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 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS
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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
 ASSIGNED NAMES AND
 18 NUMBERS,
 19 Defendant.
 20
 21
 22

Case No. CV 16-00862-RGK

Assigned for all purposes to the
 Honorable R. Gary Klausner

**ICANN'S OPPOSITION TO
 PLAINTIFF'S *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

[Declaration of Jeffrey A. LeVee and
 Declaration of Kate Wallace Filed
 Concurrently]

INTRODUCTION

1
2 Plaintiff DotConnectAfrica Trust's ("Plaintiff's" or "DCA") Ex Parte
3 Application for Temporary Restraining Order ("TRO Application"), like its
4 Amended Complaint, is fatally flawed and relies on complete misrepresentations of
5 the facts relating to its application to operate the generic top level domain
6 ("gTLD") .AFRICA ("Application"). Once the Court is apprised of those facts,
7 defendant Internet Corporation for Assigned Names and Numbers ("ICANN") has
8 no doubt that the Court will deny Plaintiff's Motion for Preliminary Injunction and
9 will dismiss this lawsuit.

10 In order to respond substantively to Plaintiff's TRO Application and the
11 Motion for Preliminary Injunction, ICANN needs to work with inside counsel and
12 other ICANN employees, nearly all of whom are presently in (or traveling to)
13 Morocco for ICANN's public Board meeting. (Declaration of Jeffrey A. LeVee
14 ("LeVee Decl.") ¶ 20.) For this reason, and because ICANN seeks an expeditious
15 resolution of Plaintiff's Motion for Preliminary Injunction ("PI Motion"), ICANN
16 opposes Plaintiff's TRO Application but consents to Plaintiff's alternative request
17 that the hearing on the PI Motion be advanced to a date prior to March 18, 2016. If
18 convenient for the Court, ICANN proposes that the hearing on the PI Motion be
19 scheduled for March 14, 2016, and that ICANN file its opposition to the PI Motion
20 no later than 4 p.m. Pacific on March 9, 2016.

21 There is no immediate need for the Court to consider Plaintiff's TRO
22 Application since as a practical matter, .AFRICA cannot be delegated until at least
23 March 18, 2016. Earlier today, ICANN's Board passed a resolution lifting the stay
24 on the delegation of .AFRICA, which the Board had imposed in July 2015 pending
25 ICANN's full compliance with the Independent Review Process ("IRP") Panel's
26 recommendation that ICANN resume its evaluation of Plaintiff's Application. (*Id.*
27 ¶ 19.) However, due to the logistical preparations required for the delegation of a
28 new gTLD into the Internet's root zone, no delegation of .AFRICA will be

1 practicable before March 18, 2016. (*Id.*) For this reason, should the Court hear and
2 resolve Plaintiff’s Motion for Preliminary Injunction before March 18, 2016, no
3 TRO would be necessary or appropriate.

4 ARGUMENT

5 **I. NO GOOD CAUSE EXISTS FOR PLAINTIFF’S TRO APPLICATION.**

6 Despite the purported urgency of Plaintiff’s TRO Application, Plaintiff in
7 fact delayed considerably in filing its TRO Application. Indeed, Plaintiff initially
8 filed its action in state court, where it sought a TRO on January 25, 2016. The state
9 court categorically denied the TRO because Plaintiff’s notice was improper, and
10 because Plaintiff failed to provide evidence to show that ICANN was not
11 conducting itself consistent with the “Independent Review Process” or “IRP”
12 declaration that Plaintiff had obtained. (Wallace Decl. ¶ 5.)

