

1 Jeffrey A. LeVee (State Bar No. 125863)

Contact Information Redacted

2 Kate Wallace (State Bar No. 204447)

Contact Information Redacted

3 Rachel H. Zernik (State Bar No. 281222)

Contact Information Redacted

4 JONES DAY

555 South Flower Street

5 Fiftieth Floor

Los Angeles, CA 90071.2300

6 Telephone: +1.213.489.3939

Facsimile: +1.213.243.2539

7

Attorneys for Defendant

8 INTERNET CORPORATION FOR

ASSIGNED NAMES AND NUMBERS

9

10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

12 WESTERN DIVISION

13

14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16

v.

17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND
NUMBERS,

19 Defendant.

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Case No. CV 16-00862-RGK

Assigned for all purposes to the
Honorable R. Gary Klausner

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

[Opposition to Motion and
Declarations of Akram Atallah,
Kevin Espinola, Christine Willett,
and Moctar Yedaly Filed
Concurrently]

Hearing Date: April 4, 2016

Hearing Time: 9:00 a.m.

Hearing Location: Courtroom 850

1 I, Jeffrey A. LeVee, declare the following:

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

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

12 3. DCA filed its Notice of IRP in October 2013 but did not include the
13 paperwork that was necessary until January 2014. DCA did not initially move for
14 any form of interim relief. Instead, DCA waited until March 28, 2014 to file such a
15 request. On 12 May 2014, the three-member IRP panel (“IRP Panel”) issued an
16 interim declaration recommending that the delegation of .AFRICA to ZA Central
17 Registry (“ZACR”) be stayed pending the conclusion of the IRP. ICANN’s Board
18 then agreed to abide by that recommendation.

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

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

26 6. Paragraphs 1-60 of the Declaration (pages 2-17) summarize the
27 procedural background of the case. Paragraphs 53-61 (pages 16-18) summarize the
28 parties’ positions on the merits, and state in a summary fashion the IRP Panel’s

1 determination that ICANN's Board did not act consistently with ICANN's Articles
2 of Incorporation and Bylaws. Paragraphs 62-77 (pages 19-77) summarize the
3 parties' positions on the standard of review to be applied and the IRP Panel's
4 determination in that regard.

5 7. Paragraphs 78-85 (pages 23-27) detail DCA's position on the merits.
6 Paragraph 80 describes DCA's various contentions regarding ICANN's and the
7 Geographic Names Panel's handling of DCA's and ZACR's applications
8 for .AFRICA. Paragraphs 81-82 describe DCA's contention that ICANN's Board
9 should not have accepted the advice of ICANN's Governmental Advisory
10 Committee ("GAC") objecting to DCA's application for .AFRICA ("Advice").

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

16 9. Paragraphs 92-117 (pages 39-54) detail the IRP Panel's findings
17 regarding the merits of DCA's claims. The entirety of the Panel's discussion is
18 devoted to the Board's acceptance of the GAC's Advice. The IRP Panel concludes
19 that ICANN's Board did not act consistently with ICANN's Articles and Bylaws in
20 accepting the GAC's Advice. (§ 115.) With respect to all of DCA's other claims,
21 the Panel reaches no conclusion except to state in Paragraph 117 that:

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

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

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

9 12. Finally, paragraphs 148-150 set forth the Panel’s final declaration.
10 The Panel repeats its finding that ICANN’s Board did not act consistently with
11 ICANN’s Articles and Bylaws, as well as its recommendation that DCA’s
12 Application be “permit[ted] [] to proceed through the remainder of the new gTLD
13 application process.” (*Id.* ¶¶ 148-149.) It also repeats its finding that DCA is the
14 prevailing party and its awards of costs to DCA. (*Id.* ¶ 150.)

15 13. In sum, the IRP Panel made no findings whatsoever concerning
16 ICANN’s processing of either Plaintiff’s Application or ZACR’s application
17 for .AFRICA. Nor did the IRP Panel make findings that could possibly be
18 construed to remove or eliminate the Guidebook requirement that an application for
19 a gTLD representing a geographic region (such as .AFRICA) must obtain the
20 support or non-objection of at least 60% of the governments in that region. As a
21 result, DCA’s (apparent) argument that it should be allowed to skip this essential
22 Guidebook requirement does not find support in the IRP Panel’s declaration. To the
23 contrary, the net effect of the IRP Panel declaration was that the Panel wanted DCA
24 to have another opportunity to meet that requirement and any other requirements
25 that DCA had not yet been able to meet (or that ICANN had not yet evaluated).

26 14. In its briefs to the IRP Panel, ICANN argued that IRP panel
27 declarations were not binding on ICANN’s Board. ICANN’s argument was based,
28 in part, on the fact that the only previous IRP declaration to have been issued (as of

1 that time) expressly found that IRP Panel declarations are not binding. The IRP
2 Panel disagreed, however, and in a 14 August 2014 declaration on procedural issues
3 (“Procedural Declaration”), the IRP Panel determined that its declaration would be
4 binding on ICANN’s Board. The portions of the Procedural Declaration that
5 address this point are reproduced at paragraph 23 (pages 5-6) of the IRP Panel’s
6 Declaration.

7 15. Following the IRP Panel’s Declaration, another IRP panel addressed
8 the issue and concluded that IRP panel declarations were not binding on ICANN’s
9 Board. Most importantly, however, the question of whether the IRP Panel’s
10 declaration was considered binding in conjunction with DCA’s IRP became a moot
11 point when ICANN’s Board elected to adopt all of the findings and
12 recommendations in the IRP Panel’s Declaration. A copy of the resolution by
13 ICANN’s Board adopting the IRP Panel’s Declaration is attached as Exhibit B to
14 the concurrently-filed Declaration of Akram Atallah.

15 I declare under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.

17 Executed on March 14, 2016, in Los Angeles, California.

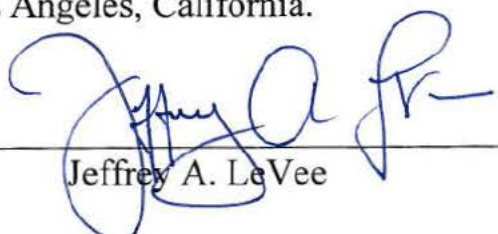
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20 Jeffrey A. LeVee
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EXHIBIT A

International Centre for Dispute Resolution

CASE No. Case 50-20-1300-1083

Between

DOTCONNECTAFRICA TRUST (DCA TRUST),
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),
Respondent

WITNESS STATEMENT OF SOPHIA BEKELE ESHETE

I, SOPHIA BEKELE ESHETE, of Walnut Creek, California, hereby make the following statement:

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust (“DCA”) for rights to .AFRICA, a new generic top-level domain name (“gTLD”), to the Internet Corporation for Assigned Names and Numbers (“ICANN”).

2. I am the founder and executive director of DCA and a champion for DCA’s application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN’s breaches of its Bylaws,

Articles of Incorporation, and the New gTLD Guidebook due to its improper cooperation with the African Union Commission (“AUC”), the backer of the competing application for the .AFRICA gTLD submitted by UniForum S.A., now known as ZA Central Registry (“ZACR”).¹ ICANN basically drew a road map for the AUC to prevent any other applicant from obtaining rights to .AFRICA by advising the AUC that it could reserve .AFRICA for its own use as a member of ICANN’s Governmental Advisory Committee (“GAC”). ICANN then accepted the GAC’s advice—engineered by the AUC following ICANN’s road map—to block DCA’s application for .AFRICA. In my view, this entire process was highly improper and most irregular.

I. PERSONAL AND PROFESSIONAL BACKGROUND

3. I was born in Addis Ababa, Ethiopia, the third of six children, to Ato Bekele Eshete and Sister Muluaem Beyene. My father was a prominent and successful businessman who was involved in diverse businesses in Ethiopia and was the founder and board member of United Bank and United Insurance, one of the largest financial institutions in Ethiopia. My mother was a career nurse. Growing up, I idolized my mother, who was kind, compassionate and deeply religious. At the same time, I listened to my father talk about his businesses to friends and family at home, where I learned a lot from him about the business world and learned the value of independence, networking, and risk-taking. I came to the U.S. after completing my secondary school education. I earned my bachelor’s degree in business analysis and information systems from San Francisco State University and a master’s of business administration in management of information systems from Golden Gate University.

¹ For the sake of consistency, I refer to the applicant competing with DCA for .AFRICA as ZACR in my statement.

4. When I finished my bachelor's degree, I was recruited by Bank of America ("BoA") to serve as an information auditing and security professional. As a senior information technology audit consultant, I led, planned and executed medium to complex control reviews of production application systems for various technical platforms and I served as lead auditor for BoA's Capital Markets activities in San Francisco, New York, Chicago and Latin America. My responsibilities included auditing computer systems to ensure that data inputs and outputs were consistent (similar to how an auditor would examine a company's cash flows), performing and overseeing corporate governance and risk management functions, providing training and support to BoA employees on system security and technology related issues and coordinating and implementing pilot projects, including developing working standards, models and programs within various audit divisions.

5. Approximately five years later, I moved to UnionBanCal, to reengineer and manage UnionBanCal's audit division. In the role of senior information technology audit specialist, I reported directly to the audit director in UnionBanCal's Corporate Audit Risk Management Division. My main role was to set up a new information technology auditing unit and team. I provided strategies and action plans for streamlining existing auditing processes and procedures, improving existing audit programs, developing new audit programs and recommending technical and business specifications for implementing a local area network within the division. I also mentored and supervised auditors and executed technology and integrated audits locally and within the holding bank located in New York, as well as supported external auditors (*e.g.*, Deloitte & Touche) on audit projects. About one year later, I moved to PricewaterhouseCoopers ("PwC") to manage the information technology audit portfolio of one of the firm's largest

banking accounts, Barclay's Bank. After spending one year at PwC in the role of senior technology advisory consultant, I started my own companies.

6. In 1998, I founded and became the chief executive officer of tech start-ups CBS International ("CBS"), based in California, and affiliate SbCommunications Network plc ("SbCnet"), based in Addis Ababa. CBS primarily offers services in the areas of technology and business consulting and internet solutions. Using Africa as a base, I launched affiliate SbCnet, which specializes in systems and technology integration and support services. Both companies are part of an initiative to support the transfer of technology and knowledge to enterprises in emerging markets. Clients include global, multinational, continental and national organizations in both the private and public sectors.

7. In 2004, I shifted my focus back to the U.S. to help meet the challenges arising from the major corporate governance scandals taking place, such as Enron and WorldCom. I advised U.S.-based clients, including Intel Corp., NASDAQ, Genetech, BDO Sieldman LLP and the Federal Reserve Bank, on corporate governance and risk management within the context of information technology, including on complying with the requirements of Sarbanes-Oxley. I also advised clients on corporate relations and communications programs.

8. In the course of my career, I have obtained and I continue to maintain various professional certifications, including Certified Information Systems Auditor or "CISA," Certified Control Specialist or "CCS," and Certified in the Governance of Enterprise Information Technology or "CGEIT." These certifications are issued to professionals who demonstrate knowledge and proficiency in the field of information systems auditing and security, and enterprise information technology governance principles and practices.

9. I am also a founding member and executive director of the San Francisco Bay Area chapter of the Internet Society (“ISOC”), which serves the ISOC’s purpose of promoting open access to the Internet for all persons by focusing on local issues and representing the interests of those who live or work in the San Francisco Bay Area. In addition, I am a co-founder of the Internet Business Council for Africa (“IBCA”), the aim of which is to promote the involvement and participation of the African private/non-governmental sector (and the global private sector involved in Africa) in the global information and communication technology and Internet community, and also to provide an avenue for them to participate in global Internet governance.²

10. In 2008, I formed DCA to pursue applying for and obtaining a .AFRICA gTLD. Through my involvement in the Internet domain name systems (“DNS”) industry, I got the idea to apply for .AFRICA and recognized the potential benefits to the people of Africa of operating a .AFRICA gTLD for charitable purposes. In 2012, DCA applied for .AFRICA through the New gTLD Program.

II. EARLY INVOLVEMENT WITH ICANN AND INTERNET GOVERNANCE MATTERS

11. Since 2005, I have been very active in the DNS industry, which encompasses website design and hosting, building servers and hosting domain names, managing and registering domain names and setting up email addresses. In 2005, I was elected as the first African to serve on ICANN’s Generic Names Supporting Organization Council (“GNSO”), a policy advisory body that advises the ICANN Board of Directors (the “Board”) on global public policies that guide the development of the Internet, including the gTLD policy and processes affecting such TLDs as .asia, .com, .net, .org, and others.

² Internet Business Council for Africa, <http://theibca.org/>.

12. In my initial statement of interest to ICANN, I declared my interest in issues facing emerging economies relating to information and communications technology and the Internet as well as my interest in pursuing an initiative to obtain a .AFRICA continental domain name.³ Later, my statement of interest evolved to encompass the many projects I worked on at the GNSO, including my efforts to obtain the .AFRICA gTLD.

13. During the two years that I served on the GNSO, ICANN was actively engaged in a global Internet expansion project to introduce new gTLDs. As a member of the GNSO, I helped develop the rules and requirements for the New gTLD Program and participated in discussions about how to “standardize” the rules to ensure that the process for awarding new gTLDs would be fair, transparent and equitable. When we were formulating the rules and requirements, we tried to craft the requirements in such a way as to ensure that the application process would be open and competitive, and that applications would be evaluated on the basis of objective criteria.

14. During my service on the GNSO, I was also instrumental in initiating policy dialogue over internationalized domain names (“IDNs”). I led an active campaign to introduce IDNs under which new IDNs in Arabic, Cyrillic, Chinese and other non-Latin alphabets would become available, thereby providing non-English/non-Latin language native speakers an opportunity to access and communicate on the Internet in their native languages. In furtherance of this goal, I helped form an IDN working group within ICANN to bring the global voices of the IDN stakeholders to ICANN. I was then nominated to chair ICANN’s IDN Working Group at the GNSO and was highly influential in drafting the IDN policy guidelines.⁴ Our group, which later organized itself as the International Domain Resolution Union (“IDRU”), is credited with

³ Sophia Bekele Statement of Interest, ICANN, <https://mex.icann.org/node/4985>.

⁴ Sophia Bekele, ICANNWiki, http://icannwiki.com/index.php/Sophia_Bekele.

pioneering the IDN TLD globally.⁵ These new IDNs have been introduced by ICANN through the current New gTLD Program.⁶

III. NEW gTLD PROGRAM

15. One of ICANN's key responsibilities is to introduce and promote competition in the registration of Internet domain names, while ensuring that the domain name system is secure and stable. For the first several years of ICANN's existence, TLDs were very few in number and were limited by ICANN. The New gTLD Program is a response to demands by Internet stakeholders that ICANN permit the expansion of new top-level domain names into the root zone (*i.e.*, the top-level Domain Name System zone maintained by ICANN). The New gTLD Program is meant to allow an unlimited number of new TLDs in order to enhance competition for and to promote consumer choice in domain names. It evolved, in large part, out of the work ICANN's GNSO performed between 2005 and 2007 to explore introducing new gTLDs, work in which I was directly involved as a member of the GNSO Council at that time.

16. In 2005, the year I was elected to the GNSO, I and other members of the GNSO began the process of developing the parameters for introducing new gTLDs. The process involved detailed discussions and debate about what the rules and requirements should be for new gTLDs, including what technical, operational and financial standards should apply. During this process, we were mindful of the balance between ICANN's objective of expanding the universe of Internet domain names and protecting the security and stability of the system. In 2008, relying on the work of the GNSO, ICANN's Board adopted the GNSO's recommendations for introducing new gTLDs. Ultimately, these recommendations and input from various Internet

⁵ Letter from David Allen, Exec. Director IDRU, to Sophia Bekele, Exec. Director, DCA (5 Dec. 2010), *available at* <http://origin.library.constantcontact.com/download/get/file/1102516344150-330/TAS-IDRU+endorsement++DCA.pdf>.

⁶ *ICANN in Beijing, China: IDNs to win big in the new gTLD process*, Tандаа Биашара (17 Apr. 2013), <http://tandaabiashara.com/icann-in-beijing-idn-to-win-big-in-the-new-gtld-process/>.

stakeholders was brought together in 2011 in ICANN’s gTLD Applicant Guidebook (the “AGB”) and the launch of the New gTLD Program.

IV. THE DOTCONNECTAFRICA INITIATIVE AND THE DOTCONNECTAFRICA TRUST

17. While serving on the GNSO Council, I came across discussions being held on new geographic TLDs like .asia and .lat, as well as .EU under the country-code TLD (“ccTLD”) program. Being from Africa and in light of my activities in Africa at the time, I asked my colleagues at the GNSO why a “.AFRICA” did not exist. Part of the diligence I performed to ensure that my efforts to obtain a .AFRICA gTLD would not overlap with the work of others, included making inquiries into registered TLDs potentially relating to .AFRICA. After confirming that no one was championing it among the African participants in ICANN, that there was no African participation in GNSO sessions nor any sign that anyone appeared to be interested in .AFRICA as a new gTLD, I turned my focus to securing the .AFRICA TLD.

a. Creation of the DotConnectAfrica Initiative and Formation of DCA

18. I first proposed developing .AFRICA as a new gTLD in 2006, in a presentation given to the African members of the ICANN Board. The following year, I gave a presentation on the topic to different African organizations of the ICANN community during the ICANN 28 meeting in Lisbon, Portugal.⁷ Soon thereafter, I led the .AFRICA initiative under a new start-up, envisioning connecting the dots in Africa under one umbrella and calling the initiative “DotConnectAfrica.” In February 2008, I wrote to the Board to notify ICANN of the “DotConnectAfrica Initiative”⁸ and in June of 2008, at the ICANN 32 meeting in Paris, I made

⁷ Presentation to the ICANN Africa Group ICANN 28 meeting in Lisbon, Portugal (2007), *available at* <http://www.slideshare.net/Nyosef/dotafrika>.

⁸ Letter from Sophia Bekele, Executive Coordinator (.Africa), to P. Dengate Thrush, Chairman, ICANN (13 Feb. 2008), *available at* <http://www.scribd.com/doc/99725682/Letter-of-Notification-for-ICANN-for-Applying-for-Delegation-of-Dotafrika-TLD-Chairman-ICANN>.