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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, a California Corporation; ZA CENTRAL REGISTRY, a South African non-profit company; and DOES 1-50, inclusive;

Defendant.

[Assigned for all purposes to:
Hon. Robert Broadbelt, Dep't 53]

Case No.: BC607494

PLAINTIFF DCA'S CLOSING TRIAL BRIEF

Date: April 4, 2019
Time: 8:30 a.m.
Dep't.: 53

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I. INTRODUCTION

From February 6, 2019 through February 8, 2019 this Court held a bench trial regarding whether Plaintiff DotConnectAfrica Trust ("DCA") should be judicially estopped from pursuing its claims before this Court based on statements DCA and its counsel made during Defendant Internet Corporation for Assigned Names and Number's ("ICANN") Independent Review Panel Process ("IRP"). The Court admitted over 50 exhibits into evidence and heard the testimony from DCA's CEO as well as the testimony of two high-level ICANN employees.

ICANN did not meet its burden of proving any, much less all, of the elements of judicial estoppel at trial. Specifically, it is undisputed that the IRP was a non-binding proceeding that subjected ICANN Board actions and inactions to accountability review by examining whether those actions/inactions complied with ICANN's Bylaws and Articles of Incorporation. Accordingly, ICANN did not prove that the IRP was a quasi-judicial proceeding or that DCA was successful in its position that the IRP was binding. DCA also introduced evidence at trial that its statements at the IRP were made in the context of claims different from those at issue in the instant lawsuit and therefore DCA's positions in IRP and this lawsuit are actually consistent. Finally, DCA also presented evidence at trial that it was ignorant and mistaken with regard to the scope of ICANN's litigation waiver at the time in question and that it acted in good faith. For these reasons and those described in more detail herein, DCA respectfully requests that the Court decline to apply judicial estoppel to the instant matter. DCA Trust should not be judicially estopped from pursuing its lawsuit against ICANN.

II. ARGUMENT

A. The First Amended Complaint is not barred by judicial estoppel

At trial, ICANN failed to meet its burden to prove *all* of the elements of judicial estoppel. To establish judicial estoppel, the moving party must prove "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the

position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Jackson v. Cty. of L.A.* ("*Jackson*") (1997) 60 Cal.App.4th 171, 183. "[E]ach case must be decided on its own facts and in light of equitable considerations." *Jogani v. Jogani* ("*Jogani*") (2006) 141 Cal.App.4th 158, 181. Here, ICANN failed to prove the requisite elements.

1. *The IRP panel's decision was non-binding, so the IRP was not a quasi-judicial proceeding*

ICANN's IRP is not a "judicial" or "quasi-judicial proceeding." The DCA v. ICANN IRP was not a binding arbitration or a binding adjudicative process. While there is no clear definition of what qualifies as "quasi-judicial," courts usually require that the proceeding have "the formal hallmarks of a judicial proceeding. . .." *Tri-Dam v. Schediwy* (E.D. Cal. Mar. 7, 2014) No. 1:11-CV-01141-AWI, 2014 WL 897337, at *6. A proceeding that only results in a non-binding recommendation is not a judicial or quasi-judicial proceeding. *See Nada Pacific Corp. v. Power Eng'g and Mtg., Ltd.* ("*Nada*") (N.D. Cal. 2014) 73 F.Supp.3d 1206, 1217. Furthermore, in determining whether to apply judicial estoppel, "courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings." *Vandenberg v. Sup. Ct.* (1999) 21 Cal. 4th 815, 829; *see also Sanderson v. Niemann* (1941) 17 Cal.2d 563, 573–575 (holding prior judgments not entitled to collateral estoppel effect because of the informality of the proceedings and limited right to judicial review).