13 Thereafter, on February 17, 2016, ICANN informed Plaintiff that it had
14 failed ICANN’s Extended Evaluation, and that its Application therefore would not
15 proceed, but Plaintiff did nothing in court to protect its rights until this week.
16 (LeVee Decl. ¶ 17.) Accordingly, Plaintiff has been on notice for two weeks that
17 ICANN’s Board might authorize the delegation of .AFRICA for operation by ZA
18 Central Registry (“ZACR”), the successful applicant for .AFRICA. In particular,
19 on February 25, 2016, ICANN announced on its public website that its Board
20 intended to discuss .AFRICA during its meeting on March 3, 2016 in Marrakech,
21 Morocco. (*Id.* ¶ 18.) Despite this, Plaintiff waited five more days—until March 1,
22 2016—to file its PI Motion, and it waited until March 2, 2016 to file its TRO
23 Application. By that time, ICANN’s Board and relevant ICANN staff members
24 were in or on their way to Morocco. (*Id.* ¶ 20.)

25 Plaintiff’s TRO Application is confusing in terms of the nature of the relief it
26 seeks. If Plaintiff seeks to enjoin ICANN’s Board from lifting the stay on the
27 delegation of .AFRICA, Plaintiff filed its TRO application too late because Plaintiff
28 filed only hours before the Board was set to consider the .AFRICA situation on

1 March 3, 2016. Indeed, this opposition is being filed after ICANN’s Board has
2 already passed a resolution authorizing the delegation of .AFRICA for operation by
3 ZACR.

4 Plaintiff’s TRO Application is timely, however, if the application seeks to
5 keep ICANN from permitting the .AFRICA gTLD to be delegated into the
6 Internet’s root zone, which is presumably the actual relief Plaintiff seeks. As a
7 practical matter, this cannot occur until after March 18, 2016, which is why ICANN
8 consents to advancing the hearing on Plaintiff’s Motion for Preliminary Injunction
9 to March 14, 2016, or to another date prior to March 18 and consistent with the
10 Court’s calendar.

11 **II. PLAINTIFF’S PI MOTION WILL FAIL.**

12 Even if Plaintiff could demonstrate good cause and irreparable injury, its
13 TRO Application should be denied as its underlying PI Motion is fatally flawed.
14 Specifically, Plaintiff’s PI Motion relies on two fundamental premises, each of
15 which is demonstrably false.

16 First, Plaintiff needs the Court to find that the Release and Covenant Not to
17 Sue that Plaintiff agreed to when Plaintiff submitted its application is not
18 enforceable. Second, Plaintiff needs the Court to find that ICANN’s Board did not
19 accept the determination of the independent review panel (“DCA IRP Panel”)
20 recommending that Plaintiff’s Application proceed through the review process set
21 forth in the New gTLD Applicant Guidebook (“Guidebook”).¹ The failure of either
22 premise dooms Plaintiff’s PI Motion, and ICANN is confident that, once ICANN is
23 given a few days to provide the Court with the actual facts, the Court will find that
24 both premises are false.

25
26 ¹ The Guidebook provides detailed instructions to gTLD applicants and sets
27 forth the procedures as to how new gTLD applications would be evaluated. It was
28 developed with the ICANN community in a process that involved numerous
versions that were prepared, distributed for public comment, and then revised as a
result of the public input received. (LeVee Decl. ¶ 14.)

1 **A. Plaintiff’s Claims Are Barred by a Clear, Unambiguous, and**
2 **Enforceable Release and Covenant Not to Sue.**

3 In submitting its Application, Plaintiff agreed to a clear, unambiguous
4 Release and Covenant Not to Sue:

5 Applicant hereby releases ICANN and the ICANN Affiliated Parties
6 [i.e., ICANN’s affiliates, subsidiaries, directors, officers, employees,
7 consultants, evaluators, and agents] from any and all claims by
8 applicant that arise out of, are based upon, or are in any way related to,
9 any action, or failure to act, by ICANN or any ICANN Affiliated Party
10 in connection with ICANN’s or an ICANN Affiliated Party’s review of
11 this application, investigation or verification, any characterization or
12 description of applicant or the information in this application, any
13 withdrawal of this application or the decision by ICANN to
14 recommend, or not to recommend, the approval of applicant’s gTLD
15 application. **APPLICANT AGREES NOT TO CHALLENGE, IN**
16 **COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL**
17 **DECISION MADE BY ICANN WITH RESPECT TO THE**
18 **APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO**
19 **SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL**
20 **FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM**
21 **AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH**
22 **RESPECT TO THE APPLICATION. . . .**

23 (Declaration of Sophia Bekele Eshete (“Eshete Decl.”) Ex. 3 at 436 (Module 6 ¶ 6),
24 ECF No. 17-3 (bold emphasis added).)

25 Plaintiff’s claims in this case, which relate to ICANN’s and the Geographic
26 Names Panel’s evaluation of Plaintiff’s Application, clearly relate to the “review”
27 of Plaintiff’s Application and are therefore barred by the Release and Covenant Not
28 to Sue. As a court in the Western District of Kentucky found just last month, this

1 Release and Covenant Not to Sue is “clear and comprehensive” and bars claims
2 “aris[ing] out of ICANN’s review of [a new gTLD application]” *Commercial*
3 *Connect v. Internet Corp. for Assigned Names and Numbers*, No. 3:16-cv-00012-
4 JHM, 2016 U.S. Dist. LEXIS 8550, at *9-10 (W.D. Ky. Jan. 26, 2016).

5 Plaintiff, a sophisticated business entity that paid \$185,000 to apply for
6 .AFRICA, now attempts to evade its promise not to file a lawsuit against ICANN
7 related to its gTLD application. (TRO Application at 20.) As ICANN will
8 establish, Plaintiff has no basis to avoid the effect of the Release and Covenant Not
9 To Sue. Indeed, the only case Plaintiff cites for its holding that a release was found
10 unenforceable involved an adhesion contract in an employment context, a context
11 far different than here. *See Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148
12 (1990) (employer required release of employee claims arising out of on-the-job
13 asbestos exposure). This case, by contrast, involves a voluntary agreement between
14 two corporate entities. Plaintiff had no obligation to apply for a gTLD, and
15 Plaintiff was well aware of the Release and Covenant Not to Sue when it submitted
16 its Application. Plaintiff’s CEO testified to the *DCA* IRP Panel that she “helped
17 develop the rules and requirements for the ICANN’s New gTLD Program” (which
18 were memorialized in the Guidebook and included the Release and Covenant Not to
19 Sue). (LeVee Decl. ¶ 4.)

20 In sum, ICANN is confident that, once apprised of the facts, the Court will
21 rule that Plaintiff has no likelihood of success on the merits because Plaintiff had no
22 right to file this lawsuit in the first instance.

23 **B. ICANN’s Board Adopted in Full the Declaration of the *DCA***
24 **IRP Panel.**

25 Plaintiff’s primary argument in its PI Motion is that ICANN’s Board ignored
26 and failed to adopt the recommendations of the *DCA* IRP Panel in its final
27 declaration (“Declaration”). This is demonstrably false.

28 In its Declaration, the *DCA* IRP Panel declared that ICANN’s Board had

1 violated ICANN's Articles of Incorporation and Bylaws by accepting the
2 Governmental Advisory Committee's advice against proceeding with Plaintiff's
3 Application. The Panel declared Plaintiff to be the prevailing party in the IRP,
4 awarded Plaintiff its costs, and recommended that "ICANN continue to refrain from
5 delegating the .AFRICA gTLD and permit [Plaintiff]'s application to proceed
6 through the remainder of the new gTLD application process." (Eshete Decl. Ex. 1
7 at 67 ¶ 149, ECF No. 17-1.)

8 On July 16, 2015, one week after the *DCA* IRP Panel issued its Declaration,
9 ICANN's Board passed a resolution in which it adopted the Declaration in full,
10 resolving to "continue to refrain from delegating the .AFRICA gTLD," "permit
11 [Plaintiff's] application to proceed through the remainder of the new gTLD
12 application process," and "reimburse DCA for the costs of the IRP." (LeVee Decl.
13 ¶ 13.)

