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 14 INTERNET CORPORATION FOR
 15 ASSIGNED NAMES AND NUMBERS

16 **UNITED STATES DISTRICT COURT**
 17 **CENTRAL DISTRICT OF CALIFORNIA**
 18 **WESTERN DIVISION**

19 DOTCONNECTAFRICA TRUST, a
 20 Mauritius Charitable Trust,
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 22 Plaintiff,
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 24 v.
 25 INTERNET CORPORATION FOR
 26 ASSIGNED NAMES AND
 27 NUMBERS, et al.,
 28
 DefendantS.

Case No. 2:16-cv-00862-RGK
 (JCx)

Assigned for all purposes to the
 Honorable R. Gary Klausner

**ICANN'S RESPONSE TO
 PLAINTIFF'S EVIDENTIARY
 OBJECTIONS TO
 DECLARATION OF KEVIN
 ESPINOLA**

Date: April 4, 2016
 Time: 9:00 a.m.
 Ctrm: 850

1 Defendant Internet Corporation for Assigned Names and Numbers
 2 (“ICANN”) hereby responds to Plaintiff DotConnectAfrica Trust’s objections to the
 3 Declaration of Kevin Espinola:

Espinola Declaration	Plaintiff’s Objection	ICANN’s Response	Court’s Ruling
<p>4 ¶3: “The Generic Names Supporting Organization (“GNSO”) – one of the supporting organizations that develops global Internet policy within ICANN – was responsible for policy development work on the introduction of new generic top-level domains (“gTLDs”) and approved a set of 19 policy recommendations. The GNSO’s work involved representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, the technology community, and others – engaging in discussions on policy questions regarding new gTLDs, including the application criteria and the contractual conditions that should be required for new gTLD registries going forward. An overview of the GNSO’s policy work and its outcomes is available at</p>	<p>5 Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602].</p>	<p>6 Mr. Espinola testified that he has served outside counsel for ICANN and that in that position he assisted in the development of ICANN’s New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge of the matters about which he is testifying.</p>	

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Espinola Declaration	Plaintiff's Objection	ICANN's Response	Court's Ruling
<p>http://gnso.icann.org/issues/new-gtlds. The culmination of the GNSO's policy development work was a June 2008 decision by the ICANN Board of Directors to adopt the GNSO-developed new gTLD policy.</p>			
<p>¶4: Following this decision, ICANN and its community began the process of developing the New gTLD Applicant Guidebook ("Guidebook"), which implemented the recommendations made by the GNSO and set forth the requirements and the criteria by which new gTLD applications are evaluated. The Guidebook was developed as part of a years-long, bottom-up multistakeholder process during which numerous versions were published by ICANN for public comment and revised, in part based on comments received. In total, six complete versions of the Guidebook were published for public comment.</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602].</p>	<p>Mr. Espinola testified that he has served outside counsel for ICANN and that in that position he assisted in the development of ICANN's New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge of the matters about which he is testifying.</p>	

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<p>¶5: “On December 13, 2010, as part of this process, Plaintiff submitted a written public comment regarding the November 12, 2010 version of the Guidebook (“November 2010 Guidebook”), noting its support for the New gTLD Program and for a .AFRICA gTLD. Attached hereto as Exhibit A is a true and correct copy of Plaintiff’s comment. Attached hereto as Exhibit B is a true and correct copy of an excerpt of the “New gTLDs Proposed Final Applicant Guidebook Public Comment Summary,” summarizing comments received regarding the November 2010 Guidebook. Plaintiff’s comment is addressed on page 3. I am informed and believe that Plaintiff did not submit any comments regarding Section 6 of Module 6 of the Guidebook (“Covenant Not to Sue”).</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)); <i>See also Bank Melli Iran v. Pahlavi</i>, 58 F.3d 1406, 1412-1413 (9th Cir. 1995) (Holding “the Bank’s response to Pahlavi’s evidence was information and belief declarations from their counsel. Those were entitled to no weight because the declarant did not have personal knowledge.” [emphasis added])]. Completeness doctrine [Fed. R. Evid. 106].</p>	<p>Mr. Espinola testified that he has served outside counsel for ICANN and that in that position he assisted in the development of ICANN’s New gTLD Program. (Espinola Decl. ¶ 1.) As such, he is qualified to authenticate Exhibits A and B.</p>	