At trial, DCA showed that the IRP was a proceeding with a very limited scope with limited authority and that ICANN could *choose* whether or not to follow the IRP's orders and rulings. However, if a ruling was in ICANN's favor, no applicant could appeal an IRP ruling. At the time the *DCA v. ICANN* IRP was conducted, ICANN's Bylaws did not authorize a binding, final dispute resolution process that was consistent with international arbitration norms and that was also enforceable in any court. The evidence of the foregoing presented at trial includes the following:

- The IRP panel merely had the authority to "declare whether an action or inaction of the Board was inconsistent with the [ICANN] Articles of Incorporation or [ICANN] Bylaws." [*See* Joint Ex. No. 4 (April 2013 Bylaws Section 3.11); *see* Stipulated Fact Nos. 8, 32].
- In its June 1, 2015 Letter to the Panel, ICANN stated: "…the Bylaws mandate that the Board has responsibility of fashioning the appropriate remedy once the panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation or Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect." [Stipulated Fact No. 37].
- ICANN consistently argued during the IRP proceedings that the ICANN Board was not bound to follow the rulings and recommendations of the IRP Panel, since the Board could not outsource its decision-making authority. [*See* Stipulated Facts Nos. 20, 30, 32, 37].
- ICANN repeatedly argued that the IRP was not an arbitration but was instead a corporate accountability mechanism. [Ex. No. 121 at Heading I and ¶ 10 ("This proceeding is an internal accountability mechanism constituted under and governed by ICANN's bylaws. It is not an international arbitration."); Ex. No. 124 at page 2 ("Further, words such as "arbitration" and "arbitrator" were *removed* from the Bylaws, making DCA's argument that this IRP Panel's declaration should have the force of normal commercial arbitration even more specious"); Stipulated Fact No. 31].
- The IRP panel itself explained why a non-binding IRP lacked the hallmarks of a judicial forum: "If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. **This is, to put it mildly, a highly watered down notion of "accountability." Nor is such a process "independent," as the ultimate decision maker, ICANN is also a party to the dispute and directly interested in the outcome. Nor is the process "neutral,"** as ICANN"s "core values" call for in its Bylaws." [Joint Ex. 18, fn. 62, emphasis added].

- There was no appeal to an IRP decision, nor could the parties confirm the final declaration in court [Transcript of Christine Willet's Trial Testimony at 346:9-25].
- ICANN argued that the IRP should be non-binding [Stipulated Fact No. 20].
- After the IRP issued its final declaration on July 9, 2015, the ICANN Board voted on whether or not to accept it. [Joint Ex. 41].
- The ICANN Board never resolved to accept the panel's finding that the IRP was a binding proceeding. [Transcript of Christine Willet's Trial Testimony at 323:27-324:3; Joint Ex. 41].
- In fact, ICANN did not follow the IRP panel's intent in carrying out the IRP panel's ruling that DCA's application should be allowed to proceed through the "remainder" of the process, claiming that DCA's application was not passed through the geographic names panel review – just as DCA's competitor ZACR wished and just as the GAC wished.[1]
- The ICANN Board's resolutions regarding the processing of DCA's application after the IRP were selectively adopted from the IRP Panel's Final Declaration. The ICANN Board also made resolutions that were not from the IRP Final Declaration and were instead independent directions fashioned by the ICANN Board. [Transcript of Christine Willet's Trial Testimony at 342:3-346:8; Joint Ex. 41].
- These ICANN Board resolutions included instructions that ICANN consider the very GAC objection advice that the IRP Panel found that ICANN had inappropriately adopted in the first place. [Transcript of Christine Willet's Trial Testimony at 348:11-350:20; Transcript of Akram Attalah's Trial Testimony at 381:18-382:12; 2/07/19 Transcript of Sophia Bekele's Testimony at 232:27 – 233:27; Joint Ex. 41 at page 2 ("Whereas, in addition to the Declaration, the Board must also take into account other relevant information, including but not limited to: (i) that ICANN received and accepted GAC consensus advice that DCA's application for .AFRICA should not proceed") and Joint Ex. 41 Resolution 2015.07.16.04 at page 2].

[1] This conduct is part of the basis for DCA's Phase II case.