14 Contrary to what Plaintiff now implies, the *DCA* IRP Panel made no findings
15 whatsoever concerning ICANN's processing of either Plaintiff's Application or
16 ZACR's application for .AFRICA. The *DCA* IRP Panel also made no findings that
17 possibly could be construed to remove or eliminate the Guidebook requirement that
18 an application for a gTLD representing a geographic region (such as .AFRICA)
19 must obtain the support of at least 60% of the governments in that region.²
20 Accordingly, nothing about the *DCA* IRP Panel's declaration could possibly be
21 construed to mean (as Plaintiff suggests) that ICANN should modify the
22 Guidebook's requirements with respect to Plaintiff's Application. To the contrary,
23

24 ² The purpose of the Guidebook's requirement was to make sure that, if an
25 entity was proposing to operate a gTLD that literally was the name of a geographic
26 region such as a continent, at least 60% of the countries of that continent supported
27 the entity's application. In this instance, DCA does not have the support of a single
28 country in Africa, making its request to block ZACR from operating the .AFRICA
gTLD even more inappropriate. The people of Africa have been waiting over two
years for the operation of this gTLD to commence, and they should not have to wait
any further.

1 the net effect of the *DCA* IRP Panel declaration was that the Panel wanted Plaintiff
 2 to have another opportunity to meet that requirement—precisely what ICANN gave
 3 it.³

4 In ruling on the application for temporary restraining order that Plaintiff
 5 sought in state court, the court specifically observed that, in light of ICANN’s
 6 Board acceptance of, and ICANN’s compliance with, the *DCA* IRP Panel’s
 7 Declaration, Plaintiff’s request that the court require ICANN’s Board to do so was
 8 moot. (Wallace Decl. ¶ 5.) ICANN has no doubt that this Court will reach the
 9 exact same finding, which will result in the Court’s denial of Plaintiff’s PI Motion
 10 because ICANN has done all that it committed to do, and all that the *DCA* IRP
 11 Panel asked ICANN to do. Plaintiff is unable to meet the Guidebook’s
 12 requirements because it does not have the necessary support from African
 13 countries, leaving no basis whatsoever for any further delays, even if Plaintiff had
 14 the right to seek relief in this Court, which clearly Plaintiff does not have.

15 **III. FURTHER DELAY PREJUDICES THE COUNTRIES OF AFRICA.**

16 Plaintiff argues that no injury will be suffered if the delegation of .AFRICA
 17 is further delayed. In fact, the countries of Africa have repeatedly expressed their
 18 desire for the expeditious delegation of .AFRICA for operation by ZACR. Despite
 19 having no support from the countries of Africa, Plaintiff has already delayed the
 20 delegation of .AFRICA for two years. The longer the delegation is delayed, the

22 ³ Plaintiff argues that it once had support of the countries of Africa, and that
 23 those countries (represented by the African Union Commission or AUC) were not
 24 entitled to withdraw that support under the terms of the Guidebook. Plaintiff’s
 25 argument takes great liberty with the actual facts, which demonstrate that the AUC
 26 withdrew its support for Plaintiff two years before Plaintiff even submitted its
 27 application with ICANN (a fact Plaintiff knew but did not disclose to ICANN when
 28 it filed its application). Nothing in the Guidebook restricts countries that did not
 support an applicant on the date the application is filed from continuing to withhold
 their support. As a result, Plaintiff’s argument that it had support from 60% of the
 countries of Africa when it filed its application in 2012 is demonstrably false, as
 ICANN will demonstrate when it files its opposition to the Motion for Preliminary
 Injunction.

1 greater the prejudice to the African governments and the ICANN community. For
2 this reason, ICANN urges the Court to deny Plaintiff's TRO Application but grant
3 Plaintiff's alternative request that the hearing on Plaintiff's PI Motion be advanced
4 to March 14, 2016.

5 **CONCLUSION**

6 ICANN respectfully requests that the Court deny Plaintiff's TRO Application.
7 ICANN further requests that the Court advance the hearing on Plaintiff's PI Motion
8 to March 14, 2016 (or another date that week prior to March 18, 2016) and order
9 ICANN to submit its opposition to Plaintiff's motion no later than March 9, 2016 at
10 4 p.m. PST.

11 Dated: March 3, 2016

JONES DAY

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By: /s/ Jeffrey A. LeVee
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS