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INTERNET CORPORATION FOR  
9 ASSIGNED NAMES AND NUMBERS

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, *et al.*,  
19 Defendants.

Case No. CV 16-00862-RGK(JCx)  
Assigned for all purposes to the  
Honorable R. Gary Klausner

**DECLARATION OF JEFFREY A.  
LEVEE IN SUPPORT OF  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND  
NUMBERS' OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
LEAVE TO AMEND**

Hearing Date: November 7, 2016  
Hearing Time: 9:00 a.m.  
Courtroom: 850

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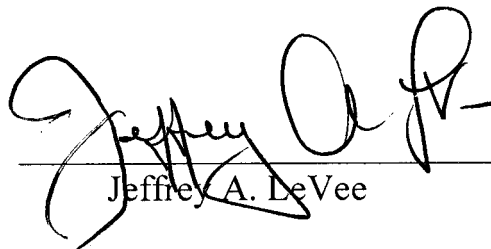
1 I, Jeffrey A. LeVee, declare the following:

2 1. I am a partner of Jones Day, counsel to defendant Internet Corporation  
3 for Assigned Names and Numbers (“ICANN”). I have personal knowledge of the  
4 matters set forth herein and am competent to testify as to those matters. I make this  
5 declaration in support of ICANN’s Opposition to plaintiff DotConnectAfrica  
6 Trust’s (“Plaintiff’s”) Motion for Leave to Amend (ECF No. 138).

7 2. On September 27, 2016, Plaintiff’s counsel called ICANN’s counsel to  
8 meet and confer regarding the Motion. Following the telephonic meet-and-confer,  
9 ICANN responded further in writing on September 28, 2016, reserving its rights to  
10 seek sanctions in connection with any motion seeking leave to add a claim that  
11 posits ICANN is a governmental actor based on multiple grounds, including that  
12 courts have already determined that ICANN is not a governmental actor. Attached  
13 hereto as **Exhibit 1** is a true and correct copy of my letter dated September 28, 2016.

14 3. Attached hereto as **Exhibit 2** is a true and correct copy of pertinent  
15 excerpts of the certified transcript from the hearing that took place before  
16 Magistrate Judge Jacqueline Chooljian on August 23, 2016 regarding ICANN’s  
17 Motion for Protective Order Limiting 30(b)(6) Deposition Topics and Duration.  
18 See ECF No. 121-2 (ICANN’s motion for protective order); ECF No. 127 (Order  
19 granting in part and denying in part ICANN’s motion for protective order)

20 I declare under penalty of perjury under the laws of the United States of  
21 America that the foregoing is true and correct. Executed on October 17, 2016, in  
22 Los Angeles, California.

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25 Jeffrey A. LeVee  
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# EXHIBIT 1

JONES DAY

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JP010530  
172210-665014

September 28, 2016

**VIA EMAIL AND U.S. MAIL**

Sara Colon  
Brown Neri Smith & Khan LLP  
11766 Wilshire Blvd., Suite 1670  
Los Angeles, CA 90025  
sara@bnsklaw.com

Re: DotConnectAfrica Trust v. ICANN

Dear Ms. Colon:

Yesterday, you informed my colleague Rachel Gezerseh that DCA intends to file a motion for leave to file a second amended complaint so as to add a Fifth Amendment claim alleging that ICANN performs a governmental function and has violated DCA's due process rights.<sup>1</sup>

As Ms. Gezerseh indicated yesterday, ICANN will oppose DCA's motion for leave to amend and does not consent to this requested amendment. In short, there is no good faith basis to bring a Fifth Amendment claim against ICANN. ICANN is not a governmental entity or a regulatory body, nor is there a good faith basis for DCA to argue otherwise. *See* Affirmation of Commitments, § 8 ("ICANN is a *private organization* and nothing in this Affirmation should be construed as control by any one entity.") (emphasis added).<sup>2</sup>

ICANN's existence began pursuant to a series of agreements with the United States Department of Commerce (the "DOC"), beginning with a Memorandum of Understanding ("MOU"). The MOU was superceded by subsequent agreements, including a Joint Project Agreement with the DOC, which ended 30 September 2009. ICANN and the DOC then entered into the Affirmation of Commitments. As contemplated by the original MOU that ICANN entered into with the DOC in 1998, ICANN executed numerous contracts with registries and registrars. (*See* <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>).

<sup>1</sup> Yesterday DCA also informed the Court of the same in a footnote in its Supplemental Brief Regarding Defendant ZA Central Registry, NPC's Motion to Intervene Pursuant to Rule 24.

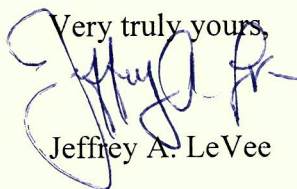
<sup>2</sup> ICANN is a noncommercial, non-profit public benefit corporation organized under California law. Its mission is "to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems." *See* Article 1 of the ICANN Bylaws. Nothing in ICANN's Bylaws or its Articles of Incorporation remotely suggests that ICANN is a governmental actor.