- ICANN also sought ZACR's opinion on how to proceed with DCA's application after the IRP – in contravention of the gTLD guidebook procedures on "independence'" a move that had no basis in the IRP panel's final declaration. [Transcript of Akram Attalah's Trial Testimony at 372:24-375:7; Exhibit 137].
- Not surprisingly ZACR responded that "In the event that ICANN elects to refer the DCA application to the Geographic Names Panel (GNP) for evaluation, we must insist that, at the very minimum, the GAC advice should be regarded as an objection, by relevant governments, against the DCA application." [Ex. 138]. However, pursuant to the Guidebook, "For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period. [Joint Ex. 2 at 150]. At the point of ZACR's response, any objection period for gTLD applicants had been closed. [Transcript of Christine Willet's Trial Testimony at 348:8 - 10].
- IRP decisions were non-binding until approximately 9 months *after* DCA filed the instant lawsuit, when ICANN changed its Bylaws make IRP declarations binding. [Transcript of Akram Attalah's Trial Testimony at 131:14 - 132:28]. Perhaps this was to minimize future risk of lawsuits by applicants.

The Court in *Nada* opined judicial estoppel should not apply to positions taken in non-binding proceedings such as the IRP. In *Nada* the proceeding in question was by the Dispute Review Board ("DRB"), which was established by a contract between the parties and consisted of members who were required to hold a certification or pre-qualification from the Dispute Resolution Board Foundation or the American Arbitration Association. *See Nada, supra,* 73 F.Supp.3d 1206 at 1211. The DRB holds a hearing and accepts pre-hearing submittals including briefing supported by evidence. *Id.* After the hearing "the DRB issues a **nonbinding**, written recommendation (the "DRB Report"), which is admissible in subsequent litigation or other dispute resolution proceedings. The recommendation in the DRB Report is based on the pertinent contractual provisions, applicable laws and regulations, and facts and circumstances of the dispute. It includes an explanation of the DRB's reasoning in reaching the recommendation."

(Internal citations omitted, emphasis added). *Id.* The court accordingly found that the "DRB proceeding had many of the hallmarks of a judicial or quasi-judicial-proceeding: it was adversarial; the parties submitted briefs making arguments and citing to evidence; the parties could respond to each other's arguments; the parties could submit the opinions of experts; etc. But it lacked the most important hallmark—the ability to make a decision." *Id.* at 1217 (emphasis added). The Court ultimately declined to apply judicial estoppel where there was "no authority holding, or even suggesting, that the doctrine of judicial estoppel may be applied in the context of a body with no power to make a decision that is binding on the parties before it." *Id.* The Court here should likewise decline to apply judicial estoppel with regard to positions taken during the non-binding IRP.

In support of its argument in its trial brief that the IRP was a judicial proceeding, ICANN argues that "DCA has essentially acknowledged" that the IRP was a quasi-judicial proceeding. ICANN points to DCA's statements during the IRP as evidence of this fact. Of course, as explained herein, DCA argued that the IRP *should* function as an arbitration and that it *should* be binding. The IRP's ruling was ultimately not binding however, and DCA never took the position that a non-binding IRP was like an arbitration.

Finally, none of the cases ICANN cites in its trial brief find that a non-binding proceeding constitutes a quasi-judicial proceeding. Furthermore, ICANN cited the *Nada* case in its trial brief, which stands for the proposition, as explained above, that a non-binding proceeding is *not* a quasi-judicial proceeding.

In sum, the IRP was a non-binding and non-appealable procedure. The *DCA v. ICANN* IRP was not a binding arbitration. It was a "corporate accountability mechanism" - as ICANN referred to it - not a "quasi-judicial proceeding." *See Nada, supra,* 73 F.Supp.3d at 1217.

2. DCA did not succeed in its first position that the IRP was the sole forum for its claims.

ICANN must also prove DCA "was successful in asserting [its] first position. . .." "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations'" *Jogani, supra,* 141 Cal.App.4th at 171 (internal citations

omitted). In its opening trial brief and at trial, ICANN cited a number of statements by DCA that it claims DCA ultimately succeed on. However, DCA did not actually succeed on those statements as the IRP never actually ruled on them or adopted them as true. Set forth below are the positions ICANN alleges DCA succeeded on with evidence from trial to the contrary, including testimony from Ms. Willet that she has no knowledge that the IRP ever ruled on those positions or accepted those positions as true:

DCA's Position	Evidence DCA Was Not Successful on the Position
"DCA has a right to be heard in a meaningful way in the only proceeding available to review the ICANN Board's Decisions" Joint Ex. 11 (Request for Emergency Arbitrator and Interim Measures of Protection ¶ 29).	Q: Do you agree…that the panel limited its findings to the manner in which the GAC advice was treated only?" A: That is my understanding. 2/8/19 Trial Transcript of Mike Silber Deposition Testimony at 419:7 – 419:14 "*Assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." Joint Ex. 33 (IRP Final Declaration, ¶ 73)
"The Panel should be guided by the cardinal principal set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body." Ex. 39 (April 20, 2014 Letter to the IRP Panel at 3)	Q: Ms. Willett, are you aware of the IRP making any procedural ruling that the proceedings, that the IRP proceedings, will be the first and last opportunity that DCA trust has to have its rights determined by an independent body? … A: I am not aware. I didn't read the – any of the intermediate IRP declarations. 2/8/19 Trial Transcript of Willett Testimony at 339:26 - 340:8
"It is also critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among	Q: Okay. And are you aware of any ruling anywhere in the IRP declarations that for DCA and other gTLD applicants, the IRP is their only recourse with no other legal remedy available? A: I'm not aware. 2/8/19 Trial Transcript of Willett Testimony at 339:9 – 15.

those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. Joint Ex. 15 (May 5, 2014 Submission on Procedures ¶ 22)	
"…[A]s a condition of applying for a gTLD, DCA unilaterally surrendered all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws. As a result, the IRP is the sole forum in which DCA can seek independent, third-party review of the actions of ICANN's Board of Directors." Joint Ex. 17 (May 29, 2014 Letter to IRP Panel at 2 – 3).	2/8/19 Trial Transcript of Willett Testimony at 341:3 – 342:2.
"This is the only opportunity that a claimant has for independent and impartial review of ICANN's conduct, *the only opportunity*." Joint Ex. 35 (May 22, 2015 IRP Hearing at 22:16 – 23:3	Q: Do you agree…that the panel limited its findings to the manner in which the GAC advice was treated only?" A: That is my understanding. 2/8/19 Trial Transcript of Mike Silber Deposition Testimony at 419:7 – 419:14 "*Assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." Joint Ex. 33 (IRP Final Declaration, ¶ 73)
"We cannot take you to Court. We cannot take you to arbitration. We can't take you anywhere. We can't sue you for anything." Joint Ex. 36 (May 23, 2015 Hearing Tr. At 507:24 – 508:5).	Q: Do you agree…that the panel limited its findings to the manner in which the GAC advice was treated only?" A: That is my understanding. 2/8/19 Trial Transcript of Mike Silber Deposition Testimony at 419:7 – 419:14 "*Assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." Joint Ex. 33 (IRP Final Declaration, ¶ 73)
The IRP is "the only independent accountability mechanism	Q: Do you agree…that the panel limited its findings to the manner in which the GAC advice was treated only?"

available to parties such as DCA." Joint Ex. 31 (July 1, 2015 Submission on Costs at 2).	A: That is my understanding. 2/8/19 Trial Transcript of Mike Silber Deposition Testimony at 419:7 – 419:14 "*Assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." Joint Ex. 33 (IRP Final Declaration, ¶ 73)

