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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

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: February 2, 2017
TIME: 8:30 a.m.
DEPT: 53

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1 **DECLARATION OF JEFFREY LEVEE**

2 I, Jeffrey LeVee, declare the following:

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

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

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

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

17 5. In May 2015, a two-day final hearing was held in the *DCA* IRP. On July 9, 2015,
18 the IRP Panel issued a 63-page final declaration (“Declaration”). Paragraphs 92-117 (pages 39-
19 54) detail the IRP Panel’s findings regarding the merits of DCA’s claims. The IRP Panel’s
20 discussion is devoted exclusively to the Board’s acceptance of the GAC’s Advice. The IRP Panel
21 concludes that ICANN’s Board did not act consistently with ICANN’s Articles and Bylaws in
22 accepting the GAC’s Advice. (¶ 115.) With respect to all of DCA’s other claims, the IRP Panel
23 reaches no conclusion except to state in Paragraph 117 that:

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

28 6. The IRP Panel recommends that “ICANN continue to refrain from delegating the

1 .AFRICA gTLD and permit [Plaintiff s] application to proceed through the remainder of the new
2 gTLD application process” (*id.* ¶¶133, 148-149). The IRP Panel concludes that DCA is the
3 prevailing party and orders ICANN to pay DCA’s costs. (¶¶ 139, 146, 150.)

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

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

22 9. Most importantly, however, the question of whether the IRP Panel’s Declaration
23 was considered binding in conjunction with the *DCA* IRP became a moot point when ICANN’s
24 Board elected to adopt *all* of the findings and recommendations in the IRP Panel’s Declaration.
25 A copy of the resolution by ICANN’s Board adopting the IRP Panel’s Declaration is attached to
26 the concurrently-filed Declaration of Akram Atallah.

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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 10. DCA filed this suit against ICANN on January 20, 2016, in Los Angeles County
2 Superior Court. After the Superior Court denied DCA's request for a temporary restraining order,
3 ICANN timely removed the case to federal court, invoking diversity jurisdiction. On March 1,
4 2016, DCA moved for a preliminary injunction, which the federal court granted on April 12, 2016
5 on the basis of an admitted factual error and before DCA admitted in deposition that the entire
6 basis on which the district court had granted the injunction – that the IRP Panel had allowed DCA
7 to skip the geographic review requirement – was false.

8 11. Following remand, DCA again moved for preliminary injunction based on its ninth
9 cause of action. The Court denied that motion on December 22, 2016 based on "the reasoning
10 expressed in the oral and written arguments of defense counsel." Attached hereto as **Exhibit I** is
11 a true and correct copy of the Court's December 22, 2016 Minute Order denying DCA's
12 application for preliminary injunction.

13 12. Attached hereto as **Exhibit J** is a true and correct copy of relevant portions of the
14 transcript of the December 22, 2016 hearing on DCA's Motion for Preliminary Injunction.

15 13. The Court confirmed the broad basis for this Order at the January 4, 2017 hearing
16 on DCA's *ex parte* TRO application, when the Court stated that its ruling was indeed based on all
17 defense arguments, just as the Court had written in its order. These arguments included that DCA
18 did not establish irreparable harm or succeed in showing that the balance of harms favors DCA;
19 that DCA has no likelihood of success on the merits as to its ninth cause of action; and that the
20 Covenant contained in the Applicant Guidebook barred DCA's claim.

21 14. Attached hereto as **Exhibit K** is a true and correct copy of the April 16, 2010 letter
22 from Deputy Chairperson Erastus Mwencha of the AUC to Sophia Bekele.

23 15. Attached hereto as **Exhibit L** is a true and correct copy of the April 17, 2010 letter
24 from Sophia Bekele to AUC Chairperson Jean Ping.

25 16. Attached hereto as **Exhibit M** is a true and correct copy of the January 26, 2011
26 letter from Sophia Bekele to AUC Chairperson Jean Ping and Abdoulie Jannie, United Nations
27 Under-Secretary General and Executive Secretary of UNECA.

28 17. Attached hereto as **Exhibit N** is a true and correct copy of the December 30, 2011

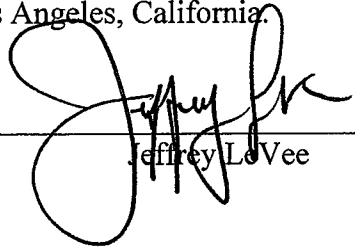
1 letter from Sophia Bekele to John Shinkaiye, Chief of Staff, Bureau of the Chairperson at the
2 AUC.

3 18. Attached hereto as **Exhibit O** is a true and correct copy of the July 20, 2015 letter
4 from Sandra Baffoe-Bonnie, Secretary of the Commission and Legal Advisor at UNECA, to the
5 Dr. Elham Ibrahim, Commissioner for Energy and Infrastructure at the AUC.

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

9
10 I declare under penalty of perjury under the laws of the United States and the State of
11 California that the foregoing is true and correct.

12 Executed this 19th day of January 2017, in Los Angeles, California.

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15 _____
16 Jeffrey LeVee

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