration.

ICANN recognizes that the IRP panel in the *DotConnectAfrica* matter issued a finding that its declaration would be legally binding, in contrast to the finding made by the panel in the *Vistaprint* and *ICM* matters that their declarations were not legally binding.<sup>19</sup> As ICANN has emphasized repeatedly to all IRP panels, the ICANN Board has announced that it will take (and is required by the Bylaws to take) any declarations of IRP panels seriously and to date has adopted the recommendations of all IRP declarations. Accordingly, we believe that further discussion of this issue would not be particularly useful.

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<sup>16</sup> Guidebook § 2.2.1.1 (Ex. C-5).

<sup>17</sup> Bylaws Art. IV, § 3.11.d (Ex. C-1).

<sup>18</sup> NGPC Resolutions 2015.04.26.14-2015.04.26.16, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.b> (*Booking.com*); NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*); Board Resolutions 2010.03.12.39-41 (*ICM*).

<sup>19</sup> *DotConnect Africa Trust v. ICANN*, Declaration of the IRP Procedure ¶¶ 98-115 (Ex. CLA-9D); *Vistaprint* Final Declaration ¶ 149 (An IRP panel's declaration is a "'non-binding declaration' when it comes to recommending that the Board take or refrain from taking any action or decision . . .") (Ex. R-8); *ICM v. ICANN*, Declaration of the Independent Review Panel ¶¶ 131-134 (Ex. CLA-1). There was an extensive amount of briefing to both panels on the subject, which we could provide to this Panel if you believed it would be helpful, although it is quite voluminous and involved interpretations of two different sets of Bylaws. The *Booking.com* Panel did not address the issue of whether its declaration was binding.



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(d) ICANN agrees with the statements in Paragraph 53 of the *Booking.com* IRP Panel's Declaration that: (1) the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board, and (2) the "rules" at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook. However, the notion of Board "inaction" leading to a decision that is reviewable by an IRP Panel must involve a situation where the Board was required to, but did not, act.

For example, ICANN receives complaints from various types of Internet stakeholders regarding a myriad of issues, ranging from spam to cybersquatting, and so forth. These matters are almost never brought to the attention of the ICANN Board, meaning that the Board's "inaction" in addressing such matters would not warrant independent review. By contrast, if the Board were specifically presented with a decision—i.e., to decide to adopt a new policy recommended by one of ICANN's supporting organizations—but the Board elected not to consider that policy, that type of "inaction" could support independent review.

Here, as explained in ICANN's briefs, ICANN's Board acted in full accordance with ICANN's Articles, Bylaws, and the relevant provisions of the Guidebook in: (i) not independently evaluating the CPE Reports regarding Dot Registry's Applications; and (ii) not taking further action with respect to those Reports. The Board had no obligation to consider either of these matters, which is why ICANN has argued that independent review of those Board "inactions" is not appropriate under the terms of the Bylaws.

(e) ICANN's Bylaws and the Supplementary Procedures governing this IRP do not prohibit the holding of an in-person hearing. However, the Bylaws do strongly encourage IRP panels to "conduct [] proceedings by electronic means to the extent feasible" and contemplate that "in-person hearings" will be necessary only in "extraordinary" circumstances.<sup>20</sup>

As to live witness, testimony, Paragraph 4 of the Supplementary Procedures and Article IV, Section 3.12 of the Bylaws are dispositive and expressly prohibit live witness testimony: "the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."<sup>21</sup> IRP panels do not have the discretion to modify or ignore such express provisions of the Supplementary Procedures, and that it would be contrary to both the Bylaws and the Supplementary Procedures for an IRP Panel to order that any of the potential witnesses be subjected to live examination.<sup>22</sup>

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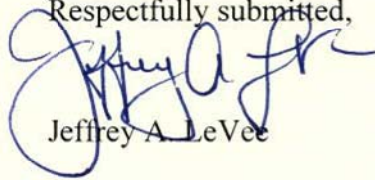
<sup>20</sup> Bylaws Art. IV, § 3.12 (Ex. C-1), Supplementary Procedures ¶ 4 (Ex. C-3).

<sup>21</sup> *Id.*

<sup>22</sup> ICANN anticipates that Dot Registry will note that the Panel in the *DCA* matter insisted on live testimony, over ICANN's vehement objection and in contravention of the express language of ICANN's Bylaws, and ICANN wound up bringing its declarants to the hearing. ICANN did not submit any declarations on the merits

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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jeffrey A. LeVee". The signature is stylized and cursive.

Jeffrey A. LeVee

cc: Counsel for Dot Registry

Enclosure

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(continued...)

in conjunction with this matter and does not believe it would be necessary or useful to be able to cross-examine Dot Registry's declarants.



# EXHIBIT F

# Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

## 1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

## 2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

## 3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

#### **4. Conduct of the Independent Review**

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

#### **5. Written Statements**

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

#### **6. Summary Dismissal**

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

## 7. Interim Measures of Protection

An IRP PANEL may recommend 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 IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

## 8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

## 9. Declarations

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall be made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

## 10. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

## 11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

## 12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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# EXHIBIT G

# EXHIBIT D



## **ICANN Board-GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants**

### **EXPLANATION OF ISSUE/HISTORY**

The following is background on the issue of "legal recourse" for new gTLD applicants, which is one of the issues identified by the GAC for the forthcoming Board-GAC consultation on new gTLDs.

The GAC's Comments on v4 of the Draft Applicant Guidebook (23 September 2010) noted, "The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly." <<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>>

This appears to be a new issue that has not been raised in previous GAC communiqués, even though the legal release language is essentially the same since the first draft applicant guidebook published in 2008 <<http://www.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf>>. Two years ago (in February 2009), seven words ("IN COURT OR ANY OTHER JUDICIAL FORA") were added to make it clear that the release only applied to challenges in court <<http://www.icann.org/en/topics/new-gtlds/draft-terms-redline-18feb09-en.pdf>>. In other words, applicants would agree not to sue ICANN, but would still have access to the avenues for review built in to the new gTLD application process, as well as ICANN's existing accountability mechanisms: ombudsman, reconsideration, and independent review. Additional mechanisms may result from the consideration and implementation of the recommendations of the Accountability and Transparency Review Team.

### **REMAINING AREAS OF DIFFERENCE**

The GAC requests that ICANN remove language for the Applicant Terms and Conditions that (paraphrasing) the Applicant agrees not to challenge in court final decisions made by ICANN with respect to the application and the Applicant waives the right to sue ICANN with respect to the application. ICANN has declined this request, stating (among other things) it would be an inappropriate risk for ICANN to undertake.

### **ICANN Response to GAC on "Legal Recourse" for New gTLD Registry Applicants**

In the letter from Peter Dengate Thrush to Heather Dryden (23 November 2010) "Response to GAC Comments on New gTLDs and DAGv4" <<http://icann.org/en/minutes/resolutions-25sep10-en.htm> - 2.10>, the ICANN Chairman noted that:

As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.

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ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.

The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.

Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions."

ICANN is a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world initiated by applicants that might want to challenge the results of the community-designed new gTLD application process. ICANN anticipates that, absent the broad waiver and limitation of liability in the application terms and conditions, rejected or unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful rollout of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

ICANN has surveyed multiple jurisdictions including outside the U.S., and is not aware of any law prohibiting the inclusion of such a waiver in a contract. Further, such a waiver is consistent with competition laws since it does not have the effect of excluding competition; the release simply limits the recourses available to one of the contracting parties. As noted above however, all internal ICANN accountability and review processes will remain available to applicants. ICANN will review whether further changes to the wording of the terms and conditions are necessary to clarify that internal review mechanisms will be available to applicants.

Under its Bylaws, ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to legal actions from potential unsuccessful applicants.

#### **RELEVANT GUIDEBOOK SECTIONS**

The following is the wording of the legal release provision in the most recent several drafts:

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"Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD."

## **REFERENCE DOCUMENTS: LEGAL RECOURSE FOR APPLICANTS**

- **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS**

21 February 2011  
DRAFT**LEGAL RECOURSE FOR APPLICANTS**

<b>GAC Advice and Comments</b>	<b>ICANN responses and key documents</b>
<p><b>10 March 2009: Comments on V1 of Applicant Guidebook</b></p>	<p><b>24 October 2008: Applicant Guidebook Version 1</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf</a></p> <p><b>18 February 2009, version 1 Public Comments Analysis Report</b>  <a href="http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf">http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf</a></p>
	<p><b>18 February 2009: Applicant Guidebook Version 2</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf</a></p> <p><b>31 May 2009, Summary and analysis of public comments on version 2</b>  <a href="http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf">http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf</a></p>
	<p><b>28 May 2010: Applicant Guidebook Version 4</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf</a></p> <p><b>12 November 2010: Summary and analysis of comments version 4</b>  <a href="http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf">http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf</a></p>
<p><b>23 September 2010: Comments on V4 of Applicant Guidebook</b>  The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly.</p>	<p><b>23 November 2010: Reply from ICANN Chairman</b>  <a href="http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf">http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</a></p> <p>As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.</p> <p>ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.</p>

	<p>The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.</p> <p>Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p><b>25 September 2010: Board meeting in Trondheim</b>  <a href="http://www.icann.org/en/minutes/resolutions-25sep10-en.htm">http://www.icann.org/en/minutes/resolutions-25sep10-en.htm</a></p> <p>Board Briefing Materials:  <a href="#">One</a> [PDF, 3.23 MB]  <a href="#">Two</a> [PDF, 2.03 MB]  <a href="#">Three</a> [PDF, 816 KB]  <a href="#">Four</a> [PDF, 240 KB]  <a href="#">Five</a> [PDF, 546 KB]</p> <p>"... Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook. Resolved (2010.09.25.__), staff is directed to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments."</p> <p><b><i>Role of the Board</i></b>  The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met.  Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed.  The Board reserves the right under exceptional circumstances to individually</p>

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	<p>consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p><b>12 November 2010: Proposed Final Applicant Guidebook</b>  <a href="http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf">http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf</a></p>
<p><b>9 December 2010: Communiqué Cartagena</b>                  That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include:</p> <ul style="list-style-type: none"> <li>• Legal recourse for applicants;</li> </ul>	<p><b>10 December 2010, Board meeting</b></p> <p>New gTLD Remaining Issues  <a href="http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2">http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2</a></p> <p>Resolved (2010.12.10.21), the Board:</p> <ol style="list-style-type: none"> <li>1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue.</li> <li>2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report.</li> <li>3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to make a decision in relation to the working group's recommendations.</li> <li>4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement.</li> <li>5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon as possible.</li> <li>6. Commits to provide a thorough and reasoned explanation of ICANN</li> </ol>

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	<p>decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis.</p> <p>7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.</p>
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# EXHIBIT H

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

DOTCONNECTAFRICA TRUST,

Plaintiff,

vs.

CASE NO.  
2:16-cv-00862-RGK (JCx)