Sara Colon  
September 28, 2016  
Page 2

ICANN continues to maintain those contracts. ICANN's authority arises solely out of those contracts, not any "governmental" authority to regulate.

In fact, the Ninth Circuit has expressly held that "*ICANN is not a government actor.*" *McNeil v. Verisign, Inc.*, No. 03-16946, 2005 U.S. App. LEXIS 5450, at \*2-3 (9th Cir. Apr. 1, 2005) (dismissing First Amendment claim against ICANN on state action grounds) (emphasis added). The Southern District of New York reached the identical conclusion in a 2004 published ruling: "*ICANN is not a governmental body.*" *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 247 (S.D.N.Y. 2000), *aff'd* 356 F.2d 393 (2d Cir. 2004) (emphasis added). The district court in *Register.com* rejected the argument that the Accreditation Agreement that ICANN enters with registrars "represent quasi-regulatory standards," and noted that any argument to the contrary "must fail because ICANN is not a governmental body." *Id.* As the court explained, "the Department of Commerce's establishment of ICANN signified a movement away from nascent public regulation of the Internet and toward a consensus-based private ordering regime." *Id.* In fact, the court described ICANN as a "private, not-for-profit corporation initiated by the Department of Commerce to privatize the Domain Name System." *Id.* at 242 n.1. Another federal court in this circuit has reached similar conclusions, noting that "there is no authority for the proposition that ICANN policies have the force of law." *Frogface v. Network Solutions, Inc.*, No. C-00-3854 WHO, 2002 U.S. Dist. LEXIS 2594, at \*9-10 (N.D. Cal. Jan. 14, 2002).

For these reasons, DCA lacks any good faith basis to assert a Fifth Amendment due process claim against ICANN. We hereby put you on notice that, if DCA proceeds with its plan to file a motion for leave to amend to add a Fifth Amendment due process claim, ICANN reserves the right to seek sanctions for a bad faith filing pursuant to Fed. R. Civ. P. 11 and any other applicable rule or statute.

Very truly yours,  
  
Jeffrey A. LeVec

cc: David Kesselman, Esq.

# EXHIBIT 2

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION - LOS ANGELES

DOTCONNECTAFRICA TRUST,	)	Case No. CV 16-862-RGK (JCx)
	)	
Plaintiff,	)	Los Angeles, California
	)	Tuesday, August 23, 2016
v.	)	9:28 A.M. to 10:26 A.M.
	)	10:36 A.M. to 11:35 A.M.
INTERNET CORPORATION FOR	)	
ASSIGNED NAMES AND NUMBERS,	)	
et al.,	)	
	)	
Defendants.	)	
	)	

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JACQUELINE CHOOLJIAN,  
UNITED STATES MAGISTRATE JUDGE.

Appearances:	See Page 2
Deputy Clerk:	Hana Rashad
Court Reporter:	Recorded; CourtSmart
Transcription Service:	JAMS Certified Transcription 16000 Ventura Boulevard #1010 Encino, California 91436 (661) 609-4528

Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

1 APPEARANCES:

2

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1 LOS ANGELES, CALIFORNIA, TUESDAY, AUGUST 23, 2016, 9:28 A.M.

2 (Call to Order of the Court.)

3 THE CLERK: Calling Case No. CV 16-862,  
4 DotConnectAfrica Trust v. Internet Corporation for Assigned  
5 Names and Numbers, et al.

6 Counsel, please state your appearances for the  
7 record beginning with plaintiff.

8 SARA COLÒN: Good morning. Sara Colòn for  
9 Plaintiff DotConnectAfrica Trust.

10 JEFFREY A. LEVEE: Good morning, Your Honor.  
11 Jeff LeVee and Charlotte Wasserstein for ICANN.

12 THE COURT: Okay. Have a seat.

13 MR. LEVEE: Thank you.

14 THE COURT: So we have on calendar today Defendant  
15 ICANN's -- or is ICANN? (Pronouncing.)

16 MR. LEVEE: ICANN.

17 THE COURT: Really? I've mispronounced it for  
18 years. Okay.

19 So is Defendant ICANN's motion for a protective  
20 order limiting 30(b)(6) deposition topics and duration, which  
21 I'll probably refer to as the "motion" or "defendants'  
22 motion." Based on my consideration of what you've submitted  
23 and for reasons I'll shortly explain, I'm tentatively  
24 inclined to grant in part and deny in part without prejudice  
25 the defendants' motion.

1 matters.

2           So this one I'm sort of of two minds, but I come  
3 out as follows: Although I think it's very likely that  
4 inquiry on these topics will yield little of marginal value  
5 and will largely be a waste of time, because I think  
6 defendant will likely and properly interpose privilege  
7 objections and instructions not to answer, I don't think I  
8 can conclude that plaintiff's inquiries would exclusively  
9 call for privileged information in light of how much is  
10 already in the public record about the iterations of the  
11 release and defendants' position on whether the IRP is  
12 binding versus nonbinding.

13           Having said that, I'm going to harken back to issue  
14 one and caution plaintiff that if plaintiff wastes too much  
15 time on questions which appear to me likely to be -- fairly  
16 obviously call for only privileged information in these  
17 areas, that's something that the Court would certainly  
18 consider in the future in assessing whether to limit the  
19 duration of the Rule 30(b)(6) depositions. So -- anyway, I  
20 think I've stated the view on that.

21           Next issue, six, topics 44, 45, 46, and 47, these  
22 topics call for testimony regarding a specified contract  
23 defendant has with the U.S. Department of Congress -- I'm  
24 sorry -- Commerce. The Court is inclined to grant the motion  
25 and to preclude inquiry on these requests. This strikes me

1 as a burdensome fishing expedition about potential  
2 transparency and accountability and failure to follow  
3 guidelines in connection with a contract that is not at  
4 issue. I'm thinking -- likening it to basically a 404(b)  
5 type of search for evidence, but suffice to say that any  
6 relevance in the Court's mind is outweighed by the burden  
7 required to prepare a witness to testify regarding the  
8 Department of Commerce contract.

9 Finally, issue seven. This is topics 24, 35, and  
10 40. Topic 24 calls for testimony regarding AUC's membership  
11 in the GAC. Topics 35 and 40 call for testimony regarding  
12 the substance of declarations of two individuals. And I  
13 would say I think this was probably just an oversight, or at  
14 least I hope so, but nobody gave me the declarations that are  
15 the subjects of 35 and 40 so I could really kind of look at  
16 them in detail.

17 But first -- the first declaration, that of  
18 Heather Dryden -- she's a apparently a chair or former chair  
19 of the GAC -- that was apparently submitted with defendants'  
20 response to plaintiff's amended notice of IRP. That doesn't  
21 appear to be in the record anywhere, though its contents are,  
22 to some degree, summarized in the joint stipulation and the  
23 IRP decision, which are in the record. The other  
24 declaration, that of Moctar Yedaly, an AUC representative,  
25 was filed in the defendants' opposition to the preliminary

1 prejudice as to Topic 6 and grant the motion without  
2 prejudice as to Topic 18, and, again, that does not prevent  
3 plaintiff from posing an interrogatory on the discrete matter  
4 they've talked about and -- or even a request for admission  
5 -- you know, whatever you want to do. I -- that seems to me  
6 to be the more efficient way to do it. So I'm really  
7 granting the defendants' motion on 18 based not exclusively  
8 on attorney-client privilege but also proportionality in  
9 light of the other available options to plaintiff to get that  
10 discrete piece of nonprivileged information.

11 MS. COLÒN: Okay.

12 THE COURT: All right?

13 Okay. Sorry. I know this is taking a while.

14 All right. Issue six, Topics 44 to 47. Okay.

15 Defendant -- yeah, plaintiff has to explain to me why this is  
16 at all relevant. Maybe you just didn't give me enough  
17 information, but I was scratching my head trying to figure  
18 out why this contract, which I don't understand, has any  
19 relevance here.

20 MS. COLÒN: Okay. Well, I'm not sure that I fully  
21 understand the contract either, and I know that this is not  
22 on the face of our First-Amended Complaint. However, ICANN  
23 has presented arguments in its papers that the rules in its  
24 Guidebook are discretionary, that it does not have to follow  
25 its own rules in the Guidebook, and our point in bringing in

1 these contracts is that ICANN, at the moment, although a  
2 transition is going to happen soon, is overseen by the  
3 U.S. Department of Commerce through these contracts, and the  
4 contracts state that ICANN basically has to follow its own  
5 rules.

6 So that was our point in bringing in the contracts,  
7 and we wanted someone to testify as to, you know, again, how  
8 does ICANN see that relationship? How does ICANN see the  
9 statement it made regarding the fact that it doesn't have to  
10 follow the rules as compared to this contract it has with the  
11 U.S. Department of Commerce that says "You have to follow  
12 your rules when you make decisions about gTLD applicants"?

13 THE COURT: Okay. Defendant, you want to respond?

14 MR. LEVEE: Yes. The predicate is false. ICANN  
15 doesn't say that it doesn't have to follow its rules. So we  
16 don't say that -- what we say is that the terms of the  
17 Guidebook are subject to being amended, but we don't say we  
18 don't have to follow our rules.

19 Moreover, the contract with the Department of  
20 Commerce relates to what's called the "IANA" function of  
21 ICANN. It's the technical -- who are the technical  
22 administrators of various country codes? Who are the  
23 administrative contacts for people? It's a technical  
24 function now. It's in the news these days because the  
25 Obama Administration is changing its relationship with ICANN

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Julie Messa  
Julie Messa, CET\*\*D-403  
Transcriber

August 28, 2016  
Date