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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a
13 Mauritius Charitable Trust,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS, a
18 California Corporation; ZA CENTRAL
REGISTRY, a South African non-profit
company; and DOES 1-50, inclusive;

19 Defendant.

[Assigned for all purposes to:
Hon. Howard L. Halm Dep't 53]

Case No.: BC607494

**OPPOSITION TO DEFENDANT
ICANN'S MOTION FOR PROTECTIVE
ORDER**

Date: December 13, 2017
Time: 8:30 a.m.
Dep't.: 53

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On June 4, 2013, the Board of Defendant Internet Corporation for Assigned Names and
4 Numbers (“ICANN”), voted to reject Plaintiff DotConnectAfrica Trust’s (“DCA”) application.
5 ICANN voted to do this, based on flawed advice that it accepted from its
6 Governmental Advisory Committee (“GAC”). This was factually determined, in the
7 Independent Review Panel (IRP) Process, where DCA challenged ICANN’s improper
8 rejection of its .Africa new gTLD application.

9 One of those members of ICANN’s Board who voted on the flawed advice, was Mike
10 Silber (“Silber”), the individual subject to this motion and who DCA intends to depose. Prior
11 to that decision, DCA had submitted a complaint to the ICANN Ombudsman citing a conflict
12 of interest with Silber, through his former affiliation as a director of DCA’s only competitor
13 for .Africa, intervenor ZA Central Registry, NPC (“ZACR”) and his affiliation at the time as
14 Treasurer and Director of the .za Domain Name Authority (“ZADNA”). When DCA
15 submitted its complaint regarding Silber’s conflict of interest, ZADNA was also in a business
16 relationship with UniForum ZACR for the administration of the .za South African country-
17 code top-level domain name (ccTLD) and had also officially endorsed ZACR’s .Africa
18 application that was submitted to ICANN. Thus, Silber was a former director of DCA’s
19 direct competitor, was a member of an organization that had officially endorsed ZACR’s
20 application, and yet remained on the ICANN Board and made decisions on whether DCA’s
21 .Africa application (ZACR’s competitor), would be rejected. Silber should have recused
22 himself from taking any action, let alone making any final decisions, as to the .Africa
23 applications.

24 DCA seeks Silber for many reasons including to determine the extent of Silber’s
25 apparent conflict of interest, any influence he may have had over the ICANN board in ruling
26 against DCA’s application, and the extent of ICANN’s investigation into Silber’s conflict of
27 interest. This information, goes directly to the heart of DCA’s claims for fraud and negligent
28 misrepresentation, in that ICANN had decided from the start, to improperly reject DCA’s
.Africa application and ensure that ZACR’s application succeeded. DCA further seeks to

1 depose Silber because as an ICANN Board member, he would have had direct insight into the
2 decision-making of the ICANN Board, when it rejected DCA's application.

3 ICANN argues that Silber's testimony is irrelevant. As explained above, however, Silber
4 was involved in a number of decisions regarding DCA's Africa application. ICANN further
5 argues that a third-party, the ICANN Ombudsman, already made a determination that Silber was
6 not conflicted. ICANN does not disclose that the Ombudsman's decision, was based on the fact
7 that Silber had not yet made any decision on DCA's application (prior to the time of the
8 investigation) and ruled that any disqualification was therefore premature. The Ombudsman
9 further admitted that he had no power to make recommendations that the ICANN Board consider
10 anything. Thus, the Ombudsman's decision in no way resolves the issues DCA seeks to discover
11 through Silber's deposition.

12 ICANN also argues that Silber's one vote would not have changed the Board's decisions
13 regarding DCA's application. But that does not mean that Silber did not have an influence on
14 the vote. If Silber in any way participated in the decision, when he was conflicted, his influence
15 goes to the heart of DCA's claims.

16 Finally, the IRP decision does not moot this issue, as ICANN proposes. The decision of
17 the ICANN Board (with Silber voting) to reject DCA's application, was improper. The IRP
18 made that factual finding. But that finding did not make a determination of whether ICANN
19 intentionally rejected DCA's application, in spite of the rules it agreed to follow. If ICANN
20 rejected DCA's application because it wanted ZACR to succeed, and since Silber was involved
21 in that decision to reject DCA's application, Silber's testimony is material.

22 With respect to the document requests, DCA has asked ICANN numerous times to
23 confirm that it has produced all documents responsive to the requests it has been served with.
24 ICANN has never provided a response to the question. To the extent ICANN has not produced
25 any documents responsive to the requests, they should be ordered to do so. DCA has no interest
26 in having ICANN produce, or in reviewing, duplicative documents.

27 For the foregoing reasons explained below in more detail, DCA respectfully requests the
28 Court deny ICANN's Motion for Protective Order.

1 **II. BACKGROUND**

2 **a. The First Amended Complaint**

3 In January 2016, DCA filed its lawsuit against ICANN in this Court. (*See* Complaint.)
4 The proceeding was removed to federal court, where DCA amended its Complaint, and
5 eventually was remanded back to this Court for further proceedings. (*See* Notice of Remand.)
6 After the parties conducted some discovery, ICANN filed a motion for summary judgment. (*See*
7 ICANN MSJ.) The Court denied in part, and granted in part, ICANN’s MSJ, leaving DCA’s
8 second through fifth, and tenth causes of action remaining. The remaining causes of action are
9 intentional misrepresentation, negligent misrepresentation, fraud and conspiracy to commit
10 fraud, and declaratory relief. (*See* FAC.)

11 As to its fraud causes of action, DCA alleges that:

12 “[ICANN] had no intention of following its Bylaws, Articles of
13 Incorporation or the rules outlined in the gTLD Applicant Guidebook.
14 ICANN’s rules state that three criteria are used to object to a specific
15 applicant by the GAC: problematic, potentially violating national law, and
16 raises sensitivities. However, ICANN’s Board representative testified on
17 behalf of ICANN during the IRP hearing that the GAC and ICANN’s
18 Board did not in fact follow the published rules for issuing a GAC
19 objection (FAC ¶ 75a);”

17 “ICANN had no intention of ever participating in an IRP process in good-
18 faith and at all times believed it would do whatever it wanted. And when
19 forced to participate in IRP proceedings, ICANN argued that the IRP was
20 not binding. After the IRP Declaration, ICANN followed through with its
21 intention to act according to its own wishes and desires regardless of the
22 IRP ruling and procedure (FAC ¶ 75b);” and

21 “ICANN never had any intention of treating applicants the same or
22 making them follow the same rules. Instead, ICANN simply chose
23 applicants based on its own wishes and in exchange for political favors.
24 As an example, ICANN allowed ZACR to break its rules and procedures
25 by not requiring ZACR to submit a Community Top Level Domain
26 application for .Africa even though the AUC had claimed that it had
27 endorsed ZACR to apply on behalf of the African community (FAC ¶
28 76).”

27 **b. Mike Silber’s Conflict of Interest**

28 One of the main principles surrounding DCA’s claims for misrepresentation, is ICANN’s
intention in processing DCA’s application. ICANN admits that Silber was a member of ICANN’s

1 board when it intentionally and improperly (as determined by the IRP) accepted the GAC's advice
2 to reject DCA's application. (Motion at 1:9-14.) Silber's information on that decision, or any
3 decision thereafter in processing DCA's application, is highly relevant to this proceeding, and to
4 DCA's remaining claims for fraud. Mr. Silber clearly had a conflict of interest while participating
5 in the processing of DCA's application, but ICANN ignored that conflict.

6 For example, Mr. Silber and Lucky Masilela (of ZACR) have an ongoing professional
7 relationship both at ZADNA and ZACR based on the cross-cutting relationship that exists between
8 ZADNA and ZACR over the .za ccTLD, and the endorsement and collaborative support ZACR
9 received from ZADNA for .Africa. (*See* Declaration of Sophia Bekele Eschete ("Bekele Decl."),
10 ¶¶ 9-10, Exs. 8, 9.)

11 Mr. Silber failed to adequately disclose this relationship with ZACR even after DCA
12 complained of the conflict. After DCA's complaint, Mr. Silber updated his statement of interest
13 ("SOI") to say "[Mr. Silber] is also a director and Treasurer of the .za Domain Name Authority,
14 the ccTLD administrator for .za. The .za Domain Name Authority has concluded an arms-length
15 operating agreement with UniForum to operate the .za registry. Under the agreement, UniForum
16 will collect and pay transaction fees to .za Domain Names Authority. UniForum is acting as the
17 registry services provider for various new gTLD applicants." (*See* Bekele Decl., ¶ 7, Ex. 6.)

18 In the SOI, Mr. Silber did not indicate the collaborative agreement that ZADNA had with
19 ZACR over .Africa; i.e. the cooperative support and endorsement that ZADNA had provided to
20 ZACR over .Africa. Similarly, Mr. Silber was not transparent enough whilst updating his SOI in
21 mentioning clearly that UniForum was acting as the registry services provider for various new
22 gTLD 'applications' including .Africa", even though he was undoubtedly aware that UniForum
23 was also applying for .Africa. Again, stating 'applicants' instead of 'applications' made his SOI
24 less transparent.

25 Therefore, Mr. Silber deliberately tried to downplay the closeness of the relationship
26 between ZADNA and UniForum ZACR by calling it 'arms length' – even though Mr. Silber was
27 sitting on the ZADNA Board that directly supervised the operations of UniForum ZACR as
28 operator of the South African ccTLD .za domain name, and other second-level domains such as

1 .co.za, .org.za, etc. that UniForum ZACR managed and technically administered on behalf of
2 ZADNA.

3 Even after the conclusion of the IRP Panel proceedings; and whilst the instant lawsuit was
4 already pending, Mr. Silber continued to involve himself in discussions and making comments
5 regarding .Africa, which shows that he had a (continuing) special interest in the matter. A good
6 example is demonstrated by what transpired at the ICANN GAC meeting discussions with the
7 ICANN Board at Marrakech on March 9, 2016. Mr. Silber was reported in the meeting transcripts
8 as saying: “Thank you, Chair. Thank you for the intervention, Namibia. It’s greatly appreciated. I
9 think you have the commitment from ICANN, the Board and the staff to not let the litigation issues
10 intervene; and we will pursue the finalization of this issue with diligence and all appropriate
11 measures to ensure that the interests of all parties are protected.” (*See* Bekele Decl., ¶7, Ex. 6.)

12 It is important to note that Mr. Silber gave a blanket commitment on behalf of the ICANN
13 organization, the ICANN Board and ICANN staff and reassuring the GAC Representative of an
14 African country (Namibia) that an ongoing litigation over .Africa would not intervene – but that
15 the issue will be finalized with a single-minded purpose to protect the interest of all parties –
16 presumably a reference to AUC, ZACR, and ICANN but not DCA.

17 As another example, during the ICANN GAC meeting discussions with the ICANN Board
18 at Marrakech on March 9, 2016, the African Union Commission representative to the ICANN
19 GAC had made an oral presentation which was recorded in the meeting transcripts. The AUC
20 representative gave “special thanks to Mike [Silber] who supported us in the .AFRICA issue.”
21 This raises the highly relevant question of what support Mike Silber rendered to the AUC on the
22 .AFRICA issue that singled him out for special honorable mention and appreciation by the AUC
23 – the supposed partner/co-applicant of ZACR for .Africa. (*See* Bekele Decl., ¶7, Ex. 6.)

24 **c. Mike Silber and the Ombudsman**

25 On July 18, 2012, DCA wrote to ICANN, regarding the apparent conflict of interest that
26 existed with Silber, an ICANN Board member. (Bekele Decl., ¶ 2, Ex. 1.) DCA explained that
27 Silber was (1) a current member of the ICANN Board of Directors from South Africa, (2) a
28 current member of the Board of Directors of the South African Domain Names Authority
(ZADNA), and (3) that he was a former director of UniForum ZACR. (*Id.*) DCA argued that

1 those affiliations biased Silber’s decision-making, and that he should recuse himself from
2 decisions regarding the .Africa gTLD, or else DCA’s would suffer strong prejudice. (*Id.*) DCA
3 expressly requested that ICANN prohibit Silber from taking part “in any discussion or decision
4 or evaluation activities relating to the new gTLD applications submitted for Africa (.africa).”
5 (*Id.*) ICANN claims to have considered the conflict of interest issue during a board meeting. It
6 promised to provide a transcript of that meeting during the IRP, but has thus far failed to do so.
7 (*See* Bekele Decl., ¶5, Ex. 4.)

8 In October later that year, DCA submitted a formal complaint to the ICANN
9 Ombudsman, again raising its concern with Silber being an ICANN Board member, who would
10 ultimately take part in the decision to reject or accept DCA’s .Africa gTLD application. (*Id.*, ¶ 3,
11 Ex. 2.) Ultimately, the Ombudsman concluded that Silber (and the other member DCA raised
12 conflict issues with) made no decisions at that point that could have affected DCA’s application.
13 (*Pushinsky* Decl. ¶ 4, Ex. B.) The Ombudsman stated:

14 “I consider that no disqualifying conflict of interest, or indeed any conflict
15 of interest at all, *is present in the actions* of both Chris Disspain and Mike
16 Silber” (*Id.* [emphasis added].)

17 But in finding this, the Ombudsman qualified his investigation and conclusion:

18 “It is in my view premature to consider whether there can even be
19 apparent bias, because it is too remote to link suggested connections with
20 the very generic discussions which have taken place, and in addition,
21 where the actual decisions about the applications are still some distance
22 from being made.” (*Id.*)

23 Importantly, the Ombudsman emphasized that:

24 “If there is a conflict of interest then this would result in unfairness,
25 which under Bylaw V, is a matter that I can investigate. The
26 complainant’s issue is of course one of considerable importance if
27 proved.” (*Id.*)

28 **Thus, the Ombudsman made no definitive decision as to whether Silber had a
conflict of interest that would justify his recusal from the ICANN Board. The Ombudsman**

1 **merely held that Silber had not participated in any decisions at that point that justified**
2 **removing him from the ICANN Board New gTLD Program Committee.**¹

3 Had the Ombudsman made a finding to recuse Silber, it would have been useless anyway.
4 Ms. Bekele wrote to the Ombudsman after he sent a draft of his report to the parties, asking him
5 to recommend to the ICANN Board that Silber recuse himself from further actions with respect
6 to the .Africa applications. (*Id.*, ¶ 4, Ex. 3.) The Ombudsman replied and told Ms. Bekele that
7 he had spoken to the general counsel for ICANN, John Jeffrey, and *did not have the power to*
8 *make any recommendation to the board* with respect to any Board members recusing themselves.
9 (*Id.*) Just like the IRP, the Ombudsman’s review is yet another illusory process which ICANN
10 touts to be available for redress. This is also apparent from ICANN’s Bylaws regarding the
11 Ombudsman. (Puskinsky Decl. ¶ 13, Ex. H at Art. V, § 3, ¶ 2.)

12 Although DCA complained to the Ombudsman, and the Ombudsman investigated
13 possible conflicts of interest, the Ombudsman made his report based on the fact that no decisions
14 had been made with respect to DCA’s .Africa application by Silber, not on the question of
15 whether Silber was conflicted and should recuse himself. Finally, under ICANN’s conflict rules,
16 Silber only had to disclose present possible interests, so the Ombudsman did not take into
17 consideration whether Silber’s former affiliation with UniForum ZACR justified recusal.

18 **d. ICANN’s Decision to Reject DCA’s Application**

19 On April 11, 2013, the ICANN GAC issued consensus advice that DCA’s .Africa
20 application should not continue. (Puskinsky Decl. ¶ 15, Ex. J at ¶ 112.) The GAC has three
21 possible grounds for issuing consensus advice according to the New gTLD Guidebook, the rules
22 that govern the processing of gTLD applications, and the GAC did not provide any reason for its
23 decision. (Bekele Decl., ¶ 5, Ex. 4 at ¶ 104.) At that time, Silber was a Board member of
24 ICANN, and one of the Board members that voted to reject DCA’s application, even though the
25 GAC advice was flawed.

26 When DCA appealed that decision to the IRP, the IRP reversed ICANN’s decision. The
27 IRP panel unanimously decided against ICANN and recommended that ICANN “continue to
28

¹ The IRP specifically noted that the Ombudsman report was based on the fact that no decisions with respect to DCA were made at that point by Silber. (Bekele Decl., ¶ 4, Ex. 3 at 213:1-11.)

1 refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed
2 through the remainder of the gTLD application process.” (*Id.* at ¶ 149.)

3 ICANN placed DCA back at the geographic names panel, and eventually rejected DCA’s
4 application for a second time. DCA then filed suit against ICANN in this Court.

5 **e. Notice of Deposition of Mike Silber**

6 On October 4, 2017, DCA noticed the deposition of Mike Silber and requested that Silber
7 provide documents at this deposition. (Pushinsky Decl. ¶ 2, Ex. A.) To the date of this filing,
8 Silber remains a Board member of ICANN.² Although the IRP ruled in favor of DCA as to
9 ICANN’s Board’s decision (with Silber voting) to reject DCA’s application, the IRP did not make
10 any finding as to Silber’s conflict of interest, influence on fellow Board members, or any
11 discussions that the ICANN Board had prior to rejecting DCA’s application the first time. The
12 IRP did not contemplate the Board’s rejection of DCA’s application a second time because the
13 second rejection occurred after the IRP panel issued its ruling that DCA’s application should be
14 permitted to proceed through the remainder of the new gTLD application process.

15 Silber had been affiliated with DCA’s only competitor before the .Africa gTLD application
16 process started. Silber was also affiliated with ZADNA, who had a business agreement with
17 ZACR, and also officially endorsed and supported ZACR’s application. Yet Silber still voted on
18 whether to accept or reject DCA’s application.

19 DCA noticed Silber’s deposition, to question him on the ICANN Board’s June 4, 2013
20 initial vote with respect to rejecting DCA’s application, the ICANN second decision to reject
21 DCA’s application in February 2016, Silber’s relationship with ZADNA, Silber’s relationship with
22 ZACR, Silber’s involvement in the ICANN New gTLD Program Committee (“NGPC”), Silber’s
23 involvement in the ICANN Board Governance Committee (“BGC”) and many other topics.

24 It was apparent to DCA that a conflict existed with Silber, enough for DCA to raise the
25 issue to ICANN and to the ICANN Ombudsman. ICANN made no actual determination of the
26 conflict (whether through the Ombudsman or otherwise), and if a conflicted member was permitted
27 to vote against DCA’s application, that goes to the very substance of DCA’s claim that ICANN
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² <https://www.icann.org/resources/pages/board-of-directors?user=mike-silber>

1 intended not to honor its promises, but rather intended to reject DCA’s application the entire time
2 to permit ZACR to succeed and obtain the .Africa gTLD.

3 **III. ARGUMENT**

4 **a. Legal Standard**

5 “The Court, for good cause shown, may make any order that justice requires to protect
6 any party, deponent, or other natural person or organization from unwarranted annoyance,
7 embarrassment, or oppression, or undue burden and expense.” Code of Civil Procedure (“CCP”)
8 § 2025.420(b). “This is a statute whose language clearly indicates that the burden of showing
9 ‘good cause’ for a protective order rests on the party seeking to deny the other's discovery right.”
10 (*Southern California Edison Co. v. Superior Court of Los Angeles County* (1972) 7 Cal.3d 832,
11 843 [citing former code section 2019(b)(1)].) “The concept of good cause . . . calls for a factual
12 exposition of a reasonable ground for the sought order.” (*Goodman v. Citizens Life & Casualty*
13 *Ins. Co.* (1967) 253 Cal.App.2d 807, 819.)

14 The code provision authorizing "any order which justice requires" is applicable, by its
15 language, to those cases wherein annoyance, embarrassment or oppression is shown. (*Carlson v.*
16 *Superior Court of Los Angeles County* (1961) 56 Cal.2d 431, 440.)

17 “In the exercise of its discretion the court should weigh the relative importance of the
18 information sought against the hardship which its production might entail, and it must weigh the
19 relative ability of the parties to obtain the information before requiring the adversary to bear the
20 burden or cost of production, keeping in mind the statutory admonition of entering an order
21 consistent with justice.” (*Southern California Edison Co. v. Superior Court of Los Angeles*
22 *County* (1972) 7 Cal.3d 832, 841.)

23 **b. Silber’s Testimony is Discoverable and Will Likely Lead to the Discovery of**
24 **Admissible Evidence**

25 ICANN is wrong that Silber’s testimony is irrelevant, and by relying upon that argument
26 only, has failed to demonstrate any unwarranted annoyance, undue burden, or good cause
27 justifying the granting of a protective order prohibiting Silber’s deposition. “For discovery
28 purposes, information is relevant if it ‘might reasonably assist a party in *evaluating* the case,
preparing for trial, or *facilitating* settlement.’ Admissibility is *not* the test and information,

1 unless privileged, is discoverable if it might reasonably *lead* to admissible evidence. The phrase
2 "reasonably calculated to lead to the discovery of admissible evidence" makes it clear that the
3 scope of discovery extends to *any information* that reasonably might lead to other evidence that
4 would be admissible at trial. 'Thus, the scope of permissible discovery is one of *reason, logic*
5 *and common sense.*' These rules are applied liberally in favor of discovery. (*Lipton v. Superior*
6 *Court* (1996) 48 Cal.App.4th 1599, 1611-1612 [citations omitted and italics in original].) As is
7 well known throughout case law, relevancy in and of itself is not the standard for denying
8 discovery, although for the reasons explained above, Silber's testimony is relevant to DCA's
9 claims.

10 Further, "[o]bjections to the competency of the deponent, or to the relevancy, materiality,
11 or admissibility at trial of the testimony or of the materials produced are unnecessary and are not
12 waived by failure to make them before or during the deposition. In other words, the deponent's
13 counsel should not even raise an objection to a question counsel believes will elicit irrelevant
14 testimony at the deposition. Relevance objections should be held in abeyance until an attempt is
15 made to use the testimony at trial." (*Stewart v. Colonial Western Agency, Inc.* (2001) 87
16 Cal.App.4th 1006, 1014.)

17 Silber was a board member of ICANN before ICANN's Board accepted flawed advice
18 from ICANN's GAC to reject DCA's application. DCA had raised the issue of Silber's apparent
19 conflict with ICANN, and the issue went unresolved. Silber could have recused himself, but he
20 did not.

21 First, if Silber was a Board member who voted on the flawed advice to reject DCA's
22 application, Silber had an influence on the outcome. Whether by his vote, his discussions during
23 that vote, or his discussions with other ICANN Board members prior to the vote. It is
24 presumptuous to assume that Silber had no influence on the vote to reject DCA's gTLD
25 application, simply because everyone else voted to do so. The issue is not whether his vote
26 influenced the final outcome, but whether he should have been recused for his apparent conflict
27 of interest. His influence and conflict, make his testimony highly relevant to DCA's remaining
28 causes of action.

1 Second, DCA prevailing at the IRP does not change the fact that ICANN improperly
2 accepted flawed advice and agreed to reject DCA’s application. The issue at the IRP was
3 whether ICANN did any investigation into the flawed advice. When it admitted that it did not,
4 that admission gives an inference that DCA was intentionally rejected in favor of ZACR. The
5 IRP’s ruling that ICANN’s actions were improper, does not remove the taint of those prior
6 actions. Why it took those actions, and how Silber’s conflict affected those actions, is
7 information that DCA is entitled to discover.

