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DOTCONNECTAFRICA TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL

DOTCONNECTAFRICA TRUST, a Mauritius
charitable trust,

Plaintiff,

v.

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

Defendants.

Case No. BC607494

[Assigned to Hon. Robert B. Broadbelt]

JOINT STATUS REPORT

Date: September 25, 2018

Time: 8:30 a.m.

Dept.: 53

Complaint Filed: January 20, 2016

Trial Date: TBD

Estimated Length of Trial: 10-12 court days

1 **JOINT STATUS REPORT**

2 **TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 Pursuant to this Court’s August 1, 2018 order, Plaintiff DotConnectAfrica Trust
4 (“DCA”), Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”), and
5 Intervenor ZACR Central Registry, NPC (“ZACR”) (collectively “the Parties”), hereby submit
6 the following Joint Status Report, as follows:

7 **I. FACTUAL BACKGROUND**

8 ICANN is a California not-for-profit public benefit corporation that oversees the
9 technical coordination of the Internet’s domain name system (“DNS”). The DNS’s essential
10 function is to convert numeric IP addresses into easily-remembered domain names such as
11 “uscourts.gov” and “ICANN.org.” The portion of a domain name to the right of the last dot (in
12 these examples, “.gov” and “.org”) is known as a generic top-level domain or gTLD. DCA is a
13 not-for-profit corporation that was formed with a charitable mission and objective to advance
14 education in information technology in the African society, and in connection with that
15 objective, to benefit the general Africa public access to Internet services and to apply for, and to
16 operate the continental domain name and new gTLD “.AFRICA.” Intervenor ZACR, formed in
17 1988, is a not-for-profit company based in South Africa.

18 In 2012, ICANN accepted applications in conjunction with its “New gTLD Program,” in
19 which it invited interested parties to apply to be designated the operator of their applied-for
20 gTLD. ICANN’s New gTLD Applicant Guidebook (“Guidebook”) prescribes the requirements
21 for new gTLD applications. The Guidebook requires, among other things, that an applicant for a
22 geographic name provide documentation of support or non-objection from at least 60% of the
23 governments in that region. The Guidebook further provides that a Geographic Names Panel
24 will confirm that each applicant has provided the required documentation, and that “the
25 communication is legitimate and contains the required content.”¹ With respect to DCA’s

26 _____
27 ¹ The Guidebook sets forth the terms and conditions that all applicants accepted by submitting a gTLD application.
28 The Guidebook also includes a covenant not to sue (“Covenant”). Although the Covenant bars lawsuits against
ICANN, ICANN’s Bylaws provide for an independent review process (“IRP”), under which independent panelists
evaluate whether in taking a particular action, the ICANN Board has acted consistently with ICANN’s Articles and
Bylaws.

1 application for .AFRICA, the Geographic Names Review was conducted by the third-party
2 provider InterConnect Communications (“ICC”).

3 ICANN also has an advisory committee called the Governmental Advisory Committee
4 (“GAC”), which is a body consisting of representatives from over 150 international governments
5 and organizations. The GAC was formed to consider and provide advice on the activities of
6 ICANN.

7 **a. Plaintiff’s Claims**

8 ICANN is a California non-profit established by the U.S. government. ICANN is the
9 only organization in the world that assigns rights to Generic Top-level Domains (“gTLDs”). It
10 therefore yields monopolistic power and forces participants in the market for gTLDs to play by
11 its rules. Nevertheless, ICANN’s own Bylaws state that it shall not apply its standards
12 inequitably or single out any particular party for disparate treatment. ICANN is supposed to be
13 accountable to the Internet community for operating in a manner consistent with its Bylaws and
14 Articles of Incorporation as a whole.

15 In consideration of ICANN’s promises to abide by its own Bylaws, Articles of
16 Incorporation, and the Guidebook DCA paid ICANN a \$185,000.00 mandatory application fee.

17 The Guidebook contained the Prospective Release. The Prospective Release states that
18 an applicant “releases ICANN...from any and all claims *by applicant* that arise out of, are based
19 upon, or any are in any way related to, any action, or failure to act, by ICANN...in connection
20 with ICANN’s...review of this application.” ICANN does not release the applicant from any
21 claims.

22 ICANN purports to provide applicants with an Independent Review Process (“IRP”) as
23 an alternative to court action to challenge ICANN’s actions regarding gTLD applications.
24 Although the Prospective Release provides that an applicant may utilize the IRP, the IRP can
25 only review ICANN’s procedural actions, not any substantive claims.

26 With respect to geographic gTLDs like .Africa, ICANN required that applicants obtain
27 endorsements from 60% of the region’s national governments, and have no more than one
28 written statement of objection. DCA obtained the endorsements of the African Union

1 Commission (“AUC”) and the United Nations Economic Commission for Africa (UNECA),
2 among others. In April 2010, nearly a year later, the AUC wrote DCA and informed DCA that it
3 had “reconsidered its approach in implementing the subject Internet Domain Name (.Africa) and
4 no longer endorses individual initiatives in this matter[.]” Presumably, the AUC tried to
5 withdraw its support of DCA because, in 2011, it attempted to obtain the rights to .Africa for
6 itself, requesting that ICANN include .Africa in the List of Top-Level Reserved Names. ICANN
7 denied the AUC’s request to reserve .Africa, and not only advised the AUC via an official letter
8 regarding how to control the delegation outcome of the .Africa string, but assisted AUC in
9 obtaining the .Africa delegation rights through a proxy - ZACR. In exchange for the AUC’s
10 endorsement, ZACR agreed to allow the AUC to “retain all rights relating to the dotAfrica
11 TLD.”

12 Only after this litigation commenced did ICANN argue that DCA’s application lacked
13 merit because its AUC endorsement had been withdrawn. Not only did the August 2010 letter
14 from the AUC fail to expressly withdraw the AUC’s endorsement of DCA, but it lacked the
15 signature of the AUC’s chairman who signed the original endorsement letter. Further, Section
16 2.2.1.4.3 of the Guidebook states that a “government may withdraw its support for an application
17 at a later time...*if the registry operator has deviated from the conditions of original support or*
18 *non-objection.*” There were no conditions on the AUC or UNECA endorsements to DCA. The
19 letter was sent to ICANN at the same time it was sent to DCA, and ICANN continued to process
20 DCA’s application nonetheless – recognizing the continued validity of the endorsement. ICANN
21 testified that it had not considered the AUC endorsement letter withdrawn in evaluating DCA’s
22 application; ICANN’s only objection, was with respect to the fourth, and non-mandatory
23 geographic names evaluation factor.²

24 The AUC became a member of the GAC in 2012, through ICANN’s guidance. Then,
25 with ICANN’s direction, the AUC employed the GAC as a vehicle to issue advice against
26 DCA’s application. This effectively allowed the AUC to ensure that the rights to .Africa would
27 be delegated to itself – through its proxy ZACR. But the GAC’s advice was arbitrary. ICANN

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² This factor is discretionary in that it is framed as a “should” while the other factors are framed as “must.”

1 rejected DCA's application based on that GAC advice. ICANN refused to reconsider this
2 decision.

3 Subsequently, ICANN also ghostwrote an endorsement for ZACR to submit to the AUC
4 for its signature.

5 In October 2013, DCA successfully sought an IRP to review ICANN's processing of its
6 application, including ICANN's handling of the GAC opinion. During the IRP, ICANN took
7 every possible step to limit the evidentiary review and IRP's power. Despite the initiation of the
8 IRP, ICANN passed ZACR's application – *even signing a contract for the operation of .Africa*
9 *with ZACR*. The IRP panel, during emergency proceedings, found this improper and enjoined
10 further issuance of .Africa to ZACR. DCA succeeded in the IRP, which held ICANN's actions
11 in rejecting DCA's application violated ICANN's Articles of Incorporation or Bylaws. The IRP
12 panel declared that both the actions and inactions of the Board with respect to the application of
13 DCA Trust relating to the .Africa gTLD were inconsistent with the Articles of Incorporation and
14 Bylaws of ICANN.

15 ICANN did not act in accordance with the IRP's Final Declaration. Instead of allowing
16 DCA's application to proceed through the *remainder* of the application process, ICANN forced
17 DCA to be reevaluated in the geographic names evaluation phase. Although ICANN never
18 challenged DCA's endorsements as insufficient prior to the IRP, and had already agreed to
19 accept regional endorsements from the AUC and UNECA, ICANN now claimed that DCA's
20 endorsements were insufficient as to a fourth, non-mandatory factor set forth in the Guidebook –
21 that the endorsement *should* demonstrate the endorser's understanding that the gTLD is being
22 sought through ICANN, subject to ICANN's conditions.

23 Against the backdrop that the Geographic Names Panel had cautioned ICANN that it
24 risked treating one application (DCA's) unfairly and favoring the other .Africa application
25 (ZACR's), ICANN assisted ZACR's application by helping to draft and prepare an endorsement
26 letter that was set to the AUC for signing, and again accepted by ICANN as a satisfactory
27 endorsement letter to enable ZACR to fulfill the geographic names government support
28 requirement and pass the Geographic Names Panel review.

1 ICANN then sent cursory clarifying questions to DCA and ultimately rejected DCA’s
2 application after DCA reiterated that its endorsements were sufficient. DCA then filed suit.

3 **b. ICANN & ZACR’s Claims/Defenses**

4 In 2012, ICANN received two applications for .AFRICA, one from DCA and one from
5 ZACR. DCA submitted six letters of support with its application for .AFRICA – one from the
6 African Union Commission (“AUC”) (secretariat for the African Union) dated August 27, 2009,
7 one from the United Nations Economic Commission for Africa (“UNECA”) dated August 8,
8 2008, three from individual African countries, and one from the South African Embassy in
9 Washington, D.C. ZACR submitted 41 letters of support with its application, including over
10 thirty letters from individual African governments and a 2012 letter from the AUC.

11 The evidence is clear that DCA did not have the 60% support needed from the
12 governments of Africa to meet the Guidebook requirement for .Africa. The AUC, acting on
13 behalf of its then 54 member governments in Africa, held an open process to endorse a qualified
14 candidate. DCA chose not to participate in that open process. ZACR did participate and
15 received the AUC endorsement on behalf of the governments of Africa (and also received the
16 endorsement of Morocco, which has since rejoined the AUC). Having passed each of the criteria
17 set forth in the ICANN Guidebook, and with the AUC’s express endorsement, including
18 providing an updated letter from the AUC during the ICANN application review process, ZACR
19 was selected by ICANN to serve as the registry for .Africa. By contrast, DCA lacked AUC
20 support and thus did not (and could not) provide an updated contemporaneous letter
21 demonstrating the required African governmental support. This litigation is now premised on
22 DCA’s contention that it should have been allowed to bypass this critical requirement, and
23 should have been awarded .Africa notwithstanding that the governments of Africa did not
24 support DCA’s application at the time DCA submitted its application to ICANN or at any time
25 thereafter.

26 ICANN has proffered evidence that, in April 2010 (over two years before DCA submitted
27 its application), the AUC sent DCA a letter that formally withdrew its support for DCA’s
28 application, stating that the AUC intended to conduct an “open process” to identify the entity that

1 the AUC would endorse as the potential operator of the .AFRICA gTLD. DCA submitted its
2 application in 2012 and included the 2009 AUC support letter, but did not include the 2010 AUC
3 withdrawal letter. In doing so, ICANN argues that DCA directly violated rules set forth in the
4 Guidebook.

5 In 2013, ICANN determined that both DCA and ZACR had passed all other stages of the
6 application process except the Geographic Names Review. During the Geographic Names
7 Review, the ICC determined that *all* of the letters of support submitted by DCA and most of the
8 letters initially submitted by ZACR failed to meet one or more of the four requirements of
9 Section 2.2.1.4.3 of the Guidebook or were otherwise not appropriate letters of support as
10 required by the Guidebook. When an endorsement letter does not comply with the Guidebook
11 requirements, the ICC directs “clarifying questions” to the applicant; the applicant then has the
12 opportunity to obtain an updated letter from the endorsing entity or government. In the Spring of
13 2013, the ICC drafted clarifying questions for both DCA and ZACR. In response, ZACR
14 obtained a revised letter from the AUC; the AUC had been supporting ZACR’s application since
15 2012. The ICC determined that the revised letter satisfied all the criteria in the Guidebook;
16 accordingly, ZACR passed the Geographic Names Review.

17 On April 11, 2013, before the clarifying questions could be sent to DCA, the GAC issued
18 “consensus advice” that DCA’s application should not proceed. On June 4, 2013, the ICANN
19 Board accepted the GAC’s advice, which halted the processing of DCA’s application.
20 Accordingly, ICANN told the ICC to discontinue processing DCA’s application.

21 Thereafter, pursuant to the available accountability mechanisms set forth in ICANN’s
22 then operative Bylaws, DCA initiated an “Independent Review Process” or IRP challenging the
23 Board’s acceptance of the GAC’s advice. On July 9, 2015, following an exhaustive twenty-
24 month process that included discovery, extensive briefing, and a live hearing with opening
25 statements, witness examination, and closing arguments, the IRP Panel found in DCA’s favor in
26 a 63-page final declaration. The IRP Panel concluded that, rather than defer to the GAC’s
27 advice, ICANN should have “investigate[d] the matter further.”

1 The ICANN Board adopted the IRP Panel’s recommendations, and ICANN returned
2 DCA’s application to the exact same place in processing that the application had been in prior to
3 the Board’s 2013 decision to stop work on the application. ICANN asked the Geographic Names
4 Panel to continue its evaluation of DCA’s application and to determine whether DCA had the
5 required support or non-objection from 60% of the governments of Africa. The ICC promptly
6 sent clarifying questions to DCA. The clarifying questions explained, among other things, that
7 the letters DCA had provided from the AUC and UNECA did not meet the Guidebook’s
8 requirements and asked for updated letters. The clarifying questions were nearly identical to
9 those sent to ZACR in 2013. DCA did not, however, provide an updated letter from the AUC or
10 UNECA; instead, DCA continued to take the position that the 2008 and 2009 letters were
11 sufficient to pass Geographic Names Review.

12 Because DCA was unable to provide updated support letters, the ICC determined that
13 DCA’s application did not pass the Geographic Names Review. ICANN then issued an Initial
14 Evaluation Report notifying DCA that its application had failed, but that DCA was eligible for
15 “Extended Evaluation.” In Extended Evaluation, DCA again received clarifying questions
16 explaining that its support letters were deficient and requesting updated letters. Again, DCA
17 claimed that the 2009 AUC letter and 2008 UNECA letter were sufficient and refused to provide
18 updated letters. As a result, ICANN issued an Extended Evaluation Report on February 17,
19 2016, notifying DCA that its application had not passed the Geographic Names Review and
20 would not proceed.

21 **II. PROCEDURAL HISTORY**

22 DCA filed this lawsuit in Los Angeles Superior Court in January 2016. ICANN removed
23 the case to federal court in February 2016.³ In October 2016, after ZACR intervened in the
24 federal court and caused that court to lose diversity jurisdiction, the case was remanded to this
25 Court. The Court set a September 13, 2017 trial date. The parties later stipulated to a February
26 28, 2018 trial date.

27 _____
28 ³ DCA originally named ZACR as a party defendant. The federal district court granted ZACR’s motion to dismiss
on all causes of action. However, ZACR subsequently moved to intervene to protect its rights given DCA’s ongoing
claims and request for injunctive relief relating to .Africa.

1 The complaint initially involved ten causes of action against ICANN, including breach of
2 contract claims and claims for declaratory relief. All of the claims relate to ICANN's processing
3 of DCA's application for .AFRICA. On May 26, 2017, ICANN moved for summary judgment
4 on the grounds that DCA's lawsuit was barred both by a Covenant Not to Sue and Release
5 contained in the Guidebook, and by the doctrine of judicial estoppel due to DCA's positions on
6 whether it was permitted to sue ICANN. On August 9, 2017, the Court ruled on ICANN's
7 motion for summary judgment, granting it in part (and thereby entering judgement in ICANN's
8 favor on the non-fraud causes of action), and further ruled that the trial would be bifurcated. The
9 Court set a bench trial on the issue of whether DCA's lawsuit was blocked by the doctrine of
10 judicial estoppel for February 28, 2018 (Phase One), and set a jury trial on DCA's remaining
11 fraud-based causes of action for April 4, 2018 (Phase Two). ICANN subsequently moved for a
12 different hearing date for its anticipated additional Motion for Summary Judgment. The earliest
13 hearing date the Court had was May 14, 2018. Accordingly, the Court continued the trial on the
14 merits to June 20, 2018. DCA opposed both ICANN's motion for a different summary judgment
15 hearing date and the continuance of the trial date.

16 On December 13, 2017, the Court vacated the June 20, 2018 trial date due to conflicts on
17 its calendar and asked the parties to meet and confer on a new trial date. On January 23, 2018,
18 after the parties stipulated to the date, the court set trial for August 22, 2018.

19 From February 28-March 1, 2018, Judge Halm held a bench trial on the judicial estoppel
20 issue. Judge Halm set the hearing for closing arguments for March 26. Due to the court's
21 calendar, the closing argument was continued several times to April 4, April 17, and May 7; on
22 May 7, due to illness of Plaintiff's counsel, it was continued again until May 22.

23 On May 22, 2018, Judge Halm indicated that he would be retiring before the August 22,
24 2018 trial on the merits (Phase Two) and offered to schedule an earlier trial date in July. Due to
25 the unavailability of ICANN's lead trial counsel in the first half of July and the fact that the
26 parties had not yet completed discovery, disclosed experts or completed expert discovery,
27 ICANN and ZACR declined that offer. Judge Halm also indicated his belief that due to his
28 unavailability to hear Phase Two, he could no longer render a decision on Phase One. After

1 researching the issue, ICANN and ZACR agreed that Judge Halm could no longer decide Phase
2 One, but DCA continued to argue that Judge Halm was permitted to render a decision on Phase
3 One. Thus, the Court set a hearing date on that issue (and for the still unheard closing arguments
4 on Phase One, if permissible) for June 1, which was then continued to July 20, and then again
5 continued by the Court to August 1.

6 On June 11, 2018, ICANN and ZACR filed an *ex parte* application to continue or vacate
7 the trial date on the basis that the parties likely would not know the outcome of Phase One –
8 which could determine not only the scope of Phase Two, but whether Phase Two would occur at
9 all – until Phase Two trial preparations were well underway. Judge Halm continued the *ex parte*
10 to be heard in conjunction with the arguments on July 20 (later continued again until August 1)
11 and indicated that he was leaning towards ruling that two different judges could decide Phase
12 One and Phase Two.

13 The parties continued to prepare for Phase Two, scheduled for August 22, 2018,
14 including by filing motions *in limine*, exchanging exhibit lists and deposition designations,
15 designating experts, taking one expert deposition, and scheduling the other expert depositions.

16 On August 1 – two days before Judge Halm was retiring – he held the hearing. Judge
17 Halm declared a mistrial on the ground that the same judge must preside over both phases of a
18 bifurcated trial unless the parties otherwise stipulate; and therefore, did not hear closing
19 arguments. Judge Halm also granted ICANN’s *ex parte* application and vacated the Phase Two
20 August 22 trial date. Judge Halm also set a status conference before the Court for the day after
21 the new Judge’s arrival, on September 25.

22 On August 17, 2018, DCA filed an *ex parte* in this Court (before temporary Judge Mohr),
23 for an order determining the status of discovery, which DCA has argued reopened as a result of
24 Judge Halm’s rulings on August 1, 2018. Judge Mohr converted that *ex parte* into a noticed
25 motion and set the hearing date for September 25, 2018, the same date as the status conference in
26 this matter. Judge Mohr ordered that any deadlines relating to discovery would be continued
27 until 14 days after the hearing September 25, 2018, without prejudice to Defendants’ making the
28 argument that no additional discovery is permitted. (8/17/18 minute order).

1 On August 31, 2018, ICANN filed a Motion to Strike DCA’s Expert Designations, which
2 ICANN argues should be excluded because (among other things), DCA failed to comply with the
3 expert disclosure requirements, missed applicable deadlines to disclose its experts, and
4 improperly attempted to name “rebuttal” experts. ICANN’s motion is also set for hearing on
5 September 25, 2018.

6 **III. OUTSTANDING ISSUES**

7 **a. Motions**

8 On September 25, 2018, the Court will hear DCA’s motion for an order on the status of
9 discovery given the mistrial of the Phase One trial. In the event that the Court declares discovery
10 reopen, DCA will file a motion for sanctions and to compel further discovery responses from
11 ICANN relating to spoliation of evidence. In the event that the Court declares discovery closed,
12 DCA will file a motion to reopen discovery so that it may file the previously mentioned motion
13 for sanctions as well as an additional motion to compel further responses from ICANN and
14 ZACR on discovery served just before the close of discovery in this matter.⁴ ICANN and ZACR
15 have opposed DCA’s motion to declare discovery reopen, and will oppose any subsequent
16 motions attempting to reopen discovery or discovery-related motion practice.

17 Also on September 25, 2018, the Court will hear ICANN’s Motion to Strike DCA’s
18 Expert Designations.

19 **b. Trial Date**

20 The parties are discussing proposals for next steps with respect to both Phases One and
21 Two and will discuss these matters with the Court at the Case Management Conference. The
22 parties provide below the dates on which they are unavailable for trial in October 2018 through
23 January 2019:

24 DCA: November 16 – January 1, 2019, January 16 – 24

25 ICANN: October 15 through October 28, 2018

26 November 19 through December 4, 2018
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28 ⁴ DCA will not need to file this motion if discovery is open because ICANN will presumably agree to supplement its responses or DCA can re-serve the requests at issue.

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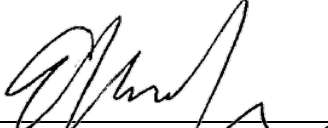
December 20, 2018 through January 4, 2019
ZACR: October 10-12, 23-24, and 29, 2018
November 6-8, and 19-23, 2018
December 17-31, 2018

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Dated: September 20, 2018


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Dated: September 20, 2018

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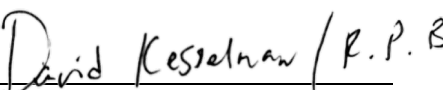
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Dated: September 20, 2018

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