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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

Case No. CV 16-00862-RGK

Assigned for all purposes to the
 Honorable R. Gary Klausner

**DECLARATION OF JEFFREY
 A. LEVEE IN SUPPORT OF
 ICANN'S OPPOSITION TO
 PLAINTIFF'S *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

[Opposition to Plaintiff's *Ex Parte*
 Application and Declaration of Kate
 Wallace Filed Concurrently]

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

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

8 **ICANN and the New gTLD Program**

9 2. I was counsel to ICANN when it was formed in 1998, and I have
10 remained ICANN’s primary outside litigation counsel since that time. ICANN is a
11 California not-for-profit public benefit corporation. As set forth in its Bylaws,
12 ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system
13 of unique identifiers, and in particular to ensure the stable and secure operation of
14 the Internet’s unique identifier systems,” including the domain name system
15 (“DNS”).

16 3. The New gTLD Program (“Program”) constitutes by far ICANN’s
17 most ambitious expansion of the Internet’s naming system. The Program’s goals
18 include enhancing competition and consumer choice, and enabling the benefits of
19 innovation via the introduction of new gTLDs, including both new ASCII gTLDs
20 and new non-ASCII, internationalized domain name (“IDN”) gTLDs.

21 4. In developing the Program with the ICANN community, numerous
22 versions of a New gTLD Applicant Guidebook (“Guidebook”) were prepared,
23 distributed for public comment, and then revised as a result of the public input
24 received. The Guidebook provides detailed instructions to gTLD applicants and
25 sets forth the procedures as to how new gTLD applications would be evaluated.
26 Plaintiff was active in the ICANN community during this time. As Plaintiff’s CEO,
27 Ms. Bekele, wrote in a declaration dated November 3, 2014: “As a member of the
28 [Generic Names Supporting Organization, an ICANN advisory committee], I

1 helped develop the rules and requirements for the New gTLD Program.”

2 5. Module 6 of the Guidebook sets forth the terms and conditions agreed
3 to by new gTLD applicants. Among those terms and conditions is a release and
4 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
10 Party in connection with ICANN’s or an ICANN Affiliated Party’s
11 review of this application, investigation or verification, any
12 characterization or description of applicant or the information in this
13 application, any withdrawal of this application or the decision by
14 ICANN to recommend, or not to recommend, the approval of
15 applicant’s gTLD application. **APPLICANT AGREES NOT TO
16 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA,
17 ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO
18 THE APPLICATION, AND IRREVOCABLY WAIVES ANY
19 RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER
20 JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL
21 CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES
22 WITH 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).) The terms and conditions also provide that
25 ICANN has the discretion to “make reasonable updates and changes to this
26 applicant guidebook and to the application process . . . at any time” and even to
27 “determine not to proceed with any and all applications for new gTLDs.” (*Id.* at
28 434-35, 439-40 (Module 6 ¶¶ 3,14).)

6. Module 2 of the Guidebook sets forth the various reviews to which
new gTLD applications are subject. Among other things, Module 2 provides that
applicants for gTLDs that represent the name of a geographic region must obtain
and submit with their application documentation of support from at least 60% of the
governments in that region. (*Id.* at 170-71 (Module 2 § 2.2.1.4.2).) A Geographic
Names Panel operated by a third-party vendor must verify the relevance and
authenticity of an applicant’s documentation. (*Id.* at 173-75 (Module 2 § 2.2.1.4.4).)

1 7. If the Geographic Names Panel determines that an applicant did not
2 have the requisite documented support, the applicant is given additional time (90
3 calendar days from the date of notice) to obtain that support. (*Id.*) If the applicant
4 does not obtain and produce documented support within that time, the application is
5 considered incomplete and ineligible for further review. (*Id.*)

6 **ICANN’s Accountability Mechanisms and Plaintiff’s Independent**
7 **Review Proceeding**

8 8. ICANN’s Bylaws make a number of accountability mechanisms
9 available to new gTLD applicants and others affected by actions of ICANN’s Board
10 and staff. One accountability mechanism is the independent review process
11 (“IRP”), whereby applicants can ask an independent panel to review an action or
12 inaction of ICANN’s Board. The current version of ICANN’s Bylaws—like the
13 version in effect at the time new gTLD applications were submitted—provides for
14 the IRP panel to issue a written determination “declar[ing] whether an action or
15 inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws”
16 and “recommend[ing] that the Board stay any action or decision, or that the Board
17 take any interim action, until such time as the Board reviews and acts upon the
18 opinion of the IRP.” The ICANN Board then considers and acts on the
19 determination.

20 9. Prior to the opening of the gTLD Program application period, only one
21 IRP had resulted in a written determination, *ICM Registry, LLC v. ICANN*. The
22 *ICM* panel expressly declared that the determinations of IRP panels were not
23 binding on ICANN’s Board, which was ICANN’s position in that IRP. To my
24 knowledge, ICANN has never represented that IRPs are binding, and none of the
25 papers that Plaintiff has filed in conjunction with its motion for preliminary
26 injunction identify any such representations. Instead, ICANN has consistently
27 argued that IRP declarations are not binding, and all but one IRP panel (the panel in
28 the *DCA v. ICANN* IRP (“*DCA* Panel”)) have agreed.

1 10. In the case of the *DCA* IRP, ICANN argued that IRP panel
2 declarations are not binding, but the *DCA* Panel disagreed and determined that its
3 decision would be binding on ICANN’s Board. But, most importantly, the question
4 of whether the Panel’s declaration was considered binding became a moot issue
5 once ICANN’s Board elected to adopt all of the *DCA* Panel’s findings and
6 recommendations, contrary to the representations in Plaintiff’s motion for
7 preliminary injunction and TRO application.

8 11. Specifically, on July 9, 2015, the *DCA* Panel issued its final
9 declaration. The *DCA* Panel determined that ICANN’s Board had violated
10 ICANN’s Articles of Incorporation and Bylaws by accepting the GAC’s advice
11 regarding Plaintiff’s application for .AFRICA (“Application”). The Panel therefore
12 recommended that “ICANN continue to refrain from delegating the .AFRICA
13 gTLD and permit [Plaintiff]’s application to proceed through the remainder of the
14 new gTLD application process.” (Compl. Ex. A ¶ 149.)

15 12. The *DCA* Panel made no findings whatsoever concerning ICANN’s
16 processing of either Plaintiff’s Application or ZACR’s application for .AFRICA.
17 The *DCA* Panel also made no findings that could possibly be construed to eliminate
18 the Guidebook requirement that an application for a gTLD representing a
19 geographic region (such as .AFRICA) must obtain the support of at least 60% of
20 the governments in that region. The net effect of the *DCA* Panel’s declaration was
21 that the Panel wanted Plaintiff to have another opportunity to meet that requirement,
22 not that the requirement would be waived or that the Guidebook’s requirements
23 would be altered in any respect.

24 13. As it has done with every IRP declaration to date, ICANN’s Board
25 promptly considered and adopted each of the *DCA* Panel’s recommendations.
26 Specifically, on July 16, 2015, the Board resolved to “continue from delegating the
27 .AFRICA gTLD,” “permit [Plaintiff’s] application to proceed through the
28

1 remainder of the new gTLD application process,” and “reimburse DCA for the
2 costs of the IRP.”

3 **Plaintiff’s Preliminary Injunction Motion**

4 14. Plaintiff’s motion for preliminary injunction argues that, following the
5 *DCA* Panel declaration, ICANN required Plaintiff to “start over” with respect to the
6 processing of Plaintiff’s application. This is false. Following the *DCA* Panel
7 declaration, ICANN resumed the processing of Plaintiff’s application at exactly the
8 point where the processing had previously stopped, and ICANN gave Plaintiff an
9 extended opportunity to demonstrate that it had the support of at least 60% of the
10 governments in Africa.

11 15. After Plaintiff’s Application for .AFRICA returned to processing, the
12 Geographic Names Panel reviewed the Application to determine whether Plaintiff
13 had the documented support of 60% of African governments. On October 12, 2015,
14 ICANN published the Initial Evaluation report for Plaintiff’s Application
15 for .AFRICA. The report stated that the Geographic Names Panel had determined
16 that Plaintiff had not demonstrated the requisite documented support.

17 16. As provided by the Guidebook, Plaintiff was provided considerable
18 additional time—until January 28, 2016—to gather the requisite support. On that
19 date, Plaintiff submitted a letter from its attorney as well as a copy of the *DCA*
20 Panel’s final declaration; however, Plaintiff did not submit any documentation of
21 support from the countries of Africa.

22 17. On February 17, 2016, ICANN published the Extended Evaluation
23 report for Plaintiff’s Application for .AFRICA. It stated that the Geographic
24 Names Panel had determined that Plaintiff still had not demonstrated the requisite
25 documented support. As provided by the Guidebook, Plaintiff’s Application was
26 not eligible for further review and was removed from contention for .AFRICA.

27 18. On February 25, 2016, ICANN’s Board announced on its website,
28 located at www.icann.org, that it intended to discuss .AFRICA during its meeting

1 on March 3, 2016 in Marrakech, Morocco. A link to that announcement (showing
2 that it was published on February 25, 2016) can be found at
3 <https://www.icann.org/resources/board-material/agenda-2016-03-03-en>.

4 19. The ICANN Board meeting did, in fact, occur earlier today (March 3,
5 2016), and during that meeting the Board adopted a resolution lifting the stay on the
6 delegation of .AFRICA, which the Board imposed in July 2015 pending ICANN's
7 full compliance with the *DCA* Panel's recommendation that ICANN resume its
8 evaluation of Plaintiff's Application for .AFRICA. However, given the logistical
9 preparations required to enter a new gTLD into the Internet's root zone file, the
10 earliest date .AFRICA could be delegated (i.e., formally added to the Internet root
11 zone file) is March 18, 2016.

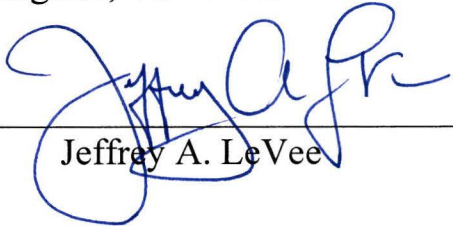
12 20. In order to respond substantively to Plaintiff's Motion for Preliminary
13 Injunction ("PI Motion"), filed on March 1, 2013, I need access to various
14 individuals from ICANN, nearly all of whom are presently in (or traveling to)
15 Morocco for ICANN's public Board meeting, known as ICANN55. I believe that I
16 can obtain that access over the next several days and that ICANN will be in a
17 position to file its substantive response to Plaintiff's PI Motion by March 9, 2016.

18 21. The declaration of Ethan J. Brown, dated February 29, 2016 and filed
19 in support of Plaintiff's PI Motion, states that Mr. Brown and I spoke on
20 February 23, 2016, and that I did not give Mr. Brown any assurances that
21 the .AFRICA gTLD would not be delegated during the pendency of this litigation.
22 Mr. Brown declares that I "failed to give any such assurance and instead reminded
23 me [Mr. Brown] that the board of ICANN could take action on .Africa at any time
24 and that ICANN had a scheduled Board meeting in Marrakesh, Morocco that would
25 begin on March 5, 2016." This statement is accurate except that I did not state a
26 date on which the Board might meet because at that time I did not know. In fact,
27 two days after this conversation, on February 25, 2016, ICANN posted on its
28

1 website, as noted above, that the Board would consider the .AFRICA situation on
2 March 3, 2016.

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

5 Executed on March 3, 2016, in Los Angeles, California.

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8 Jeffrey A. LeVee
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