8 Third, DCA’s remaining causes of action relate to ICANN’s fraud and
9 misrepresentations. ICANN argues that “DCA’s remaining claims all relate to ICANN’s
10 processing of DCA’s application, ICANN’s comparative processing of ZACR’s application, or
11 whether DCA was afforded due process during the IRP.” (Motion at 9:23-25.) The Court in
12 ruling on ICANN’s Motion for Summary Judgment held that “acts of fraud or those that cause
13 ‘willful injury’ do not arise out of ICANN’s processing of applications in that they are extra-
14 procedural: they are not related to the processing itself, but are acts that take ICANN outside of
15 the process governed by its bylaws.” (See MSJ Minute Order 08/09/2017.) Thus, ICANN’s
16 argument is wrong. ICANN also completely misunderstands how Silber’s affiliations and
17 relationships, and apparent conflict of interest, should have immediately disqualified him from
18 taking part in any decision-making with respect to either DCA or ZACR’s .Africa gTLD
19 applications. Silber was formerly affiliated with UniForum ZACR, and then-presently affiliated
20 with an organization (ZADNA) that had a business relationship with ZACR and also formally
21 endorsed ZACR’s application. DCA contends that ICANN intentionally ignored DCA’s
22 complaints, because it intended to deny DCA’s application from the start and delegate the .Africa
23 gTLD to ZACR. Accordingly, Silber’s proposed testimony goes directly to the remaining causes
24 of action, and therefore, DCA must be permitted to depose Silber.

25 Finally, the Ombudsman review of DCA’s complaint did nothing to resolve it. The
26 Ombudsman stated that he *did not have the power to make any recommendation to the board.*
27 (Bekele Decl. ¶ 4, Ex. 3.) The Bylaws that ICANN submitted also state that very fact: “[T]he
28 Ombudsman shall have not authority to act in any way with respect to administrative matters,
personnel matters, *issues relating to membership on the Board*, or issues related to

1 vendor/supplier relations.” (Pushinsky Decl. ¶ 13, Ex. H, at Art. V, § 3, ¶ 2 [emphasis added].)
2 The Ombudsman made no finding as to any conflict, or whether any future action by Silber
3 would affect DCA’s application. (*Id.*, ¶ 4, Ex. B.) Thus, the decision of the Ombudsman has no
4 bearing on the issue of conflict, Silber’s affiliations, or ICANN’s intentional rejection of DCA’s
5 application.

6 Nothing that ICANN has presented establishes the good cause necessary for the Court to
7 grant its motion and issue a protective order. It is ICANN’s burden to establish the good cause,
8 and based on the foregoing, they have failed to do so.

9 Accordingly, for the foregoing reasons, DCA respectfully requests the Court deny
10 ICANN’s Motion for Protective Order.

11 **c. Silber Must Produce Any Documents Not Yet Produced By ICANN**

12 To the extent ICANN has not produced any documents responsive to the Requests, Silber
13 should be ordered to bring them to the deposition. “A party desiring to take the oral deposition
14 of any person shall give notice in writing. The deposition notice shall state all of the following:
15 (4) the specification with reasonable particularity of any materials or category of materials,
16 including any electronically stored information, to be produced by the deponent.” CCP
17 § 2025.220(a)(4).

18 DCA has no interest in reviewing, or making ICANN produce, duplicative documents.
19 To the extent that any documents relating to the Request have not yet been produced, ICANN
20 should be ordered to produce them immediately. DCA served its requests for production on June
21 22, 2016. (Pushinsky Decl., Ex. C.) DCA has requested numerous times that ICANN confirm
22 whether all responsive documents have been produced. ICANN has not confirmed or provided
23 any date when it will be completed, but has stated on multiple occasions, that it will be in the
24 near future. (Declaration of Rowennakete P. Barnes (“Barnes Decl.”) ¶¶ 2 & 3, Ex. 1.)

25 As to the categories that are not duplicative, those categories are relevant to the decision
26 to deny DCA’s application. ICANN has continually argued that DCA lacked the requisite 60%
27 governmental support in order for its application to succeed. Those requests go directly to that
28 defense, and DCA is entitled to discover those documents and communications to the extent they
have not yet been produced.

1 Accordingly, DCA respectfully requests that the Court deny ICANN's motion for a
2 protective order.

3 **IV. CONCLUSION**

4 DCA is entitled to discover information in preparing its case for trial. Mr. Silber's
5 testimony, is both relevant and necessary for DCA's remaining claims. For the reasons stated
6 above, DCA respectfully requests that the Court deny ICANN's Motion.

7
8
9 Dated: November 30, 2017

BROWN NERI SMITH & KHAN, LLP

10
11 By: Ethan J. Brown / N.Y.
12 Ethan J. Brown

13 *Attorneys for Plaintiff,*
14 DotConnectAfrica Trust