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11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST, a
15 Mauritius Trust,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS,
20 a California corporation; ZA Central
21 Registry, a South African non-profit;
22 DOES 1 through 50, inclusive,

23 Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**EVIDENTIARY OBJECTIONS TO
DECLARATION OF JEFFREY A.
LEVEE**

Date: April 4, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Reply ISO Motion
for Preliminary Injunction;
Supplemental Declaration of Sophia
Bekele Eshete; Declaration of Sara C.
Colón; and Evidentiary Objections to
Declarations of Kevin Espinola,
Christine Willet, Moctar Yedaly, and
Akram Atallah]

1 Plaintiff DOTCONNECTAFRICA TRUST (“DCA”) respectfully submits
 2 the following evidentiary objections to the Declaration of Jeffrey A. LeVee
 3 (“LeVee Declaration”) relied upon by Defendant Internet Corporation for Assigned
 4 Names and Numbers (“ICANN”) in support of its opposition to DCA’s Motion for
 5 a Preliminary Injunction.

6 **PLAINTIFF’S EVIDENTIARY OBJECTIONS**

LeVee Declaration ¶	DCA Objection	Sustained	Overruled
<p>8 ¶3: “DCA filed its Notice of 9 IRP in October 2013 but did not 10 include the paperwork that was 11 necessary until January 2014. 12 DCA did not initially move for 13 any form of interim relief. 14 Instead, DCA waited until 15 March 28, 2014 to file such a 16 request. On 12 May 2014, the 17 three-member IRP panel (“IRP 18 Panel”) issued an interim 19 declaration recommending that 20 the delegation of .AFRICA to 21 ZA Central Registry (“ZACR”) 22 be stayed pending the 23 conclusion of the IRP. ICANN’s 24 Board then agreed to abide by 25 that recommendation.”</p>	<p>Irrelevant and prejudicial [Fed. R. Evid. 403; <i>See</i> Bekele Decl., ¶5, Ex. 1, ¶13 (“DCA Trust also submitted that ‘on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZAC in light of the</p>		

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	fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN <i>signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.”</i>]).		
LeVee Declaration ¶	DCA Objection	Sustained	Overruled
¶4: “DCA’s CEO, Sophia Bekele Eshete, submitted a declaration to the IRP Panel. A true and correct copy of an excerpt of that declaration is attached as Exhibit A.”	Completeness Doctrine [Fed. R. Evid. 106].		
LeVee Declaration ¶	DCA Objection	Sustained	Overruled
¶6: “Paragraphs 1-60 of the Declaration (pages 2-17) summarize the procedural background of the case. Paragraphs 53-61 (pages 16-18) summarize the parties’ position on the merits, and state in a summary fashion the IRP Panel’s determination that ICANN’s board did not act	The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1].		

<p>1 consistently with ICANN’s 2 Articles of Incorporation and 3 Bylaws. Paragraphs 72-77 4 (pages 19-77) summary the 5 parties’ position on the standard 6 of review to be applied and the 7 IRP Panel’s determination in 8 that regard.”</p>			
<p>9 LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>10 ¶7: “Paragraphs 78-85 (pages 11 23-27) detail DCA's position on 12 the merits. Paragraph 80 13 describes DCA's various 14 contentions regarding ICANN's 15 and the Geographic Names 16 Panel's handling of DCA's and 17 ZACR's applications for 18 .AFRICA. Paragraphs 81-82 19 describe DCA's contention that 20 ICANN's Board should not have 21 accepted the advice of ICANN's 22 Governmental Advisory 23 Committee ("GAC") objecting 24 to DCA's application for 25 .AFRICA ("Advice").”</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1].</p>		
<p>26 LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>27 ¶8: “Paragraphs 86-91 (pages 28 27-38) then detail ICANN's</p>	<p>The IRP Panel Declaration is the best</p>		

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<p>position on the merits of each of these issues. The IRP Panel quotes extensively from ICANN's briefs, which responded at length both to DCA's various contentions regarding the handling of Plaintiffs and ZACR's applications and also to DCA's contention regarding the GAC's advice.”</p>	<p>evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1].</p>		
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶9: “Paragraphs 92-117 (pages 39-54) detail the IRP Panel's findings regarding the merits of DCA's claims. The entirety of the Panel's discussion is devoted to the Board's acceptance of the GAC's Advice. The IRP Panel concludes that ICANN's Board did not act consistently with ICANN's Articles and Bylaws in accepting the GAC's Advice. (¶ 115.) With respect to all of DCA's other claims, the Panel reaches no conclusion except to state in Paragraph 117 that: [Plaintiff] had criticized ICANN</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1)].</p>		

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<p>for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that 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.”</p>			
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶10: “Paragraphs 118-133 (pages 54-57) discuss the issue of whether the IRP Panel can recommend a course of action to ICANN's Board. The Panel concludes that it can (¶128), and accordingly recommends that "ICANN continue to refrain from delegating the .AFRICA gTLD and permit [Plaintiffs] application to proceed through</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1)].</p>		

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<p>the remainder of the new gTLD application process(<i>id.</i> ¶133).”</p>			
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶11: “Paragraphs 134-147 (pages 57-61) discuss the issues of prevailing party and costs. The Panel concludes that DCA is the prevailing party and orders ICANN to pay DCA's costs. (¶¶139, 146.)”</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1].</p>		
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶12: “Finally, paragraphs 148-150 set forth the Panel's final declaration. The Panel repeats its finding that ICANN's Board did not act consistently with ICANN's Articles and Bylaws, as well as its recommendation that DCA's Application be "permit[ted] [] to proceed through the remainder of the new gTLD application process." (Id. ¶¶148-149.) It also repeats its finding that DCA is the prevailing party and its awards of costs to DCA. (Id. ¶150.)”</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1, ¶¶148-149 “148. Based on the foregoing, after having carefully reviewed the Parties’ written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-</p>		

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	<p>person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust related to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN. 149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD</p>		
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	<p>and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.”)].</p>		
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>¶13: “In sum, the IRP Panel made no findings whatsoever concerning ICANN's processing of either Plaintiff's Application or ZACR's application for .AFRICA. Nor did the IRP Panel make findings that could possibly be construed to remove or eliminate the Guidebook requirement that an application for a gTLD representing a geographic region (such as .AFRICA) must obtain the support or non-objection of at least 60% of the governments in that region. As a result, DCA's (apparent) argument that it should be allowed to skip this essential Guidebook requirement does not find support in the IRP Panel's declaration. To the</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1, ¶148 (“148. Based on the foregoing, after having carefully reviewed the Parties’ written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after</p>		

<p>1 contrary, the net effect of the 2 IRP Panel declaration was that 3 the Panel wanted DCA to have 4 another opportunity to meet that 5 requirement and any other 6 requirements that DCA had not 7 yet been able to meet (or that I 8 CANN had not yet evaluated).”</p>	<p>much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN’s Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust related to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN].</p>		
<p>LeVee Declaration ¶</p>	<p>DCA Objection</p>	<p>Sustained</p>	<p>Overruled</p>
<p>17 ¶14: “In its briefs to the IRP 18 Panel, ICANN argued that IRP 19 panel declarations were not 20 binding on ICANN's Board. 21 ICANN's argument was based, 22 in part, on the fact that the only 23 previous IRP declaration to have 24 been issued (as of that time) 25 expressly found that IRP Panel 26 declarations are not binding. The 27 IRP Panel disagreed, however, 28 and in a 14 August 2014</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1), ¶¶ 23(115) 70, 73 & 74 (“23(115). Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial</p>		

1	<p>declaration on procedural issues</p>	<p>scheme with no teeth,</p>		
2	<p>("Procedural Declaration"), the</p>	<p>the Panel is of the</p>		
3	<p>IRP Panel determined that its</p>	<p>opinion that, at a</p>		
4	<p>declaration would be binding on</p>	<p>minimum, the IRP</p>		
5	<p>ICANN's Board. The portions of</p>	<p>should forthrightly</p>		
6	<p>the Procedural Declaration that</p>	<p>explain and</p>		
7	<p>address this point are reproduced</p>	<p>acknowledge that the</p>		
8	<p>at paragraph 23 (pages 5-6) of</p>	<p>process is merely</p>		
9	<p>the IRP Panel's Declaration.”</p>	<p>advisory. This would at</p>		
10		<p>least let parties know</p>		
11		<p>before embarking on a</p>		
12		<p>potentially expensive</p>		
13		<p>process that a victory</p>		
14		<p>before the IRP panel</p>		
15		<p>may be ignored by</p>		
16		<p>ICANN. And, a</p>		
17		<p>straightforward</p>		
18		<p>acknowledgement that</p>		
19		<p>the IRP process is</p>		
20		<p>intended to be merely</p>		
21		<p>advisory might lead to a</p>		
22		<p>legislative or executive</p>		
23		<p>initiative to create a</p>		
24		<p>truly independent</p>		
25		<p>compulsory process.</p>		
26		<p>The Panel seriously</p>		
27		<p>doubts that the Senators</p>		
28		<p>questioning former</p>		

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	<p>ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, <i>and</i> b) the IRP process touted by ICANN as the ‘ultimate guarantor’ of ICANN accountability was only an advisory process, the benefit of which is accrued to ICANN. 70. In the Panel’s view, Article IV, Section 3, and Paragraph 4 of ICANN’s Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, a <i>de novo, objective and independent</i> accountability process</p>		
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	<p>that would ensure that ICANN acted in a manner consistent with ICANN’s Articles of Incorporation and Bylaws. 73. Thus, assuming that the foregoing waiver [Prospective Release] of any and all judicial remedies is valid and enforceable, then the only and ultimate “accountability” remedy for an applicant is the IRP. 74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.”].</p>		
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LeVee Declaration ¶	DCA Objection	Sustained	Overruled
<p>¶15: “Following the IRP Panel's Declaration, another IRP panel addressed the issue and concluded that IRP panel declarations were not binding on ICANN's Board. Most importantly, however, the question of whether the IRP Panel's declaration was considered binding in conjunction with DCA' s IRP became a moot point when ICANN's Board elected to adopt all of the findings and recommendations in the IRP Panel's Declaration. A copy of the resolution by ICANN's Board adopting the IRP Panel's Declaration is attached as Exhibit B to the concurrently-filed Declaration of Akram Atallah.”</p>	<p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1]. Moreover the other panel declaration referenced here is irrelevant and prejudicial [Fed. R. Evid. 403]. It is also irrelevant that ICANN adopted the findings of the IRP because they did not follow the IRP’s ruling, as explained in DCA’s initial motion and reply brief.</p>		

Dated: March 21, 2016

BROWN NERI & SMITH LLP

By: /s/ Ethan J. Brown

Ethan J. Brown
Attorneys for Plaintiff
 DOTCONNECTAFRICA TRUST