

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

6 Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
7 NAMES AND NUMBERS

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 DOTCONNECTAFRICA TRUST,

12 Plaintiff,

13 v.

14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AND NUMBERS, *et*
16 *al.*,

17 Defendant.

CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

**DEFENDANT ICANN'S REPLY IN
SUPPORT OF MOTION FOR
PROTECTIVE ORDER**

[Supplemental Declaration of Amanda
Pushinsky Filed Concurrently Herewith]

RESERVATION ID: 171103264116

DATE: December 13, 2017
TIME: 8:30 a.m.
DEPT: 53

Complaint Filed: January 20, 2016
Bench Trial Date: February 28, 2018
Jury Trial Date: June 20, 2018

1 **I. INTRODUCTION**

2 DCA’s application for .AFRICA failed because it did not have the required support or
3 non-objection of 60% of the African governments. The evidence now undisputedly demonstrates
4 that this was true when DCA applied for .AFRICA in 2012; it was true when the Governmental
5 Advisory Committee (“GAC”) issued its consensus advice to stop DCA’s application in 2013; it
6 was true in 2015, when the IRP Panel placed DCA’s application back into processing, thereby
7 granting DCA yet another chance to obtain and demonstrate the required support; and it was true
8 in 2016 when (given yet another chance) DCA did not submit to ICANN a single additional letter
9 of support from an African government. Nothing ICANN – or the ICANN Board – did or did not
10 do could have changed this outcome.

11 DCA has now spent the better part of five years attempting to obscure these facts with
12 sweeping allegations of conspiracy and fraud – including against ICANN Board member Mike
13 Silber, whose deposition it now seeks to take. DCA claims that it is seeking testimony regarding
14 an alleged conflict of interest by Mr. Silber when he participated in the (unanimous) 2013
15 ICANN Board vote to accept the GAC’s consensus advice against DCA’s application. Yet, as
16 ICANN’s Motion for Protective Order (“Motion”) and this Reply demonstrate, even if such a
17 conflict existed – which it did not – that vote was essentially rendered moot when DCA prevailed
18 in the IRP and DCA’s application was returned to processing. DCA was given a second
19 opportunity to meet the “60% requirement” and it failed. Period, end of story. The Board’s vote
20 did not result in the ultimate rejection of DCA’s application, as that was the result of DCA’s
21 failure to meet the requirement, after prevailing in the IRP, that was absolutely essential to any
22 application whose name consisted of a continent.

23 ICANN therefore seeks an order from this Court preventing the deposition from
24 proceeding and relieving Mr. Silber of any obligation to produce documents.

25 **II. DCA’S OPPOSITION OFFERS NO BASIS TO SUPPORT THE BURDEN OF**
26 **DEPOSING MR. SILBER.**

27 **A. The Sole Basis To Seek Mr. Silber’s Deposition Is His Participation In The**
28 **2013 Board Vote.**

 Although DCA’s Opposition asserts that Mr. Silber was involved in “a number of

1 decisions regarding .Africa,” the Opposition makes clear that the sole basis for seeking Mr.
2 Silber’s deposition pertains to the 2013 Board vote. *See* Opp. at 9-12.

3 DCA’s application passed all but one of the new gTLD application evaluations, the
4 Geographic Names Review, which seeks to determine whether an applicant for a geographic
5 string like .AFRICA has the support or non-objection of 60% of the governments in the
6 geographic region that the string represents. Supplemental Declaration of Amanda Pushinsky
7 (“Supp. Pushinsky Decl.”) ¶ 4, Ex. A at ¶ 6. In 2013, both ZACR’s and DCA’s applications for
8 .AFRICA moved into this Geographic Names Review evaluation. InterConnect Communications
9 (“ICC”), an independent entity, evaluated the applicants’ endorsement letters to determine
10 whether either application had demonstrated sufficient governmental support or non-objection.
11 *Id.* ¶ 5, Ex. B at ¶ 5. While ICANN employees were consulted during this process to ensure that
12 the ICC was correctly interpreting Guidebook requirements, the ICANN Board itself played no
13 part in this analysis, and no one at ICANN, including Mr. Silber or anyone on the Board, had any
14 say in whether the applicants would pass the Geographic Names Review phase of the application
15 process. *See, e.g., id.* ¶ 5, Ex. B at ¶ 15.

16 Thus, the sole basis for any assertion that Mr. Silber could provide testimony relevant to
17 this case stems from the Board’s 2013 vote to accept the GAC advice. And, as described below
18 and in ICANN’s Motion, that vote – including any conflict of interest that may or may not have
19 been at issue in that vote – is 100% irrelevant to DCA’s remaining causes of action.¹

20 **B. The Board Vote Did Not Have Any Ultimate Impact On The Outcome Of**
21 **DCA’s .AFRICA Application.**

22 DCA states that “[t]he issue ... [is] whether [Mr. Silber] should have been recused for his
23

24 ¹ The fact that Mr. Silber had no conflict of interest, and the Ombudsman’s findings to
25 that effect, are detailed in ICANN’s Motion. *See* Mot. at 5, 8. As such, this Reply does not delve
26 into the specifics of the Ombudsman’s conflicts inquiry. It should be noted, however, that: (1)
27 contrary to DCA’s assertion, Mr. Silber was never a director of ZACR (Supp. Pushinsky Decl. ¶ 6,
28 Ex. C at 230:10-13); and (2) Mr. Silber’s Statement of Interest reflected both his position as
Director and Treasurer of the .za Domain Name Authority, and the .za Domain Name Authority’s
arms-length operating agreement with Uniform to operate the .za registry at the time the
Ombudsman failed to find “any conflict of interest at all.” *See* Declaration of Sophia Bekele
Eshete in support of DCA’s Opposition to Defendant ICANN’s Motion for Protective Order, Ex.
7; Declaration of Amanda Pushinsky in Support of ICANN’s Motion for Protective Order, Ex. B.

1 apparent conflict of interest.” Opp. at 10:25-27. Even if Mr. Silber was conflicted at the time of
2 the 2013 vote, which he was not, and even if that vote had not been unanimous (thus rendering
3 Mr. Silber’s vote immaterial) – indeed, even under the unlikely scenario that Mr. Silber was able
4 to sway the entire Board’s vote, such that had he recused himself the Board would not have
5 accepted the GAC consensus advice – the vote *still* would have no relevance to DCA’s claims.
6 Either way, DCA still would have had to pass the governmental support or non-objection
7 requirement, and it could not and did not do so.

8 As detailed in ICANN’s Motion, at the time the Board voted to accept the GAC advice,
9 DCA’s and ZACR’s applications were being reviewed by the ICC to determine whether the
10 applicants had demonstrated the required governmental support or non-objection. Supp.
11 Pushinsky Decl. ¶ 5, Ex. B at ¶ 11. Neither applicant had received any feedback on their
12 endorsement letters when the Board voted to accept the GAC advice and DCA’s application was
13 halted. *Id.* When DCA prevailed in the IRP, and its application was put back into processing in
14 2015, DCA’s application was processed exactly as it would have been in 2013: the ICC reviewed
15 DCA’s endorsement letters to determine whether those letters conformed to Guidebook
16 requirements. *Id.* ¶ 5, Ex. B at ¶ 13. An examination of DCA’s endorsement letters demonstrates
17 that the outcome of the ICC’s inquiry, and so the outcome of DCA’s application for .AFRICA,
18 was unaltered by the Board’s vote.

19 DCA applied for .AFRICA with six endorsement letters: a 2008 letter from the United
20 Nations Economic Commission for Africa (“UNECA”); a 2009 letter from the African Union
21 Commission (“AUC”); three letters from individual African countries; and one letter from the
22 South African Embassy in Washington, D.C. Supp. Pushinsky Decl. ¶ 4, Ex. A at ¶ 7. The
23 individual letters were not sufficient to meet the 60% requirement, so DCA’s application as
24 submitted depended on either the UNECA or AUC letter to meet this requirement. *Id.* ¶ 5, Ex. B
25 at ¶ 5. It is undisputed that the 2008 UNECA letter was written before the Guidebook’s
26 requirements for such letters were drafted. Accordingly, it is no surprise that the UNECA letter
27 did not conform to the Guidebook’s requirements, resulting in the ICC issuing clarifying
28 questions to DCA regarding this letter. However, UNECA has made it abundantly clear that it

1 never intended its letter to support DCA's application for .AFRICA. Supp. Pushinsky Decl. ¶ 7,
2 Ex. D²; *see also id.* ¶ 4, Ex. A at ¶ 9. DCA would not have been able to obtain an updated letter
3 from UNECA, either in 2013 or when its application was returned to processing in 2015.

4 As to the AUC letter, it too was written before the Guidebook's requirements for such
5 letters were established. Moreover, in 2010 the AUC withdrew the letter, and in 2011 the AUC
6 publicly announced its support for ZACR's application. Supp. Pushinsky Decl. ¶ 5, Ex. B at ¶ 7;
7 *id.* ¶ 8, Ex. E. As such, DCA would have had to obtain an updated, conforming letter from the
8 AUC – and would have been unable to do so, in 2013 or in 2015. Indeed, when DCA's
9 application was returned to processing in 2015, and the ICC asked DCA for updated letters from
10 UNECA and the AUC, DCA admitted in deposition that it *did not even try* to obtain these letters.
11 Supp. Pushinsky Decl. ¶ 9, Ex. F at 174:5-8. DCA has not and, as demonstrated above, cannot
12 claim that it would have been able to do so in 2013.³

13 DCA is once again attempting to obscure these basic facts by alleging that Mr. Silber's
14 alleged conflict of interest somehow swayed, or "tainted," a vote that at bottom has no bearing on
15 the facts of this case. DCA's Opposition contains multiple other allegations that similarly cite
16 irrelevant or innocuous events spun to appear to be nefarious. For example:

- 17 • DCA's Opposition repeatedly asserts that the Board accepted the GAC's "flawed
18 advice." *See* Opp. at 1:5, 1:9, 7:25, 10:17, 10:22, 11:2, 11:3. However, there is
19 absolutely no evidence the GAC advice itself was flawed. Rather, the IRP Panel
20 found that ICANN failed to follow its Bylaws by failing to further investigate the
21 GAC advice before accepting it.
- 22 • DCA also repeats the argument that ICANN violated its rules and procedures by

23 ² Notably, this letter was sent to the AUC and to Ms. Bekele (but not to ICANN) before
24 DCA's application was re-reviewed by the ICC in 2015 following the IRP. Nonetheless, in
25 response to the ICC's requests for updated letters, DCA continued to insist that the 2008 UNECA
letter was a valid endorsement.

26 ³ By contrast, ZACR applied with 41 endorsement letters, including several from the AUC.
27 Supp. Pushinsky Decl. ¶ 4, Ex. A at ¶ 7. The ICC found that all of these letters failed to meet
28 Guidebook requirements. However, because the AUC did, in fact, support ZACR's application,
ZACR was able to obtain an updated letter from the AUC that conformed to the Guidebook
requirements. With this letter, ZACR passed Geographic Names Review. This outcome, too,
would have been the same even if DCA's application had proceeded through processing in 2013.

1 allowing ZACR to file a regular application, rather than a community application –
2 even though it has been established beyond dispute that the basis for DCA’s
3 assertion that ZACR should have filed a community application is the AUC’s
4 statement in a 2011 Communiqué that ZACR was applying “on behalf of the
5 African community,” and ZACR’s participation in a RFP process to obtain the
6 AUC’s endorsement – a process in which DCA was invited to participate. Supp.
7 Pushinsky Decl. ¶ 9, Ex. F at 47:15- 49:23; 52:2-11.

- 8 • DCA asserts that the Board rejected DCA’s application a second time after the IRP
9 decision (Opp. at 8:11-12); in fact, the ICC, not the Board, determined that DCA’s
10 application failed the Geographic Names Review phase of the new gTLD
11 evaluation application process. Supp. Pushinsky Decl. ¶ 5, Ex. B at ¶ 15.
- 12 • DCA references a 2016 statement by Mr. Silber promising that the current
13 litigation will not interfere with any party’s rights. Opp. at 5. But such a comment
14 in no way suggests a conflict of interest. Rather, the statement indicates ICANN
15 will proceed as prescribed by the Guidebook, demonstrates a commitment to
16 ICANN’s processes, and emphasizes equal treatment for all parties. DCA’s
17 presumption – made without citing any basis – that Mr. Silber intended to only
18 reference preserving the rights of “AUC, ZACR, and ICANN” is completely
19 unfounded.
- 20 • Similarly, DCA references a comment made by the AUC at the March 9, 2016
21 Marrakech meeting. Opp. at 5. However, this comment was not even made by
22 Mr. Silber, or anyone at ICANN. Moreover, both this and the above comment
23 were made three years after the 2013 vote, which as described above is the only
24 basis for DCA’s assertion that Mr. Silber’s testimony is relevant to this case.

25 This is by no means an exhaustive list of examples of assertions DCA has made with little
26 to no basis in or regard for the truth, assertions made for the purpose of obscuring the fact that
27 DCA’s application for .AFRICA never would have succeeded. *Even if true* – none of it actually
28 impacted DCA’s application for .AFRICA. DCA’s application failed because it was unable to

1 obtain and demonstrate the required support or non-objection of 60% of African governments.
2 The 2013 Board vote, and any testimony that could be provided by Mr. Silber regarding that vote,
3 is completely irrelevant to DCA's claims.