	Espinola Declaration	Plaintiff's Objection	ICANN's Response	Court's Ruling
<p>1</p> <p>2</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>¶7: “It is my belief that this addition was principally made in response to comments from ICANN’s Governmental Advisory Committee (“GAC”) regarding the Covenant Not to Sue, as reflected on page 2 of a February 21, 2011 document responding to those comments. A true and correct copy of that document “ICANN Board-GAC Consultation: ‘Legal Recourse’ for New gTLD Registry Applicants,” is attached to this declaration as Exhibit D.”</p>	<p>Lacks personal knowledge and lacks foundation [Fed. R. Evid. 602; Local Rule 7-7 (Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F.R.Civ.P. 56(c)(4)); <i>See also Bank Melli Iran v. Pahlavi</i>, 58 F.3d 1406, 1412-1413 (9th Cir. 1995) (Holding “the Bank’s response to Pahlavi’s evidence was information and belief declarations from their counsel. Those were entitled to no weight because the declarant did not have personal knowledge.” [emphasis added])].</p>	<p>Mr. Espinola testified that he has served outside counsel for ICANN and that in that position he assisted in the development of ICANN’s New gTLD Program. (Espinola Decl. ¶ 1.) As such, he is qualified to authenticate Exhibit D.</p>	
<p>26</p> <p>27</p> <p>28</p>	<p>¶8: “ICANN’s decision to include the Covenant Not to Sue reflected its reasoned determination</p>	<p>Lacks personal knowledge, lacks foundation, and speculative [Fed.</p>	<p>Mr. Espinola testified that he has served outside counsel</p>	

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<p>regarding the sort of risk, including financial, to which ICANN – a non-profit public benefit corporation – should reasonably subject itself as part of the New gTLD Program.”</p>	<p>R. Evid. 602]. Irrelevant [Fed. R. Evid. 403].</p>	<p>for ICANN and that in that position he assisted in the development of ICANN's New gTLD Program. (Espinola Decl. ¶ 1.) As such, he has personal knowledge of the matters about which he is testifying.</p>	
<p>¶9: “In response to public comments regarding the Covenant Not to Sue in the February 18, 2009 draft of the Guidebook (“February 2009 Guidebook”), ICANN explained: “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.” Attached hereto as Exhibit E is a true and correct</p>	<p>The best evidence of the document described is the document itself [Fed. R. Evid. 1002]. Completeness Doctrine [Fed. R. Evid. 106].</p>	<p>The Court may refer to the February 2009 Guidebook, which is part of the record. (Espinola Decl. Ex. E, ECF No. 37-5.)</p>	

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<p>copy of an excerpt of the report of public comments to the February 2009 Guidebook. The relevant language appears on p. 184.”</p>			
<p>¶10: “In the case of the <i>DCA</i> IRP, the <i>DCA</i> Panel declared that its decision would be binding on ICANN’s Board. But, most importantly, the question of whether the Panel’s declaration was or was not legally binding became a moot issue once ICANN’s Board elected to adopt all of the <i>DCA</i> Panel’s recommendations, contrary to the representations in Plaintiff’s motion for preliminary injunction and TRO application.”</p>	<p>That ICANN’s board elected to adopt all of the IRP panel’s recommendations is irrelevant to the issue of whether ICANN actually followed the IRP panel’s ruling. [Fed. R. Evid. 403].</p>	<p>The language to which Plaintiff objects is not in Mr. Espinola’s declaration.</p>	

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Dated: March 28, 2016

JONES DAY

By: /s/ Jeffrey A. LeVee

Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS