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March 28, 2014

BY EMAIL

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Re: ICDR Case 50 117 T 1083 13 DotConnectAfrica Trust (“DCA”) vs. Internet Corporation for Assigned Names and Numbers (“ICANN”)

Dear Jeff:

We write on behalf of our client DCA Trust with reference to your letter of March 24, 2014 and your email to Carolina Cardenas of the ICDR of March 25, 2014. We also write with specific reference to the current debate regarding ICANN’s future role in the governance of the Internet.

As you will undoubtedly appreciate, we are at an important juncture in ICANN’s short history as the entity responsible for oversight and governance of the Internet – our global community’s information and communications superhighway, and by any measure a global resource. Important discussions are underway regarding how and when the United States Department of Commerce may cede further regulatory control of the Internet to ICANN, and Internet stakeholders around the world are watching. Critical questions are being asked regarding whether ICANN has the organizational maturity and structure, governance sophistication, transparency and accountability to take on the role of the Internet’s Regulator. Certainly, if ICANN’s treatment of DCA’s application to serve as the registry operator of the .AFRICA TLD is anything to go by, ICANN is not ready to take on this role.

It is within this context that we address below the main points of your March 24 letter:

1) ICANN did indeed inform DCA on February 5, 2014 that it had no intention of suspending its processing of applications for .AFRICA during the pendency of this proceeding on the premise that in ICANN's view DCA's case is "exceedingly weak." Whether DCA's case is weak or not is not for ICANN to decide, but rather a decision for the Independent Review Panel to make. ICANN has

no authority to serve as judge, jury and executioner. Quite the contrary. The more even-handed course of action would have been for ICANN to suspend further consideration of competing applications for .AFRICA, pending the outcome of these proceedings. This would have been consistent with the new gTLD Guidebook, which recognizes that ICANN should stay its processing of applications where there is a pending dispute or where additional time is required to process one of the applications.¹ ICANN's categorical refusal to respect the spirit of its own rules for processing gTLDs, not to mention the spirit and purpose of the accountability mechanism that it has created to resolve disputes, demonstrates ICANN's unwillingness – and perhaps inability as an institution – to appropriately govern itself or take responsibility for the power with which it has been entrusted.

2) DCA did not respond to the intransigent position you staked out in your February 5 email that ICANN would proceed with ZACR/Uniform's application, notwithstanding the IRP. The tone and content of your email made it self-evident that any further discussion was pointless, and that there was nothing to do except proceed as expeditiously as possible with the full constitution of the Panel and for DCA to seek the Panel's assistance in obtaining interim measures of protection. ICANN, it has now become apparent, has also denied DCA this opportunity.

What is perhaps most surprising about the contents of your February 5 email is the complete absence of any mention of Article 37 of the ICDR Arbitration Rules, providing for the possibility of emergency interim relief; an option that you have only now acknowledged may be pursued by a party in the context of an IRP proceeding. Remarkably, that acknowledgment was provided at 6 p.m. US Eastern time on the same day that ICANN had already executed a registry agreement for the .AFRICA TLD with Uniform/ZACR; that is, the very measure that DCA would have sought to enjoin through the Article 37 process had it been clarified earlier that ICANN was reinstating its availability (e.g., by your making the same acknowledgment in your February 5 email as stated in your March 24 letter). In light of Article 12 of the Supplementary Procedures, in which ICANN derogated from the application of Article 37, can ICANN, in good faith, say that parties wishing to avail of ICANN's Independent Review Process – such as DCA – should somehow be aware that Article 37 emergency relief could nonetheless be pursued? If this is ICANN's view of transparency and predictability in the context of its accountability procedures, serious doubts exist as to whether ICANN can legitimately say it is ready to regulate the Internet fairly, equitably, transparently and non-discriminatorily.

¹ New gTLD Guidelines, Module 1, Section 1.1.2.10, p. 1-13, Figure 1-2, p. 1-14 (“Groups of applied-for strings that are either identical or similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable”).

Jeffrey A. LeVee, Esq.
March 28, 2014
Page 3

Weil, Gotshal & Manges LLP

What stands out most clearly from the parties' exchanges to-date is the disparity between, on the one hand, DCA's respect for the procedures ICANN has put into place, and, on the other hand, ICANN's refusal to accord anything like respect for those procedures.

Indeed, the swiftness with which ICANN rushed into a contract with ZACR notwithstanding DCA's request for relief in this IRP raises serious questions as to ICANN's good faith, not only concerning this IRP, but its administration of the entire new gTLD program.

3) Once all of the written submissions, documentary evidence, witness and expert testimony have been considered by the Panel, it is possible that your view of DCA's "case" may turn out to be correct. We certainly take the opposite view and believe very strongly that the facts demonstrate that ICANN violated its own new gTLD guidelines, Articles of Incorporation and Bylaws and applicable principles of international law, as set forth in our Amended Notice of IRP and our Request for Emergency Arbitrator and Interim Measures of Protection, attached hereto.

Sincerely,



Arif H. Ali
Counsel for DCA Trust

Cc: Carolina Cardenas-Soto, ICDR
Professor Catherine Kessedjian
Judge Richard C. Neal

Enclosures