

1 Jeffrey A. LeVee (State Bar No. 125863)
 jlevee@JonesDay.com
 2 Kate Wallace (State Bar No. 234949)
 kwallace@JonesDay.com
 3 Rachel H. Zernik (State Bar No. 281222)
 rzernik@jonesday.com
 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

8 Attorneys for Defendant
 9 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS

10 **UNITED STATES DISTRICT COURT**
 11 **CENTRAL DISTRICT OF CALIFORNIA**
 12 **WESTERN DIVISION**

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 14 DOTCONNECTAFRICA TRUST, a
 Mauritius Charitable Trust,

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
 18 ASSIGNED NAMES AND
 NUMBERS, etc., et al.,

19 Defendant.

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

Assigned for all purposes to the
 Honorable R. Gary Klausner

**ICANN'S RESPONSE TO
 PLAINTIFF'S EVIDENTIARY
 OBJECTIONS TO
 DECLARATION OF JEFFREY
 A. LEVEE**

Date: April 4, 2016
 Time: 9:00 a.m.
 Ctrm: 850

1 Defendant Internet Corporation for Assigned Names and Numbers
 2 (“ICANN”) hereby responds to Plaintiff DotConnectAfrica Trust’s objections to the
 3 Declaration of Jeffrey A. LeVee:

| LeVee Declaration | Plaintiff’s Objection | ICANN’s Response | Court’s Ruling |
|---|--|---|----------------|
| <p>4 ¶3: “DCA filed its 5 Notice of IRP in 6 October 2013 but 7 did not include the 8 paperwork that was 9 necessary until 10 January 2014. 11 DCA did not 12 initially move for 13 any form of 14 interim relief. 15 Instead, DCA 16 waited until March 17 28, 2014 to file 18 such a request. On 19 12 May 2014, the 20 three-member IRP 21 panel (“IRP 22 Panel”) issued an 23 interim declaration 24 recommending that 25 the delegation of 26 .AFRICA to ZA 27 Central Registry 28 (“ZACR”) be stayed pending the conclusion of the IRP. ICANN’s Board then agreed to abide by 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 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</i></p> | <p>Plaintiff argues that it will suffer irreparable harm if the .AFRICA gTLD is delegated to another entity. Plaintiff’s failure to move timely for interim relief is relevant to assessing Plaintiff’s argument.</p> | |

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| | <i>instead of 26 March.</i> ”]. | | |
| <p>¶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.”</p> | <p>Completeness Doctrine [Fed. R. Evid. 106].</p> | <p>Exhibit A contains all the portions of Ms. Bekele’s lengthy declaration that ICANN believes are relevant to the determination of Plaintiff’s Motion for Preliminary Injunction. Plaintiff is in possession of the full and complete copy of Ms. Eshete’s declaration and was free to enter the full declaration into the record, as provided by Fed. R. Evid. 106.</p> | |
| <p>¶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</p> | <p>The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1].</p> | <p>The Court may refer to the <i>DCA</i> Panel’s Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This overview is intended to provide the Court with a very brief summary of the lengthy</p> | |

| 1 2 | LeVee Declaration | Plaintiff's Objection | ICANN's Response | Court's Ruling |
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| 3 4 5 6 7 8 9 10 11 12 13 | determination that ICANN's board did not act consistently with ICANN's Articles of Incorporation and Bylaws. Paragraphs 72-77 (pages 19-77) summary the parties' position on the standard of review to be applied and the IRP Panel's determination in that regard." | | declaration. | |
| 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | ¶7: "Paragraphs 78-85 (pages 23-27) detail DCA's position on the merits. Paragraph 80 describes DCA's various contentions regarding ICANN's and the Geographic Names Panel's handling of DCA's and ZACR's applications for .AFRICA. Paragraphs 81-82 describe DCA's contention that ICANN's Board should not have accepted the advice of ICANN's | The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1]. | The Court may refer to the <i>DCA</i> Panel's Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This overview is intended to provide the Court with a very brief summary of the lengthy declaration. | |

