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INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DOTCONNECTAFRICA TRUST,  
Plaintiff,

v.

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, et al.,  
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
I, Jeffrey A. LeVee, declare the following:

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

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

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

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

[Signature]
EXHIBIT 1
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.¹

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).²

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 superseded 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).

¹ 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.
² 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.
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. LeVee

cc: David Kesselman, Esq.
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
 ) 9:28 A.M. to 10:26 A.M.
 ) 10:36 A.M. to 11:35 A.M.
 v. )
INTERNET CORPORATION FOR )
ASSIGNED NAMES AND NUMBERS, )
et al., )
Defendants. )

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JACQUELINE CHOO-LJIAN,
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.
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LOS ANGELES, CALIFORNIA, TUESDAY, AUGUST 23, 2016, 9:28 A.M.

(Call to Order of the Court.)

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

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

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

JEFFREY A. LEVEE: Good morning, Your Honor.

Jeff LeVee and Charlotte Wasserstein for ICANN.

THE COURT: Okay. Have a seat.

MR. LEVEE: Thank you.

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

MR. LEVEE: ICANN.


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

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

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

Next issue, six, topics 44, 45, 46, and 47, these topics call for testimony regarding a specified contract defendant has with the U.S. Department of Congress -- I'm sorry -- Commerce. The Court is inclined to grant the motion and to preclude inquiry on these requests. This strikes me
as a burdensome fishing expedition about potential transparency and accountability and failure to follow guidelines in connection with a contract that is not at issue. I'm thinking -- likening it to basically a 404(b) type of search for evidence, but suffice to say that any relevance in the Court's mind is outweighed by the burden required to prepare a witness to testify regarding the Department of Commerce contract.

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

But first -- the first declaration, that of Heather Dryden -- she's a apparently a chair or former chair of the GAC -- that was apparently submitted with defendants' response to plaintiff's amended notice of IRP. That doesn't appear to be in the record anywhere, though its contents are, to some degree, summarized in the joint stipulation and the IRP decision, which are in the record. The other declaration, that of Moctar Yedaly, an AUC representative, was filed in the defendants' opposition to the preliminary
prejudice as to Topic 6 and grant the motion without prejudice as to Topic 18, and, again, that does not prevent plaintiff from posing an interrogatory on the discrete matter they’ve talked about and -- or even a request for admission -- you know, whatever you want to do. I -- that seems to me to be the more efficient way to do it. So I’m really granting the defendants' motion on 18 based not exclusively on attorney-client privilege but also proportionality in light of the other available options to plaintiff to get that discrete piece of nonprivileged information.

MS. COLÓN: Okay.

THE COURT: All right?

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

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

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

MS. COLÓN: Okay. Well, I'm not sure that I fully understand the contract either, and I know that this is not on the face of our First-Amended Complaint. However, ICANN has presented arguments in its papers that the rules in its Guidebook are discretionary, that it does not have to follow its own rules in the Guidebook, and our point in bringing in
these contracts is that ICANN, at the moment, although a
transition is going to happen soon, is overseen by the
U.S. Department of Commerce through these contracts, and the
contracts state that ICANN basically has to follow its own
rules.

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

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

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

Moreover, the contract with the Department of
Commerce relates to what's called the "IANA" function of
ICANN. It's the technical -- who are the technical
administrators of various country codes? Who are the
administrative contacts for people? It's a technical
function now. It's in the news these days because the
Obama Administration is changing its relationship with ICANN
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        August 28, 2016
Julie Messa, CET**D-403 Date
Transcriber