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,  
et al.,

Defendants.  
~~~~~

DEPOSITION OF  
CHRISTINE WILLETT

October 7, 2016

9:03 a.m.

11766 Wilshire Boulevard  
Suite 1670  
Los Angeles, California

Dawn Schetne, CSR No. 5140

1 APPEARANCES OF COUNSEL

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15 Also Present:

16 Amy Stathos (Appeared Telephonically)  
17  
18  
19  
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1 Q. Is it your understanding that the DCA  
2 application ultimately failed to pass geographic names  
3 review because of the purported withdraw of support from  
4 the AUC?

5 A. No.

6 Q. What's your basis for that belief?

7 A. Because the AUC's letter was only one letter.  
8 It was only one entity that could have provided support.  
9 My understanding from the panel and other discussions is  
10 that there were other entities who -- potentially UNECA,  
11 but 36 of the 58 countries who could have provided  
12 letters of support, and as long as there was a  
13 sufficient number of them comprising 60 percent, then  
14 that would have qualified DCA.

15 Q. Let me ask it a different way. Is it your  
16 understanding that the ICC panel concluded that the AUC  
17 letter was insufficient because it had been purportedly  
18 withdrawn at some point?

19 MR. LeVEE: The letter from 2008?

20 MR. BROWN: The original letter from 2008, yes.

21 THE WITNESS: No, that's not my understanding.

22 BY MR. BROWN:

23 Q. Do you have a different understanding?

24 A. My understanding is that the letter was deemed  
25 insufficient because of the -- I would want to look at

1 the specific clarifying questions, but based on one or  
2 more of the four criteria that each letter must provide.  
3 My recollection is that DCA provided multiple letters of  
4 support.

5 Q. Let me mark this document as Exhibit 22.

6 (Exhibit 22 was marked.)

7 BY MR. BROWN:

8 Q. Are you familiar with Exhibit 22?

9 A. Yes.

10 Q. What is it?

11 A. These are the clarifying questions issued by  
12 the ICC to DCA during extended evaluation.

13 Q. And if you would look at the very first page,  
14 clarifying question No. 5, is that your understanding --  
15 is your understanding that that is the clarifying  
16 question that relates specifically to the endorsement of  
17 the Africa Union Commission?

18 A. Yes.

19 Q. Based on your review of that letter, can you  
20 explain to me your understanding of the basis upon which  
21 the original endorsement letter that .Africa obtained in  
22 2009 was deemed insufficient?

23 MR. LeVEE: I'll object that the exhibit speaks  
24 for itself, but you can answer the question.

25 THE WITNESS: So as written here, it identifies

1 the four criteria which must be in the letter of  
2 support, and specifically what this clarifying question  
3 is saying is that criteria No. 4 was not met by the  
4 letter as submitted. The 2009 letter. And it's asking  
5 for DCA to provide an updated letter that meets  
6 criteria 4, specifically demonstrating that the  
7 government or public authority's understanding is that  
8 the string is being sought through the new gTLD program  
9 and is willing to accept the conditions under which the  
10 string will be available.

11 BY MR. BROWN:

12 Q. So the letter specifically calls out criteria  
13 No. 4. Is it fair, then, to assume that the original  
14 letter of 2009 was deemed sufficient to meet the first  
15 three criteria?

16 A. Based on this clarifying question, I believe  
17 so.

18 Q. Is there specific language that's required in  
19 the letter in order to meet criteria No. 4?

20 MR. LeVEE: Specific words?

21 MR. BROWN: Yes, magic words that need to be in  
22 the letter.

23 THE WITNESS: That the string is being sought  
24 through the gTLD application process. A whole bunch of  
25 geographic applicants got letters of support that didn't

1 REPORTER'S CERTIFICATION

2  
3 I, Dawn Schetne, a Certified Shorthand Reporter in  
4 and for the State of California, do hereby certify:  
5

6 That the foregoing witness was by me duly sworn;  
7 that the deposition was then taken before me at the time  
8 and place herein set forth; that the testimony and  
9 proceedings were reported stenographically by me and  
10 later transcribed into typewriting under my direction;  
11 that the foregoing is a true record of the testimony and  
12 proceedings taken at that time.

13  
14 IN WITNESS WHEREOF, I have subscribed my name this  
15 17th day of October, 2016.

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19 Dawn Schetne, CSR No. 5140  
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# EXHIBIT I





**ICANN**

## March 2017 Financial Results

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Unaudited financial results for the nine months ending  
31 March 2017

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Note - All financial information is unaudited.

**ICANN**  
**Executive Summary of Unaudited Financial Results**  
**For the Nine Months Ending 31 March 2017**

**Overview - ICANN Operations and New gTLD Program**

The total ICANN change in net assets is \$134.5M higher than budget for the period mainly due to: (i) unbudgeted Auction Proceeds (\$135.0M); (ii) underspend in planned operations for ICANN Ops (\$6.4M) primarily due to slower FY17 hiring than planned and delayed activities across the organization; (iii) higher than budgeted funding for ICANN Operations (\$6.2); and (iv) total ICANN investment gains of (\$3.5M); partially offset by (v) lower revenue recognized for the New gTLD Program (-\$10.8M), (vi) higher expenses due to auctions fees; offset by lower evaluation costs due to extension of the New gTLD Program (-\$2.1M); and (vii) unbudgeted risk costs for the New gTLD Program (-\$3.8M). See below.

The Funds Under Management by ICANN increased by \$122.2M during the period to a total of \$463.0M, mainly as a result of (i) auction proceeds collected (\$135.0M); (ii) net funds collected from contributors and contracted parties (\$99.8M); and (iii) Reserve Fund gains (\$3.5M), partially offset by (iv) general operating expenses for ICANN Ops (-\$110.1M); and (v) the payment of refunds and evaluation expenses and general operating expenses for the New gTLD Program (-\$6.1M).

**Financial Position**

The Funds Under Management increased by \$122.2M during the period as a result of the following:

- An increase of the ICANN Operations funds by \$3.9M due to:

- (i) funds collected from contributors/ parties of \$99.8M
- (ii) the reimbursement to ICANN Ops from the New gTLD Program for direct/allocated costs for \$10.6M and Historical Development Costs for \$1.3M, and
- (iii) the appreciation of investments for \$2.3M, partially offset by
- (iv) payments to vendors/ employees of \$110.1M, \$14.7M of which were on behalf of the New gTLD Program.

- A increase of the New gTLD funds by \$118.2M due to:

- (i) Auction proceeds received of \$135M and
- (ii) the appreciation of investments for \$1.2M, partially offset by
- (iii) the reimbursement to ICANN Ops from the New gTLD Program for direct/allocated costs for \$10.6M and Historical Development Costs for \$1.3M,
- (iv) payments to vendors of \$5.6M, and
- (v) net refunds to New gTLD applicants of \$0.5M.

The decrease of the deferred funding balance of \$17.5M corresponds to:

- (i) the amount of funding recognized for the New gTLD program \$17.1M and
- (ii) the net refunds to New gTLD applicants \$0.5M

**Funding**

Funding for ICANN Operations was \$6.2M favorable to budget primarily due to: (i) higher Registrar fees by \$4.5M due to higher than budget new registrar application and accreditation fees, the budget assumes a conservative number of new accreditations taking place in FY2017, (ii) higher Transaction fees for Registry and Registrars by \$2.0M as the domain name registrations for both registries and registrars, which drive the transaction fees, is higher than budget due to higher growth in transactions billed in Q3, (iii) partially offset by lower than budget Other funding fees by \$0.3M due to lower than budget contributions from cctlds (-\$0.2M) and sponsorships (-\$0.1M).

Funding for New gTLD program was \$124.2M favorable to budget primarily due to (i) net auction proceeds of \$135.0M, partially offset by (ii) lower funding recognized of -\$10.8M as a result of the extension of the evaluation period for the New gTLD program.

**Operating Expenses**

Personnel expenses for ICANN Operations were \$4.6M favorable to budget primarily due to: (i) lower average compensation (including fringe) than planned and (ii) lower average headcount than planned (359.3 vs 375.6) due to slower hiring and attrition.

Personnel expenses for the New gTLD Program were \$0.8M favorable to budget due to: (i) lower average compensation (including fringe) than planned and (ii) lower average headcount (8.9 vs 11) due to slower hiring and attrition.

**ICANN**  
**Executive Summary of Unaudited Financial Results**  
**For the Nine Months Ending 31 March 2017**

Professional Services expenses were below budget by \$2.6M primarily due to: (i) timing differences across various projects including Specific Reviews, Public Responsibility, IPv6, Security and Technical Services projects (+\$2.7M); and (ii) ICANN meeting costs that were planned as professional services but used for administration costs such as equipment rental and meetings space costs (+\$0.5M), partially offset by (iii) IANA Stewardship Transition Project activities, primarily legal fees for (-\$0.6M).

Professional Services costs for the New gTLD Program were \$3.2M higher than budget due to unbudgeted auction fees of \$2.9M and legal costs of \$0.3M.

Administration expenses for ICANN Operations were relatively flat to budget.

Administrative costs for the New gTLD Program were \$0.3M favorable to budget primarily due to the extension of the evaluation period for the New gTLD program.

Bad debt: On the basis of the historical trend of uncollectible receivables, the level of bad debt on reserve at the end of the period was sufficient and therefore no additional bad debt expenses were budgeted or reserved during the period.

Depreciation costs were \$1.4M unfavorable to budget primarily due to underestimated depreciation in the the period budget.

**Other Income /Expense**

Other income/ expense for ICANN Operations was \$2.0M favorable to budget due to realized gains of \$2.6M and unrealized losses of \$0.3M on investment accounts, partially offset by unbudgeted foreign currency loss of \$0.3M primarily related to the fluctuation in the exchange rate for the Indian rupee for ICANN 57 vendors.

Other income/ expense for New gTLD was \$1.2M favorable to budget due to realized gains of \$1.4M and unrealized losses of \$0.2M on investment accounts



**Statement of Activities**  
**FY17 Adopted Budget by Quarter**  
**US dollars, in millions**

| Unaudited                                                        | Quarter 1     |              |               | Quarter 2      |              |               | Quarter 3     |              |               | Quarter 4      |              |                | Total Year     |               |                |
|------------------------------------------------------------------|---------------|--------------|---------------|----------------|--------------|---------------|---------------|--------------|---------------|----------------|--------------|----------------|----------------|---------------|----------------|
|                                                                  | ICANN Ops     | NgTLD        | Total         | ICANN Ops      | NgTLD        | Total         | ICANN Ops     | NgTLD        | Total         | ICANN Ops      | NgTLD        | Total          | ICANN Ops      | NgTLD         | Total          |
| <b>Funding</b>                                                   |               |              |               |                |              |               |               |              |               |                |              |                |                |               |                |
| Registry                                                         | \$20.1        | \$0.0        | \$20.1        | \$20.7         | \$0.0        | \$20.7        | \$21.9        | \$0.0        | \$21.9        | \$21.5         | \$0.0        | \$21.5         | \$84.2         | \$0.0         | \$84.2         |
| Registrar                                                        | 10.7          | 0.0          | 10.7          | 10.9           | 0.0          | 10.9          | 11.6          | 0.0          | 11.6          | 11.4           | 0.0          | 11.4           | 44.5           | 0.0           | 44.5           |
| Auction Proceeds                                                 | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0            | 0.0            | 0.0           | 0.0            |
| Contributions & Other Income <sup>(1)</sup>                      | 0.7           | 0.0          | 0.7           | 1.0            | 0.0          | 1.0           | 1.0           | 0.0          | 1.0           | 1.0            | 0.0          | 1.0            | 3.7            | 0.0           | 3.7            |
| New gTLD Application Fees                                        | 0.0           | 7.6          | 7.6           | 0.0            | 7.0          | 7.0           | 0.0           | 6.2          | 6.2           | 0.0            | 7.0          | 7.0            | 0.0            | 27.7          | 27.7           |
| <b>Total Funding</b>                                             | <b>\$31.6</b> | <b>\$7.6</b> | <b>\$39.1</b> | <b>\$32.5</b>  | <b>\$7.0</b> | <b>\$39.5</b> | <b>\$34.5</b> | <b>\$6.2</b> | <b>\$40.7</b> | <b>\$33.8</b>  | <b>\$7.0</b> | <b>\$40.8</b>  | <b>\$132.4</b> | <b>\$27.7</b> | <b>\$160.1</b> |
| <b>Expenses</b>                                                  |               |              |               |                |              |               |               |              |               |                |              |                |                |               |                |
| Personnel                                                        | 16.4          | 1.2          | 17.6          | 16.4           | 1.2          | 17.6          | 16.6          | 1.2          | 17.8          | 16.7           | 1.2          | 17.9           | 66.1           | 4.9           | 70.986         |
| Travel & Meetings <sup>(2)</sup>                                 | 2.5           | 0.2          | 2.7           | 5.2            | 0.2          | 5.4           | 5.5           | 0.2          | 5.8           | 5.3            | 0.3          | 5.6            | 18.5           | 1.0           | 19.487         |
| Professional Services                                            | 6.2           | 2.7          | 8.9           | 7.2            | 2.4          | 9.5           | 6.9           | 1.9          | 8.8           | 8.3            | 2.3          | 10.6           | 28.6           | 9.2           | 37.8351        |
| Administration                                                   | 4.2           | 0.3          | 4.5           | 4.7            | 0.3          | 4.9           | 4.2           | 0.3          | 4.5           | 4.0            | 0.3          | 4.3            | 17.1           | 1.1           | 18.2           |
| Bad Debt Expenses                                                | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0            | 0.1            | 0.0           | 0.1            |
| Depreciation Expenses                                            | 1.8           | 0.0          | 1.8           | 1.8            | 0.0          | 1.8           | 1.8           | 0.0          | 1.8           | 1.8            | 0.0          | 1.8            | 7.0            | 0.0           | 7.0            |
| <b>Total Expenses</b>                                            | <b>31.0</b>   | <b>4.4</b>   | <b>35.5</b>   | <b>35.2</b>    | <b>4.1</b>   | <b>39.3</b>   | <b>35.1</b>   | <b>3.6</b>   | <b>38.7</b>   | <b>36.1</b>    | <b>4.1</b>   | <b>40.2</b>    | <b>137.4</b>   | <b>16.2</b>   | <b>153.6</b>   |
| Contingency <sup>(3)</sup>                                       | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 4.6            | 0.0          | 4.6            | 4.6            | 0.0           | 4.6            |
| Interest - General                                               | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0            | 0.0            | 0.0           | 0.0            |
| Investment (Income)/ Loss                                        | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0            | 0.0            | 0.0           | 0.0            |
| <b>Total Other (Income)/Expense</b>                              | <b>0.0</b>    | <b>0.0</b>   | <b>0.0</b>    | <b>0.0</b>     | <b>0.0</b>   | <b>0.0</b>    | <b>0.0</b>    | <b>0.0</b>   | <b>0.0</b>    | <b>4.6</b>     | <b>0.0</b>   | <b>4.6</b>     | <b>4.6</b>     | <b>0.0</b>    | <b>4.6</b>     |
| <b>Change in Net Assets Before Historical Costs and Reserves</b> | <b>0.5</b>    | <b>3.1</b>   | <b>3.7</b>    | <b>(2.7)</b>   | <b>2.9</b>   | <b>0.2</b>    | <b>(0.6)</b>  | <b>2.6</b>   | <b>2.0</b>    | <b>(6.8)</b>   | <b>2.9</b>   | <b>(4.0)</b>   | <b>(9.6)</b>   | <b>11.5</b>   | <b>1.9</b>     |
| Hist. Development Costs/ (Reimbursement)                         | (0.8)         | 0.8          | 0.0           | (0.7)          | 0.7          | 0.0           | (0.6)         | 0.6          | 0.0           | (0.7)          | 0.7          | 0.0            | (2.9)          | 2.9           | 0.0            |
| Risk Costs                                                       | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0           | 0.0           | 0.0          | 0.0           | 0.0            | 0.0          | 0.0            | 0.0            | 0.0           | 0.0            |
| <b>Change In Net Assets</b>                                      | <b>\$1.3</b>  | <b>\$2.3</b> | <b>\$3.7</b>  | <b>(\$2.0)</b> | <b>\$2.2</b> | <b>\$0.2</b>  | <b>\$0.1</b>  | <b>\$1.9</b> | <b>\$2.0</b>  | <b>(\$6.1)</b> | <b>\$2.2</b> | <b>(\$4.0)</b> | <b>(\$6.7)</b> | <b>\$8.6</b>  | <b>\$1.9</b>   |

<sup>(1)</sup> Includes R.I.R, ccTLD, ccTLD IDN.

<sup>(2)</sup> Includes Community Support Requests

<sup>(3)</sup> Contingency items have been reported in the expense categories above based on the nature of the expense.



**Statement of Activities**  
**FY17 Actuals by Quarter**  
**For the Nine Months Ending 31 March 2017**  
**in millions USD**

| Unaudited                                                        | Quarter 1     |                |                | Quarter 2      |              |                | Quarter 3     |                |               | Year-to-Date   |                |                |
|------------------------------------------------------------------|---------------|----------------|----------------|----------------|--------------|----------------|---------------|----------------|---------------|----------------|----------------|----------------|
|                                                                  | ICANN Ops     | NgTLD          | Total          | ICANN Ops      | NgTLD        | Total          | ICANN Ops     | NgTLD          | Total         | ICANN Ops      | NgTLD          | Total          |
| <b>Funding</b>                                                   |               |                |                |                |              |                |               |                |               |                |                |                |
| Registry                                                         | 20.8          | 0.0            | 20.8           | 18.3           | 0.0          | 18.3           | 24.3          | 0.0            | 24.3          | 63.4           | 0.0            | 63.4           |
| Registrar                                                        | 13.0          | 0.0            | 13.0           | 10.5           | 0.0          | 10.5           | 15.2          | 0.0            | 15.2          | 38.8           | 0.0            | 38.8           |
| Auction Proceeds                                                 | 0.0           | 135.0          | 135.0          | 0.0            | 0.0          | 0.0            | 0.0           | 0.0            | 0.0           | 0.0            | 135.0          | 135.0          |
| Contributions & Other Income <sup>(1)</sup>                      | 1.0           | (0.0)          | 1.0            | 0.9            | (0.0)        | 0.9            | 0.5           | 0.0            | 0.5           | 2.4            | (0.0)          | 2.4            |
| New gTLD Application Fees                                        | 0.2           | 5.7            | 5.9            | 0.0            | 7.0          | 7.0            | 0.0           | 4.2            | 4.2           | 0.3            | 16.8           | 17.1           |
| <b>Total Funding</b>                                             | <b>\$35.0</b> | <b>\$140.7</b> | <b>\$175.7</b> | <b>\$29.8</b>  | <b>\$7.0</b> | <b>\$36.8</b>  | <b>\$40.1</b> | <b>4.2</b>     | <b>\$44.2</b> | <b>\$104.8</b> | <b>\$151.8</b> | <b>\$256.7</b> |
| <b>Expenses</b>                                                  |               |                |                |                |              |                |               |                |               |                |                |                |
| Personnel                                                        | 14.3          | 1.0            | 15.3           | 14.4           | 1.0          | 15.4           | 16.1          | 0.9            | 17.0          | 44.8           | 2.8            | 47.7           |
| Travel & Meetings <sup>(2)</sup>                                 | 2.0           | 0.2            | 2.2            | 5.6            | 0.3          | 5.8            | 4.7           | 0.2            | 4.8           | 12.3           | 0.6            | 12.9           |
| Professional Services                                            | 5.7           | 4.5            | 10.2           | 5.9            | 2.1          | 8.0            | 6.1           | 3.6            | 9.7           | 17.7           | 10.2           | 27.8           |
| Administration                                                   | 3.9           | 0.2            | 4.1            | 4.9            | 0.2          | 5.2            | 4.3           | 0.1            | 4.5           | 13.2           | 0.6            | 13.7           |
| Bad Debt Expenses                                                | 0.0           | 0.0            | 0.0            | 0.0            | 0.0          | 0.0            | 0.0           | 0.0            | 0.0           | 0.0            | 0.0            | 0.0            |
| Depreciation Expenses                                            | 2.1           | 0.0            | 2.1            | 2.5            | 0.0          | 2.5            | 2.1           | 0.0            | 2.1           | 6.7            | 0.0            | 6.7            |
| <b>Total Expenses</b>                                            | <b>28.0</b>   | <b>5.8</b>     | <b>33.9</b>    | <b>33.3</b>    | <b>3.5</b>   | <b>36.8</b>    | <b>33.4</b>   | <b>4.8</b>     | <b>38.1</b>   | <b>94.6</b>    | <b>14.2</b>    | <b>108.8</b>   |
| Contingency <sup>(3)</sup>                                       | 0.0           | 0.0            | 0.0            | 0.0            | 0.0          | 0.0            | 0.0           | 0.0            | 0.0           | 0.0            | 0.0            | 0.0            |
| Interest - General                                               | 0.0           | 0.0            | 0.0            | 0.0            | 0.0          | 0.0            | 0.0           | 0.0            | 0.0           | 0.0            | 0.0            | 0.0            |
| Investment (Income)/ Loss                                        | (2.3)         | (0.5)          | (2.8)          | 1.9            | (0.0)        | 1.9            | (1.9)         | (0.7)          | (2.7)         | (2.3)          | (1.2)          | (3.5)          |
| Other (Income)/Expense                                           | 0.1           | 0.0            | 0.1            | 0.1            | (0.0)        | 0.1            | (0.0)         | 0.0            | 0.0           | 0.3            | 0.0            | 0.3            |
| <b>Total Other (Income)/Expense</b>                              | <b>(2.2)</b>  | <b>(0.5)</b>   | <b>(2.7)</b>   | <b>2.1</b>     | <b>(0.0)</b> | <b>2.1</b>     | <b>(2.0)</b>  | <b>(0.7)</b>   | <b>(2.6)</b>  | <b>(2.0)</b>   | <b>(1.2)</b>   | <b>(3.2)</b>   |
| <b>Change in Net Assets Before Historical Costs and Reserves</b> | <b>9.1</b>    | <b>135.4</b>   | <b>144.5</b>   | <b>(5.5)</b>   | <b>3.4</b>   | <b>(2.1)</b>   | <b>8.7</b>    | <b>0.1</b>     | <b>8.7</b>    | <b>12.2</b>    | <b>138.9</b>   | <b>151.1</b>   |
| Hist. Development Costs/ (Reimbursement)                         | (0.6)         | 0.60           | 0.0            | (0.6)          | 0.6          | 0.0            | (0.5)         | 0.5            | 0.0           | (1.8)          | 1.8            | 0.0            |
| Risk Costs                                                       | 0.0           | 1.0            | 1.0            | 0.0            | 2.8          | 2.8            | 0.0           | 0.0            | 0.0           | 0.0            | 3.8            | 3.8            |
| <b>Change In Net Assets</b>                                      | <b>\$9.7</b>  | <b>\$133.8</b> | <b>\$143.5</b> | <b>(\$4.9)</b> | <b>\$0.0</b> | <b>(\$4.9)</b> | <b>\$9.2</b>  | <b>(\$0.5)</b> | <b>\$8.7</b>  | <b>\$14.0</b>  | <b>\$133.3</b> | <b>\$147.3</b> |

<sup>(1)</sup> Includes R.I.R, ccTLD, ccTLD IDN.

<sup>(2)</sup> Includes Community Support Requests

<sup>(3)</sup> Contingency items have been reported in the expense categories above based on the nature of the expense.



**Statement of Activities  
Actual vs. Adopted Budget  
For the Nine Months Ending 31 March 2017  
in millions USD**

| Unaudited                                                              | FY17 YTD Actual |                |                | FY17 YTD Adopted Budget |               |               | Variance vs. Budget |                  |                |                |                |                |
|------------------------------------------------------------------------|-----------------|----------------|----------------|-------------------------|---------------|---------------|---------------------|------------------|----------------|----------------|----------------|----------------|
|                                                                        | ICANN Ops       | New gTLD       | Total ICANN    | ICANN Ops               | New gTLD      | Total ICANN   | ICANN Ops           |                  | New gTLD       |                | Total ICANN    |                |
| <b>Funding</b>                                                         |                 |                |                |                         |               |               |                     |                  |                |                |                |                |
| Registry                                                               | 63.4            | 0.0            | 63.4           | 62.8                    | 0.0           | 62.8          | 0.6                 | 1.0%             | 0.0            | 0.0%           | 0.6            | 1.0%           |
| Registrar                                                              | 39.1            | 0.0            | 39.1           | 33.2                    | 0.0           | 33.2          | 5.9                 | 17.8%            | 0.0            | 0.0%           | 5.9            | 17.8%          |
| Auction Proceeds                                                       | 0.0             | 135.0          | 135.0          | 0.0                     | 0.0           | 0.0           | 0.0                 | 0.0%             | 135.0          | 0.0%           | 135.0          | 0.0%           |
| Contributions & Other Income <sup>(1)</sup>                            | 2.4             | (0.0)          | 2.4            | 2.7                     | 0.0           | 2.7           | (0.3)               | (11.7%)          | (0.0)          | 0.0%           | (0.3)          | (11.7%)        |
| New gTLD Application Fees                                              | 0.0             | 16.8           | 16.8           | 0.0                     | 27.6          | 27.6          | 0.0                 | 0.0%             | (10.8)         | (39.1%)        | (10.8)         | (39.1%)        |
| <b>Total Funding</b>                                                   | <b>104.8</b>    | <b>151.8</b>   | <b>256.7</b>   | <b>98.6</b>             | <b>27.6</b>   | <b>126.3</b>  | <b>6.2</b>          | <b>6.3%</b>      | <b>124.2</b>   | <b>449.5%</b>  | <b>130.4</b>   | <b>103.3%</b>  |
| <b>Expenses</b>                                                        |                 |                |                |                         |               |               |                     |                  |                |                |                |                |
| Personnel                                                              | 44.8            | 2.8            | 47.7           | 49.5                    | 3.6           | 53.1          | 4.6                 | 9.4%             | 0.8            | 22.3%          | 5.4            | 10.2%          |
| Travel & Meetings <sup>(2)</sup>                                       | 12.3            | 0.6            | 12.9           | 13.2                    | 0.7           | 13.9          | 0.9                 | 6.8%             | 0.1            | 14.5%          | 1.0            | 7.2%           |
| Professional Services                                                  | 17.7            | 10.2           | 27.8           | 20.3                    | 6.9           | 27.2          | 2.6                 | 12.8%            | (3.2)          | (46.8%)        | (0.6)          | (2.4%)         |
| Administration                                                         | 13.2            | 0.6            | 13.7           | 13.1                    | 0.8           | 13.9          | (0.1)               | (0.4%)           | 0.3            | 31.8%          | 0.2            | 1.5%           |
| Bad Debt Expenses                                                      | 0.0             | 0.0            | 0.0            | 0.1                     | 0.0           | 0.1           | 0.1                 | 100.0%           | 0.0            | 0.0%           | 0.1            | 100.0%         |
| Depreciation Expenses                                                  | 6.7             | 0.0            | 6.7            | 5.2                     | 0.0           | 5.2           | (1.4)               | (27.4%)          | 0.0            | 0.0%           | (1.4)          | (27.4%)        |
| <b>Total Expenses</b>                                                  | <b>94.6</b>     | <b>14.2</b>    | <b>108.8</b>   | <b>101.3</b>            | <b>12.1</b>   | <b>113.5</b>  | <b>6.7</b>          | <b>6.6%</b>      | <b>(2.1)</b>   | <b>(17.0%)</b> | <b>4.6</b>     | <b>4.1%</b>    |