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| 3 4 5 6 7 | Governmental Advisory Committee ("GAC") objecting to DCA's application for .AFRICA ("Advice")." | | | |
| 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 | ¶8: "Paragraphs 86-91 (pages 27-38) then detail ICANN's 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." | The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1]. | The Court may refer to the <i>DCA</i> Panel's Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This overview is intended to provide the Court with a very brief summary of the lengthy declaration. | |
| 23 24 25 26 27 28 | ¶9: "Paragraphs 92-117 (pages 39-54) detail the IRP Panel's findings regarding the merits of DCA's claims. The entirety of the | The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1]. | The Court may refer to the <i>DCA</i> Panel's Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This | |

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| <p>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 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]</p> | | <p>overview is intended to provide the Court with a very brief summary of the lengthy declaration.</p> | |

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| 3 4 5 6 7 8 9 10 11 | 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.” | | | |
| 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | ¶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 the remainder of the new gTLD application process (<i>id.</i> ¶133).” | The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1)]. | The Court may refer to the <i>DCA</i> Panel's Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This overview is intended to provide the Court with a very brief summary of the lengthy declaration. | |

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| <p>1 2 3 4 5 6 7 8 9 10</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>11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</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</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-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation,</p> | <p>The Court may refer to the <i>DCA</i> Panel's Declaration, which is part of the record. (Eshete Decl. Ex. 1, ECF No. 17-1.) This overview is intended to provide the Court with a very brief summary of the lengthy declaration.</p> | |

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| and its awards of costs to DCA. (Id. ¶150.)” | 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 and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.”)]. | | |
| ¶13: “In sum, the IRP Panel made no findings whatsoever concerning ICANN's | The IRP Panel Declaration is the best evidence of the document [Fed. R. Evid. 1002; Bekele Decl. ¶5, Ex. 1, ¶148 | ICANN agrees that the Panel declaration is the best evidence of the document. | |

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| 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | 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 contrary, the net effect of the IRP Panel declaration was that the Panel | ("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 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]. | | |

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| <p>1 2 3 4 5 6 7 8 9 10</p> | <p>wanted DCA to have another opportunity to meet that requirement and any other requirements that DCA had not yet been able to meet (or that ICANN had not yet evaluated).”</p> | | | |
| <p>11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28</p> | <p>¶14: “In its briefs to the IRP Panel, ICANN argued that IRP panel declarations were not binding on ICANN's Board. ICANN's argument was based, in part, on the fact that the only previous IRP declaration to have been issued (as of that time) expressly found that IRP Panel declarations are not binding. The IRP Panel disagreed, however, and in a 14 August 2014 declaration on procedural issues ("Procedural Declaration"), the IRP Panel determined that its</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 scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory</p> | <p>ICANN agrees that the various declarations of the IRP Panel are the best evidence of the Panel's decisions.</p> | |

| 1 2 | LeVee Declaration | Plaintiff's Objection | ICANN's Response | Court's Ruling |
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| 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | declaration would be binding on ICANN's Board. The portions of the Procedural Declaration that address this point are reproduced at paragraph 23 (pages 5-6) of the IRP Panel's Declaration." | before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgement that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former 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 | | |

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| | <p>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 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</p> | | |

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| 3 4 5 | | them and to disclose the results in a transparent manner.”]. | | |
| 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 | <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</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> | <p>The <i>DCA</i> Panel's Declaration contains no evidence regarding the determinations of <i>subsequent</i> IRP panels. Nor is it evidence regarding the ICANN Board's action with respect to that declaration.</p> <p>Plaintiff's claims are based in part on its allegation that ICANN's Board failed to adhere to the findings of the <i>DCA</i> Panel. (<i>See, e.g.,</i> FAC ¶¶ 57, 60, 81.) Plaintiff even brings a claim for declaratory relief seeking “confirmation of [the] IRP declaration.” (<i>Id.</i> ¶¶ 115-18.) As such, Mr. LeVee's testimony regarding the Board's acceptance of the <i>DCA</i> Panel's</p> | |

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| concurrently-filed Declaration of Akram Atallah.” | | Final Declaration is relevant. | |

Dated: March 28, 2016

JONES DAY

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

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS