

1 Jeffrey A. LeVee (State Bar No. 125863)
Erin L. Burke (State Bar No. 186660)
2 Rachel Tessa Gezerseh (State Bar No. 251299)
Amanda Pushinsky (State Bar No. 267950)
3 JONES DAY
555 South Flower Street
4 Fiftieth Floor
Los Angeles, CA 90071.2300
5 Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539
6 Email: jlevee@JonesDay.com

7 Attorneys for Defendant
8 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
9

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

12
13 DOTCONNECTAFRICA TRUST,

14 Plaintiff,

15 v.

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

18 Defendants.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

**DECLARATION OF JEFFREY
LEVEE IN SUPPORT OF ICANN'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

DATE: December 22, 2016
TIME: 8:30 a.m.
DEPT: 53

DECLARATION OF JEFFREY LEVEE

I, Jeffrey LeVee, declare the following:

1. I am a partner of Jones Day, counsel to defendant the Internet Corporation for Assigned Names and Numbers (“ICANN”). I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s opposition to DotConnectAfrica Trust’s (“DCA’s” or “Plaintiff’s”) motion for a preliminary injunction.

2. I was counsel to ICANN when it was formed in 1998, and I have remained ICANN’s primary outside litigation counsel since that time. I represented ICANN in connection with the independent review process (“IRP”) initiated by DCA (“DCA IRP”), and throughout this litigation.

3. DCA’s CEO, Sophia Bekele Eshete, submitted a declaration to the IRP Panel. A true and correct copy of an excerpt of that declaration is attached hereto as **Exhibit G**.

4. Attached hereto as **Exhibit H** are true and correct copies of pertinent excerpts of the transcript from the December 1, 2016 deposition taken in this matter of DCA’s “person most knowledgeable,” Ms. Sophia Bekele Eshete.

5. In May 2015, a two-day final hearing was held in the DCA IRP. On July 9, 2015, the IRP Panel issued a 63-page final declaration (“Declaration”). Because of the length of the Declaration, for the Court’s convenience, I summarize that Declaration in the next several paragraphs.

6. Paragraphs 1-60 of the Declaration (pages 2-17) summarize the procedural background of the case. Paragraphs 53-61 (pages 16-18) summarize the parties’ positions on the merits, and state in a summary fashion the IRP Panel’s determination that ICANN’s Board did not act consistently with ICANN’s Articles of Incorporation and Bylaws. Paragraphs 62-77 (pages 19-77) summarize the parties’ positions on the standard of review to be applied and the IRP Panel’s determination in that regard.

7. Paragraphs 78-85 (pages 23-27) detail DCA’s position on the merits. Paragraph 80 describes DCA’s various contentions regarding ICANN’s and the Geographic

1 Names Panel’s handling of DCA’s and ZACR’s applications for .AFRICA. Paragraphs 81-82
2 describe DCA’s contention that ICANN’s Board should not have accepted the advice of
3 ICANN’s Governmental Advisory Committee (“GAC”) objecting to DCA’s application for
4 .AFRICA (“Advice”).

5 8. Paragraphs 86-91 (pages 27-38) then detail ICANN’s position on the merits of
6 each of these issues. The IRP Panel quotes extensively from ICANN’s briefs, which responded at
7 length both to DCA’s various contentions regarding the handling of Plaintiff s and ZACR’s
8 applications and also to DCA’s contention regarding the GAC’s Advice.

9 9. Paragraphs 92-117 (pages 39-54) detail the IRP Panel’s findings regarding the
10 merits of DCA’s claims. The IRP Panel’s discussion is devoted exclusively to the Board’s
11 acceptance of the GAC’s Advice. The IRP Panel concludes that ICANN’s Board did not act
12 consistently with ICANN’s Articles and Bylaws in accepting the GAC’s Advice. (¶ 115.) With
13 respect to all of DCA’s other claims, the IRP Panel reaches no conclusion except to state in
14 Paragraph 117 that:

15 [Plaintiff] had criticized ICANN for its various actions and decisions throughout
16 this IRP and ICANN has responded to each of these criticisms in detail. However,
17 the Panel, having carefully considered these criticisms and decided that the above
18 [i.e., its finding regarding the GAC’s Advice] is dispositive of this IRP, [] does
19 not find it necessary to determine who was right, to what extent and for what
20 reasons in respect to the other criticisms and alleged shortcomings of the ICANN
21 Board identified by DCA Trust.

22 10. Paragraphs 118-133 (pages 54-57) discuss the issue of whether the IRP Panel can
23 recommend a course of action to ICANN’s Board. The IRP Panel concludes that it can (*id.* ¶
24 128), and accordingly recommends that “ICANN continue to refrain from delegating the
25 .AFRICA gTLD and permit [Plaintiff s] application to proceed through the remainder of the new
26 gTLD application process” (*id.* ¶ 133).

27 11. Paragraphs 134-147 (pages 57-61) discuss the issues of prevailing party and costs.
28 The IRP Panel concludes that DCA is the prevailing party and orders ICANN to pay DCA’s
costs. (¶¶ 139, 146.)

12. Finally, paragraphs 148-150 set forth the IRP Panel’s final declaration. The IRP
Panel repeats its finding that ICANN’s Board did not act consistently with ICANN’s Articles and

1 Bylaws, as well as its recommendation that DCA’s Application be “permit[ted . . .] to proceed
2 through the remainder of the new gTLD application process.” (*Id.* ¶¶ 148-149.) It also repeats its
3 finding that DCA is the prevailing party and its award of costs to DCA. (*Id.* ¶ 150.)

4 13. In sum, the IRP Panel made no findings whatsoever that could possibly be
5 construed to remove or eliminate the Guidebook requirement that an application for a gTLD
6 representing a geographic region (such as .AFRICA) must obtain the support or non-objection of
7 at least 60% of the governments in that region. To the contrary, as the IRP Panel notes in
8 Paragraph 46 (on page 14), DCA specifically asked the IRP Panel to give DCA “no less than 18
9 months to obtain Government support as set out in the [Guidebook] . . . or accept that the
10 requirement is satisfied as a result of the endorsement of DCA Trust’s application by UNECA,”
11 but the IRP Panel did not address DCA’s request at all. As a result, DCA’s argument that it
12 should be allowed to skip this essential Guidebook requirement finds no support whatsoever in
13 the IRP Panel’s declaration. Indeed, Ms. Bekele confirmed in deposition her understanding that
14 nothing in the IRP Declaration addressed whether or not DCA had passed the requirement of
15 obtaining 60 percent governmental support, and she further confirmed that the IRP Panel did not
16 find that DCA could “skip” that evaluation. *See* Ex. H at 203:4-7.

17 14. In its briefs to the IRP Panel, ICANN argued that IRP panel declarations were not
18 binding on ICANN’s Board. ICANN’s argument was based, in part, on the fact that the only
19 previous IRP declaration to have been issued (as of that time) expressly found that IRP panel
20 declarations are not binding.¹ The *DCA* IRP Panel disagreed, however, and in a 14 August 2014
21 declaration on procedural issues (“Procedural Declaration”), the IRP Panel determined that its
22 declaration would be binding on ICANN’s Board. The portions of the Procedural Declaration
23 that address this point are reproduced at paragraph 23 (pages 5-6) of the IRP Panel’s Declaration.

24 15. Most importantly, however, the question of whether the IRP Panel’s Declaration
25 was considered binding in conjunction with the *DCA* IRP became a moot point when ICANN’s
26 Board elected to adopt *all* of the findings and recommendations in the IRP Panel’s Declaration.

27 _____
28 ¹ A true and correct copy of an excerpt of this previous IRP declaration is attached to the
concurrently-filed declaration of Akram Atallah.

1 A copy of the resolution by ICANN's Board adopting the IRP Panel's Declaration is attached to
2 the concurrently-filed Declaration of Akram Atallah.

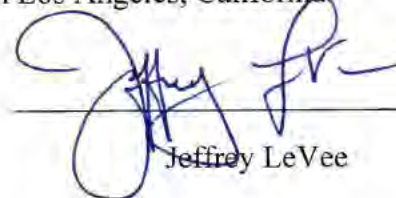
3 16. DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County
4 Superior Court. After the Superior Court denied DCA's request for a temporary restraining order,
5 ICANN timely removed the case to federal court, invoking diversity jurisdiction. On
6 February 26, 2016, DCA filed the operative First Amended Complaint, adding ZACR as a
7 defendant.

8 17. On March 1, 2016, DCA moved for a preliminary injunction, which the federal
9 court granted on April 12, 2016. ICANN and ZACR timely appealed to the Ninth Circuit.
10 However, before the Ninth Circuit could issue its decision, the district court ruled that it lacked
11 subject matter jurisdiction because ZACR is an indispensable (but non-diverse) party. As such,
12 the district court lacked jurisdiction at the time it issued the preliminary injunction. Accordingly,
13 on October 20, 2016, the district court remanded the case to this Court, thereby mooting the Ninth
14 Circuit appeal and rendering the preliminary injunction null and void. Attached hereto as **Exhibit**
15 **I** is a true and correct copy of a motion ICANN filed before the Ninth Circuit explaining the
16 district court's lack of jurisdiction and its import.

17 18. Attached hereto as **Exhibit J** is a true and correct copy of the district court's order
18 in *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx)
19 (C.D. Cal. Nov. 28, 2016).

20
21 I declare under penalty of perjury under the laws of the United States and the State of
22 California that the foregoing is true and correct.

23 Executed this ^{8th} day of December 2016, in Los Angeles, California

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25 
26 Jeffrey LeVee
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