| Contingency <sup>(3)</sup>                                             | 0.0             | 0.0            | 0.0            | 0.0                     | 0.0           | 0.0           | 0.0                 | 0.0%             | 0.0            | 0.0%           | 0.0            | 0.0%           |
| Interest - General                                                     | 0.0             | 0.0            | 0.0            | 0.0                     | 0.0           | 0.0           | 0.0                 | 0.0%             | 0.0            | 0.0%           | 0.0            | 0.0%           |
| Investment (Income)/ Loss                                              | (2.3)           | (1.2)          | (3.5)          | 0.0                     | 0.0           | 0.0           | 2.3                 | 0.0%             | 1.2            | 0.0%           | 3.5            | 0.0%           |
| Other (Income)/Expense                                                 | 0.3             | 0.0            | 0.3            | 0.0                     | 0.0           | 0.0           | (0.3)               | 0.0%             | (0.0)          | 0.0%           | (0.3)          | 0.0%           |
| <b>Total Other (Income)/Expense</b>                                    | <b>(2.0)</b>    | <b>(1.2)</b>   | <b>(3.2)</b>   | <b>0.0</b>              | <b>0.0</b>    | <b>0.0</b>    | <b>2.0</b>          | <b>0.0%</b>      | <b>1.2</b>     | <b>0.0%</b>    | <b>3.2</b>     | <b>0.0%</b>    |
| <b>Change in Net Assets<br/>(before Historical Costs and Reserves)</b> | <b>12.2</b>     | <b>138.9</b>   | <b>151.1</b>   | <b>(2.7)</b>            | <b>15.5</b>   | <b>12.8</b>   | <b>15.0</b>         | <b>(551.0%)</b>  | <b>123.3</b>   | <b>794.3%</b>  | <b>138.3</b>   | <b>1079.2%</b> |
| Hist. Development Costs/<br>(Reimbursement)                            | (1.8)           | 1.8            | 0.0            | (2.2)                   | 2.2           | 0.0           | (0.4)               | 18.7%            | 0.4            | 18.7%          | 0.0            | 0.0%           |
| Risk Costs                                                             | 0.0             | 3.8            | 3.8            | 0.0                     | 0.0           | 0.0           | 0.0                 | 0.0%             | (3.8)          | 0.0%           | (3.8)          | 0.0%           |
| <b>Change In Net Assets</b>                                            | <b>\$14.0</b>   | <b>\$133.3</b> | <b>\$147.3</b> | <b>-\$0.5</b>           | <b>\$13.4</b> | <b>\$12.8</b> | <b>\$14.5</b>       | <b>(2680.6%)</b> | <b>\$119.9</b> | <b>897.8%</b>  | <b>\$134.5</b> | <b>1049.3%</b> |
| <b>Average Headcount</b>                                               | <b>359.3</b>    | <b>8.9</b>     | <b>368.2</b>   | <b>375.6</b>            | <b>11.0</b>   | <b>386.6</b>  | <b>16.3</b>         | <b>4.3%</b>      | <b>2.1</b>     | <b>19.2%</b>   | <b>18.4</b>    | <b>4.8%</b>    |

<sup>(1)</sup> Includes R.I.R, ccTLD, ccTLD IDN.

<sup>(2)</sup> Includes Community Support Requests

<sup>(3)</sup> Contingency items have been reported in the expense categories above based on the nature of the expense.



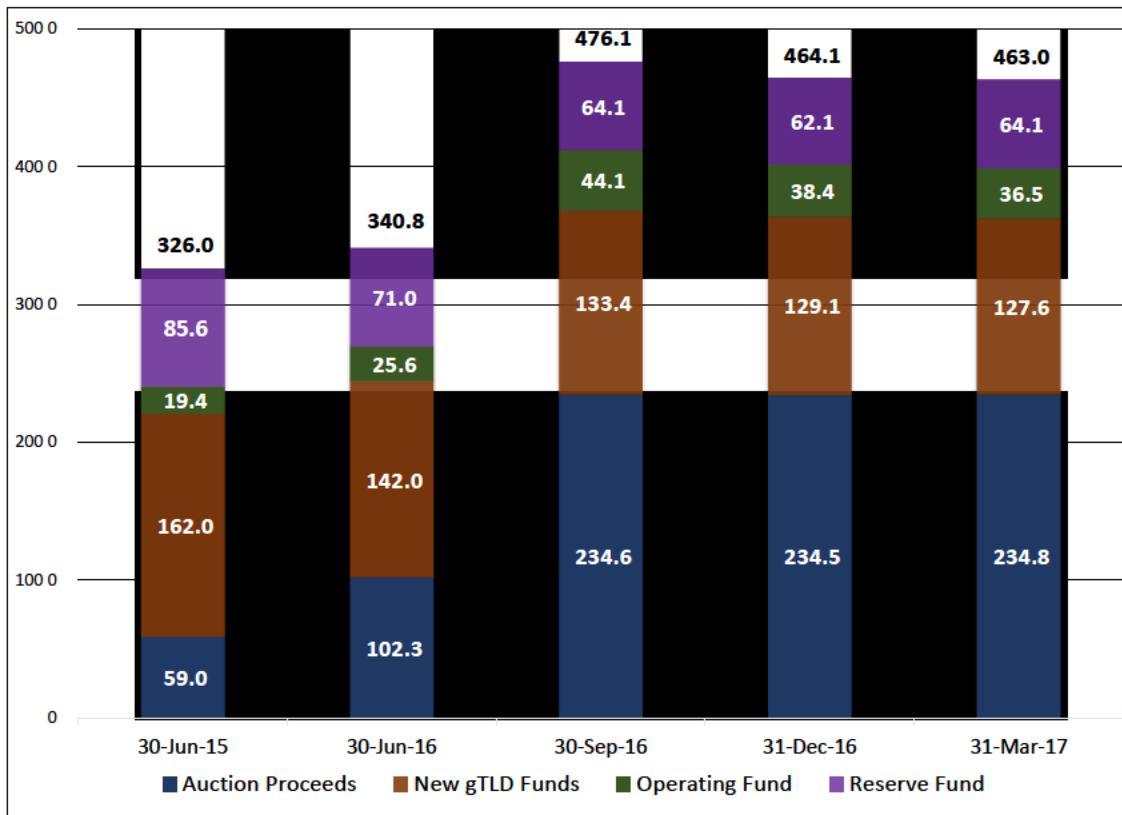
**Statement of Position**  
**As of 31 March 2017**  
**US dollars, in thousands**

| Unaudited                                 | 31 March 2017 |              | 30 June 2016 |              |              | Increase/ (Decrease) |              |              |
|-------------------------------------------|---------------|--------------|--------------|--------------|--------------|----------------------|--------------|--------------|
|                                           | New gTLD      | Total        | ICANN<br>Ops | New<br>gTLD  | Total        | ICANN<br>Ops         | New<br>gTLD  | Total        |
| <b>ASSETS</b>                             |               |              |              |              |              |                      |              |              |
| Total Cash & Cash Equivalents             | 138.8         | 175.3        | 25.6         | 11.8         | 37.4         | 10.9                 | 127.0        | 137.9        |
| Investments                               | 223.7         | 287.7        | 71.0         | 232.4        | 303.4        | -6.9                 | -8.8         | -15.7        |
| Funds Under Management                    | <b>362.5</b>  | <b>463.0</b> | <b>96.6</b>  | <b>244.2</b> | <b>340.8</b> | <b>3.9</b>           | <b>118.2</b> | <b>122.2</b> |
| Receivables                               | <b>0.1</b>    | <b>43.8</b>  | <b>36.9</b>  | <b>0.3</b>   | <b>37.2</b>  | <b>6.8</b>           | <b>-0.2</b>  | <b>6.6</b>   |
| Prepaid Expenses                          | <b>0.0</b>    | <b>2.4</b>   | <b>39.7</b>  | <b>0.0</b>   | <b>39.7</b>  | <b>-0.3</b>          | <b>0.0</b>   | <b>-0.3</b>  |
| Plant, Property & Equipment - Net         | <b>0.0</b>    | <b>17.4</b>  | <b>18.2</b>  | <b>0.0</b>   | <b>18.2</b>  | <b>-0.8</b>          | <b>0.0</b>   | <b>-0.8</b>  |
| Other Assets                              | <b>-4.7</b>   | <b>1.3</b>   | <b>5.4</b>   | <b>-4.7</b>  | <b>0.6</b>   | <b>0.6</b>           | <b>0.0</b>   | <b>0.7</b>   |
| <b>TOTAL ASSETS</b>                       | <b>357.8</b>  | <b>527.9</b> | <b>196.8</b> | <b>239.8</b> | <b>436.6</b> | <b>10.2</b>          | <b>118.0</b> | <b>128.3</b> |
| <b>LIABILITIES AND NET ASSETS</b>         |               |              |              |              |              |                      |              |              |
| Accounts Payable & Accrued Liabilities    | 3.7           | 17.3         | 17.3         | 1.4          | 18.7         | -3.8                 | 2.3          | -1.5         |
| Deferred Funding                          | 28.8          | 29.8         | 0.9          | 46.3         | 47.3         | 0.0                  | -17.5        | -17.5        |
| Other Liabilities                         | 0.0           | 0.0          | 0.0          | 0.0          | 0.0          | 0.0                  | 0.0          | 0.0          |
| <b>TOTAL LIABILITIES</b>                  | <b>32.5</b>   | <b>47.0</b>  | <b>18.3</b>  | <b>47.8</b>  | <b>66.0</b>  | <b>-3.8</b>          | <b>-15.3</b> | <b>-19.0</b> |
| <b>UNRESTRICTED/RESTRICTED ASSETS</b>     | <b>192.1</b>  | <b>333.6</b> | <b>141.5</b> | <b>192.1</b> | <b>333.6</b> | <b>0.0</b>           | <b>0.0</b>   | <b>0.0</b>   |
| <b>CURRENT YEAR CHANGE IN NET ASSETS</b>  | <b>133.3</b>  | <b>147.3</b> | <b>0.0</b>   | <b>0.0</b>   | <b>0.0</b>   | <b>14.0</b>          | <b>133.3</b> | <b>147.3</b> |
| <b>TOTAL NET ASSETS</b>                   | <b>325.3</b>  | <b>480.9</b> | <b>141.5</b> | <b>192.1</b> | <b>333.6</b> | <b>14.0</b>          | <b>133.3</b> | <b>147.3</b> |
| <b>TOTAL LIABILITIES &amp; NET ASSETS</b> | <b>357.8</b>  | <b>527.9</b> | <b>159.8</b> | <b>239.8</b> | <b>399.6</b> | <b>10.2</b>          | <b>118.0</b> | <b>128.3</b> |





**Funds Under Management**  
**As of 31 March 2017**  
**US dollars, in millions**



US dollars, in millions

New gTLD funds – Managers: Northern Trust, US Bank, Deutsche Bank

Auctions funds – Manager: Northern Trust

Reserve Fund - Manager: SSgA

Operating fund – Manager: ICANN Staff

The variances from 30 June 2016 to 31 March 2017 are as follows:

**New gTLD Auction Proceeds** increased by \$132.6M due to: (i) the receipt of funds for the auctions held during the period (\$135.0M); and (ii) gains on the investment of funds (+\$0.5M), partially offset by auction fees (-\$2.9M).

**New gTLD funds** decreased by \$14.4M mainly due to: i) the repayment to ICANN Ops for Historical Development costs and accumulated direct allocated costs incurred on behalf of the program (-\$11.9M); and ii) net refunds to applicants and disbursements to vendors of (-\$3.2M), partially offset by the appreciation in the market value of investments (+\$0.7M).

The **ICANN Operations Operating Fund** increased by \$10.9M as a result of: i) the net impact of cash received from contracted parties of (+99.8M); ii) a transfer from the Reserve Fund for FY16 Q3-4 IANA Stewardship Project costs (+\$9.2M); and iii) the cash received from the New gTLD Program for repayment of Historical Development costs and accumulated direct allocated costs incurred on behalf of the program (+\$11.9M), partially offset by iv) payments to employees and vendors of (-\$110.1M), \$14.7M of which was on behalf of the New gTLD Program.

The **ICANN Operations Reserve Fund** decreased \$6.9M as a result of the transfer to the Operating account for the reimbursement of IANA Transition Project expenses of (-\$9.2M), partially offset by the appreciation in the market value of investments of (+2.3M).



**Cash Flows Synopsis**  
**For the Nine Months Ending 31 March 2017**  
**US dollars, in millions**

| Unaudited                                                                             | FY17           |                |                |
|---------------------------------------------------------------------------------------|----------------|----------------|----------------|
|                                                                                       | ICANN Ops      | NgTLD          | Total          |
| <b>Funds Under Management at Beginning of Period</b>                                  | <b>\$96.6</b>  | <b>\$244.2</b> | <b>\$340.8</b> |
| Collected/ (refunded) from contributors/parties                                       | 99.8           | (0.5)          | 99.4           |
| Auction Proceeds                                                                      | 0.0            | 135.0          | 135.0          |
| Paid to vendors                                                                       | (49.6)         | (14.7)         | (64.3)         |
| Paid to employees                                                                     | (39.9)         | (2.8)          | (42.7)         |
| Paid to vendors and employees on behalf of New gTLD                                   | (14.7)         | 11.9           | (2.8)          |
| Reimbursement of payments to vendors and employees above, from New gTLD to ICANN Ops: |                |                |                |
| Payments to vendors                                                                   | 3.4            | (3.4)          | 0.0            |
| NgTLD team costs (Paid to employees)                                                  | 1.7            | (1.7)          | 0.0            |
| Overhead Allocations (Paid to vendors and employees)                                  | 5.4            | (5.4)          | 0.0            |
| Historical Development Costs                                                          | 1.3            | (1.3)          | 0.0            |
| Capital expenditures                                                                  | (5.9)          | 0.0            | (5.9)          |
| Change in investment market value (excludes transfers to/ from operating account)     | 2.3            | 1.2            | 3.5            |
| <b>Funds Under Management at End of Period</b>                                        | <b>\$100.5</b> | <b>\$362.5</b> | <b>\$463.0</b> |



**Reserve Fund Activity**  
**As of 31 March 2017**  
**US dollars, in millions**

| <b>Reserve Fund Activity<br/>(unaudited)</b>             |               |
|----------------------------------------------------------|---------------|
| <b>Contributions</b>                                     |               |
| <b>Nov-07</b>                                            | 25.0          |
| <b>Aug-08</b>                                            | 8.0           |
| <b>Sep-09</b>                                            | 11.0          |
| <b>Oct-13</b>                                            | 19.1          |
| <b>Feb-14</b>                                            | 1.9           |
| <b>Jul-14</b>                                            | 1.3           |
| <b>Total Contributions</b>                               | <b>66.3</b>   |
| <b>Withdrawals</b>                                       |               |
| <b>May-15</b>                                            | (1.5)         |
| <b>Dec-15</b>                                            | (7.3)         |
| <b>Apr-16</b>                                            | (8.6)         |
| <b>Sep-16</b>                                            | (9.2)         |
| <b>Total Withdrawals</b>                                 | <b>(26.6)</b> |
| <b>Balance at Beginning of Fiscal Year (01-Jul-2016)</b> | <b>71.0</b>   |
| <b>Prior Fiscal Quarter Balance (31-Dec-2016)</b>        | <b>62.1</b>   |
| <b>Balance at End of Fiscal Period (31-Mar-2017)</b>     | <b>64.1</b>   |

**Notes:**

Historical default = 12 months of operating expenses.



**New gTLD Financial Summary**  
**As of 31 March 2017**  
**US dollars, in millions**

| Unaudited                           | Program to date      |     | Full Program                      |                                 | Program Balance                               |                                             |
|-------------------------------------|----------------------|-----|-----------------------------------|---------------------------------|-----------------------------------------------|---------------------------------------------|
|                                     | Actual<br>(Mar 2017) |     | Current<br>Estimate<br>(Feb 2017) | Prior<br>Estimate<br>(Feb 2016) | Actual vs Current<br>Estimate<br>(Over)/Under | Actual vs Prior<br>Estimate<br>(Over)/Under |
| <b>Fees</b>                         |                      |     |                                   |                                 |                                               |                                             |
| Application Fees                    | (361.0)              | (1) | (361.0)                           | (361.0)                         | 0.0                                           | 0.0                                         |
| Other Fees                          | <u>(1.7)</u>         | (2) | <u>(1.3)</u>                      | <u>(1.1)</u>                    | <u>(0.4)</u>                                  | <u>(0.6)</u>                                |
| <b>Total Fees</b>                   | <b>(362.7)</b>       |     | <b>(362.2)</b>                    | <b>(362.2)</b>                  | <b>(0.4)</b>                                  | <b>(0.6)</b>                                |
| <b>Refunds</b>                      |                      |     |                                   |                                 |                                               |                                             |
| Withdrawal (Pre-reveal/Overpayment) | 1.2                  |     | 5.6                               | 5.6                             | 4.4                                           | 4.4                                         |
| Withdrawal (@ 80%)                  | 0.4                  |     | 0.4                               | 0.4                             | 0.0                                           | 0.0                                         |
| Withdrawal (@ 70%)                  | 13.4                 |     | 13.4                              | 13.4                            | (0.0)                                         | (0.0)                                       |
| Withdrawal (@ 35%)                  | 22.9                 |     | 27.9                              | 27.9                            | 4.9                                           | 3.4                                         |
| Withdrawal (@ 20%)                  | <u>4.0</u>           |     | <u>5.4</u>                        | <u>5.4</u>                      | <u>1.1</u>                                    | <u>0.7</u>                                  |
| <b>Total Refunds</b>                | <b>42.0</b>          |     | <b>52.7</b>                       | <b>52.7</b>                     | <b>10.4</b>                                   | <b>8.5</b>                                  |
| <b>Funds Net of Refunds</b>         | <b>(319.1)</b>       |     | <b>(309.5)</b>                    | <b>(309.5)</b>                  |                                               |                                             |
| <b>Revenue</b>                      |                      |     |                                   |                                 |                                               |                                             |
| Recognized Revenue                  | (286.6)              |     | (309.5)                           | (309.5)                         |                                               |                                             |
| Deferred Revenue                    | <u>(32.1)</u>        |     | <u>0.0</u>                        | <u>0.0</u>                      |                                               |                                             |
| <b>Total Revenue</b>                | <b>(318.7)</b>       |     | <b>(309.5)</b>                    | <b>(309.5)</b>                  | <b>(9.1)</b>                                  | <b>(7.4)</b>                                |
| <b>Expenses</b>                     |                      |     |                                   |                                 |                                               |                                             |
| Evaluation Processing Costs         | 110.1                |     | 129.8                             | 135.8                           | 19.6                                          | 27.4                                        |
| Overhead                            | 51.5                 |     | 60.3                              | 60.4                            | 8.7                                           | 8.9                                         |
| NgTLD Team                          | 12.9                 |     | 13.4                              | 15.4                            | 0.6                                           | 2.6                                         |
| ICANN Staff Allocation              | 33.6                 |     | 41.4                              | 39.1                            | 7.8                                           | 5.5                                         |
| Other Overhead                      | <u>5.0</u>           |     | <u>5.4</u>                        | <u>5.9</u>                      | <u>0.4</u>                                    | <u>0.9</u>                                  |
| <b>Total Operating Expenses</b>     | <b>161.7</b>         |     | <b>190.0</b>                      | <b>196.2</b>                    | <b>28.4</b>                                   | <b>36.3</b>                                 |
| Historical Development Costs        | 29.7                 |     | 32.5                              | 32.5                            | 2.7                                           | 2.7                                         |
| <b>Total Expenses</b>               | <b>191.4</b>         |     | <b>222.5</b>                      | <b>228.7</b>                    | <b>31.1</b>                                   | <b>39.0</b>                                 |
| <b>Net Remaining Funds</b>          | <b>(127.3)</b>       |     | <b>(87.1)</b>                     | <b>(80.8)</b>                   | <b>(40.2)</b>                                 | <b>(46.4)</b>                               |
| <b>Remaining Funds</b>              | <b>(127.3)</b>       |     | <b>(87.1)</b>                     | <b>(80.8)</b>                   | <b>(40.2)</b>                                 | <b>(46.4)</b>                               |
| Actual Risk Costs                   | 12.0                 | (3) | 9.7                               | 8.8                             | 2.3                                           | <b>(5.0)</b>                                |
| <b>Net Remaining Funds</b>          | <b>(115.3)</b>       |     | <b>(77.5)</b>                     | <b>(72.0)</b>                   | <b>(37.9)</b>                                 | <b>(51.4)</b>                               |

(1) Includes overpayments.

(2) Proceeds from Prioritization Draw and Fees for Change Request.

(3) Currently includes actual risk costs incurred. Future costs cannot be estimate. Further review of risk costs identification in progress.



**New gTLD Historical Development Costs**  
**As of 31 March 2017**  
**US dollars, in millions**

|                               | Accrued       | Transferred/Paid |
|-------------------------------|---------------|------------------|
| <b>FY13 Actual</b>            | <b>\$15.4</b> | <b>\$0.0</b>     |
| Q1 FY14 Actual                | 3.7           | 16.8             |
| Q2 FY14 Actual                | 1.9           | 0.0              |
| Q3 FY14 Actual                | 1.3           | 2.7              |
| Q4 FY14 Actual                | (2.4)         | 0.0              |
| FY14 Total                    | 4.6           | 19.4             |
| <b>FY14 (Program to date)</b> | <b>20.0</b>   | <b>19.4</b>      |
| Q1 FY15 Actual                | 0.9           | 0.4              |
| Q2 FY15 Actual                | 1.5           | 1.0              |
| Q3 FY15 Actual                | 2.3           | 1.1              |
| Q4 FY15 Actual                | 1.3           | 2.3              |
| FY15 Total                    | 6.0           | 4.8              |
| <b>FY15 (Program to date)</b> | <b>26.0</b>   | <b>24.3</b>      |
| Q1 FY16 Actual                | 0.9           | 1.0              |
| Q2 FY16 Actual                | 0.5           | 0.0              |
| Q3 FY16 Actual                | 1.2           | 0.0              |
| Q4 FY16 Actual                | (0.3)         | 1.8              |
| FY16 Total                    | 2.3           | 2.9              |
| <b>FY16 (Program to date)</b> | <b>28.3</b>   | <b>27.2</b>      |
| Q1 FY17 Actual                | 0.6           | 0.0              |
| Q2 FY17 Actual                | 0.1           | 0.6              |
| Q3 FY17 Forecast              | 0.7           | 0.2              |
| Q4 FY17 Forecast              | 0.8           | 0.0              |
| FY17 Total                    | 2.1           | 0.8              |
| <b>FY17 (Program to date)</b> | <b>\$30.4</b> | <b>\$27.9</b>    |
| Q1 FY18 Forecast              | 0.5           | 0.0              |
| Q2 FY18 Forecast              | 0.5           | 0.0              |
| Q3 FY18 Forecast              | 0.5           | 0.0              |
| Q4 FY18 Forecast              | 0.5           | 0.0              |
| FY18 Total                    | 2.0           | 0.0              |
| <b>FY18 (Program to date)</b> | <b>\$32.5</b> | <b>\$27.9</b>    |

*NOTE:*

Forecast referenced above, as of Feb 2017



**New gTLD Auction Proceeds and Fees  
As of 31 March 2017  
Program To Date  
In Thousands**

| Description                                | Proceeds             | Costs              | Net Proceeds         |
|--------------------------------------------|----------------------|--------------------|----------------------|
| <b>Auction Development Costs</b>           |                      |                    |                      |
| Direct Contention                          |                      | \$230,000          |                      |
| Indirect Contention                        |                      | \$120,000          |                      |
| Wilmington Trust Annual Fee                |                      | \$1,750            |                      |
| <b>Subtotal: Auction Development Costs</b> | <b>\$ -</b>          | <b>\$351,750</b>   | <b>(\$351,750)</b>   |
| <b>4 June 2014 Auction</b>                 |                      |                    |                      |
| Completed Auctions                         | \$600,000            | \$24,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 4 June 2014 Auction</b>       | <b>\$600,000</b>     | <b>\$24,500</b>    | <b>\$575,500</b>     |
| <b>9 July 2014 Auction</b>                 |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$10,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 9 July 2014 Auction</b>       | <b>\$ -</b>          | <b>\$10,500</b>    | <b>(\$10,500)</b>    |
| <b>6 August 2014 Auction</b>               |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$20,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 6 August 2014 Auction</b>     | <b>\$ -</b>          | <b>\$20,500</b>    | <b>(\$20,500)</b>    |
| <b>17 September 2014 Auction</b>           |                      |                    |                      |
| Completed Auctions                         | \$14,349,776         | \$573,991          |                      |
| Scheduled and Cancelled                    |                      | \$60,000           |                      |
| Escrow Fees                                |                      | \$3,750            |                      |
| <b>Subtotal: 17 September 2014 Auction</b> | <b>\$14,349,776</b>  | <b>\$637,741</b>   | <b>\$13,712,035</b>  |
| <b>22 October 2014 Auction</b>             |                      |                    |                      |
| Completed Auctions                         | \$12,889,463         | \$515,579          |                      |
| Scheduled and Cancelled                    |                      | \$100,000          |                      |
| Escrow Fees                                |                      | \$5,750            |                      |
| <b>Subtotal: 22 October 2014 Auction</b>   | <b>\$12,889,463</b>  | <b>\$621,329</b>   | <b>\$12,268,134</b>  |
| <b>19 November 2014 Auction</b>            |                      |                    |                      |
| Completed Auctions                         | \$700,000            | \$28,000           |                      |
| Scheduled and Cancelled                    |                      | \$150,000          |                      |
| Escrow Fees                                |                      | \$4,250            |                      |
| <b>Subtotal: 19 November 2014 Auction</b>  | <b>\$700,000</b>     | <b>\$182,250</b>   | <b>\$517,750</b>     |
| <b>17 December 2014 Auction</b>            |                      |                    |                      |
| Completed Auctions                         | \$6,447,888          | \$257,916          |                      |
| Scheduled and Cancelled                    |                      | \$90,000           |                      |
| Escrow Fees                                |                      | \$3,500            |                      |
| <b>Subtotal: 17 December 2014 Auction</b>  | <b>\$6,447,888</b>   | <b>\$351,416</b>   | <b>\$6,096,472</b>   |
| <b>21 January 2015 Auction</b>             |                      |                    |                      |
| Completed Auctions                         | \$0                  | \$0                |                      |
| Scheduled and Cancelled                    |                      | \$30,000           |                      |
| Escrow Fees                                |                      | \$750              |                      |
| <b>Subtotal: 21 January 2015 Auction</b>   | <b>\$0</b>           | <b>\$30,750</b>    | <b>(\$30,750)</b>    |
| <b>25 February 2015 Auction</b>            |                      |                    |                      |
| Completed Auctions                         | \$25,001,000         | \$700,020          |                      |
| Scheduled and Cancelled                    |                      | \$40,000           |                      |
| Escrow Fees                                |                      | \$1,750            |                      |
| <b>Subtotal: 25 February 2015 Auction</b>  | <b>\$25,001,000</b>  | <b>\$741,770</b>   | <b>\$24,259,230</b>  |
| <b>25 March 2015 Auction</b>               |                      |                    |                      |
| Completed Auctions                         | \$1,901,000          | \$76,040           |                      |
| Scheduled and Cancelled                    |                      | \$20,000           |                      |
| Escrow Fees                                |                      | \$750              |                      |
| <b>Subtotal: 25 March 2015 Auction</b>     | <b>\$1,901,000</b>   | <b>\$96,790</b>    | <b>\$1,804,210</b>   |
| <b>29 April 2015 Auction</b>               |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$10,000           |                      |
| <b>Subtotal: 29 April 2015 Auction</b>     | <b>\$0</b>           | <b>\$10,000</b>    | <b>(\$10,000)</b>    |
| <b>20 May 2015 Auction</b>                 |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$10,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 25 March 2015 Auction</b>     | <b>\$0</b>           | <b>\$10,500</b>    | <b>(\$10,500)</b>    |
| <b>29 July 2015 Auction</b>                |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$10,000           |                      |
| Escrow Fees                                |                      | \$1,000            |                      |
| <b>Subtotal: 29 July 2015 Auction</b>      | <b>\$0</b>           | <b>\$11,000</b>    | <b>(\$11,000)</b>    |
| <b>14 October 2015 Auction</b>             |                      |                    |                      |
| Scheduled and Cancelled                    |                      | \$10,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 14 October 2015 Auction</b>   | <b>\$ -</b>          | <b>\$10,500</b>    | <b>(\$10,500)</b>    |
| <b>18 November 2015 Auction</b>            |                      |                    |                      |
| Completed Auctions                         | \$2,200,000          | \$88,000           |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 18 November 2015 Auction</b>  | <b>\$2,200,000</b>   | <b>\$88,500</b>    | <b>\$2,111,500</b>   |
| <b>27 January 2016 Auction</b>             |                      |                    |                      |
| Completed Auctions                         | \$41,501,000         | \$1,030,020        |                      |
| Escrow Fees                                |                      | \$750              |                      |
| <b>Subtotal: 27 January 2016 Auction</b>   | <b>\$41,501,000</b>  | <b>\$1,030,770</b> | <b>\$40,470,230</b>  |
| <b>27 July 2016 Auction</b>                |                      |                    |                      |
| Completed Auctions                         | \$135,000,001        | \$2,900,000        |                      |
| Escrow Fees                                |                      | \$500              |                      |
| <b>Subtotal: 27 July 2016 Auction</b>      | <b>\$135,000,001</b> | <b>\$2,900,500</b> | <b>\$132,099,501</b> |
| <b>Current Total</b>                       | <b>\$240,590,128</b> | <b>\$134,565</b>   | <b>\$233,455,563</b> |



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