4 **III. MR. SILBER SHOULD BE RELIEVED OF ANY OBLIGATION TO PRODUCE**
5 **DOCUMENTS.**

6 DCA's Opposition makes clear that each of the document requests contained in the
7 Deposition Notice are entirely duplicative and cumulative of requests DCA has already
8 propounded on ICANN. As discussed in ICANN's Motion, all but three document requests are
9 explicitly encompassed by document requests previously propounded on ICANN. For the three
10 outstanding requests that could conceivably fall outside prior document requests, DCA makes
11 clear in its Opposition that these requests are also duplicative of prior requests for production.
12 DCA explained that these three requests are "relevant to the decision to deny DCA's application"
13 because "ICANN has continually argued that DCA lacked the requisite 60% governmental
14 support in order for its application to succeed. Those requests go directly to that defense." Yet,
15 DCA fails to acknowledge that it has already requested and ICANN has already produced all
16 documents and communications pertaining to DCA's .AFRICA application, which necessarily
17 includes any documents pertaining to DCA's failure to secure the required 60% governmental
18 support or non-objection.
19
20


21 Indeed, Mr. Silber was a custodian for whom ICANN reviewed, collected, and produced
22 responsive, non-privileged documents. ICANN completed its production of responsive
23 documents on November 29, 2017, rebutting any argument by DCA that ICANN has yet to
24 produce responsive documents. Supp. Pushinsky Decl. ¶ 3. The appropriate party from whom to
25 request such documents was ICANN, which DCA already has done. Mr. Silber should be
26 relieved of any obligation to replicate a process ICANN already has performed for the sole
27 purpose of responding to DCA's admittedly cumulative and duplicative requests.
28

1 IV. CONCLUSION

2 For the foregoing reasons, ICANN respectfully requests that the Court grant ICANN's
3 motion for a protective order preventing the deposition of Mr. Silber from proceeding as noticed
4 and relieving Mr. Silber of any obligation to produce documents.
5
6

7 Dated: December 6, 2017

Jones Day

8
9 By: 
10 Jeffrey A. LeVee

11 Attorney for Defendant
12 INTERNET CORPORATION FOR
13 ASSIGNED NAMES AND NUMBERS

14 NAI-1503242752
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 PROOF OF SERVICE

2 I, Deborah Futrowsky, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am
4 over the age of eighteen years and not a party to the within-entitled action. My business address
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On December 6,
6 2017, I served a copy of the within document(s):

7 **DEFENDANT ICANN'S REPLY IN SUPPORT OF MOTION FOR PROTECTIVE
8 ORDER**

- 9 by placing the document(s) listed above in a sealed envelope with postage thereon
10 fully prepaid, in the United States mail at Los Angeles, California addressed as set
11 forth below.
- 12 by placing the document(s) listed above in a sealed Federal Express envelope and
13 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery
14 Service agent for delivery.
- 15 by personally delivering the document(s) listed above to the person(s) at the
16 address(es) set forth below as noted.
- 17 by transmitting via e-mail or electronic transmission the document(s) listed above
18 to the person(s) at the e-mail address(es) set forth below.

16 Ethan J. Brown
 17 ethan@bnsklawgroup.com
 18 Sara C. Colón
 19 sara@bnsklawgroup.com
 20 Rowennakete "Kete" Barnes
 21 ketc@bnsklaw.com
 22 BROWN NERI & SMITH LLP
 23 11601 Wilshire Blvd., Suite 2080
 24 Los Angeles, CA 90025
 25 T (310) 593-9890; F (310) 593-9980

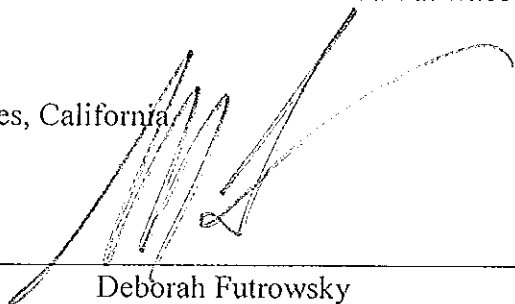
David W. Kesselman, Esq.
 Kesselman Brantly Stockinger LLP
 1230 Rosecrans Ave, Suite 690
 Manhattan Beach, CA 90266
 (310) 307-4556
 (310) 307-4570 fax
 dkesselman@kbslaw.com

VIA EMAIL ONLY

*VIA PERSONAL SERVICE and VIA
EMAIL*

23 I declare that I am employed in the office of a member of the bar of this court at whose
24 direction the service was made.

25 Executed on December 6, 2017, at Los Angeles, California



26
27
28

Deborah Futrowsky