ICANN presented no evidence - as is its burden on its affirmative defense - that DCA actually succeeded on those positions. Instead, ICANN points to DCA's success on *other* positions that were taken in the same pleadings as its positions with respect to the IRP as the sole forum. For example, the fact that the IRP ruled in DCA's favor on discovery issues is not evidence that the IRP ruled in DCA's favor on a position that the IRP was the sole forum for DCA's claims. Whether DCA was successful regarding its positions on discovery is irrelevant to whether DCA should be judicially estopped from taking the position that it can bring its claims against ICANN in this Court. Ultimately, as DCA showed during trial, the IRP could not have made findings with respect to the applicability of the litigation waiver or the IRP as the sole forum for any and all of DCA's claims because to do so was outside the scope of the IRP's jurisdiction: the IRP is limited to making findings with respect to ICANN Board action or inaction pursuant to the bylaws and articles of incorporation. *See* Joint Ex. No. 4 (April 2013 Bylaws Section 3.11); *see* Stipulated Fact Nos. 8 and 32. The enforceability of the waiver has nothing to do with ICANN board action or inaction.

For this reason, *Blix Street Records, Inc. v. Cassidy*, (2010) 191 Cal.App.4th 39, which ICANN cites in its trial brief and referenced in its opening statement, is inapposite. In *Blix*, the court accepted the party's position that a settlement agreement was enforceable as true and therefore dismissed the case. Here the IRP did not accept any statements that DCA made with regard to the waiver[2] as true because the IRP could not have made a finding on this issue as it was outside the scope of its jurisdiction.

[2] DCA also contests that it ever asserted that the waiver was actually enforceable with regard to any and all of its claims or potential claims against ICANN as discussed in Section II.A.4, *infra*.

Nor is DCA's success on the position of the IRP as binding relevant to the application of judicial estoppel here. Further, as described in Section II.A.1, it cannot be said that DCA *actually* succeeded in its position that the IRP should be binding because, as seen in the claims and actions of ICANN following the conclusion of the DCA v. ICANN IRP proceedings and its aftermath, the ICANN Board refused to treat IRP decisions as binding on it. Instead, ICANN treated the IRP as an advisory opinion from an external review panel, which is merely considered as input into ICANN's decision-making process. The ICANN Board thought that its decision should not be replaced by the IRP Panel's decision. And, ICANN's position was that DCA could not have enforced the IRP decision or any subsequent ruling if entirely disregarded by ICANN.

In fact, the only substantive issue that the IRP actually ruled on was the ICANN Board's treatment of the GAC objection advice. [Joint Ex. 33, ¶¶ 148-151; Deposition testimony of Michael Silber at 117:14-23, 144:21-145:8.] In sum, the IRP panel did not rule on or accept as true any of DCA's positions with regard to the IRP as a sole forum. This alone is reason enough to deny the application of judicial estoppel.

3. DCA presented evidence at trial showing that any changes in position were made in good faith as the result of fraud or mistake, and in any event did not result in inconsistent positions, let alone totally inconsistent, positions

"Case law indicates that the point of this element is to ensure that the bar of judicial estoppel operates only to prevent bad faith or intentional wrongdoing resulting in a miscarriage of justice." *Lee v. W. Kern Water Dist.* (2016) 5 Cal.App.5th 606, 630. Therefore, to establish judicial estoppel "there must be some basis in the record for a finding that [a party] engaged in a deliberate scheme to mislead and gain unfair advantage, as opposed to having made a mistake born of misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other innocent cause." *Id.* at 630-31. In *Lee*, a court affirmed the denial of judicial estoppel because the opposing party had offered "nothing to support the fifth element—that Lee's first position was not taken as a result of ignorance, fraud, or mistake." *Id.* at 631. The Court stated: "There is no basis in the record for a finding that Lee engaged in a deliberate scheme to mislead

and gain unfair advantage, as opposed to having made a mistake born of misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other innocent cause …" *Id.* (internal citations omitted).

ICANN presented no evidence that DCA schemed to mislead or gain unfair advantage in its positioning on the litigation waiver issue. DCA's position in this litigation on the waiver issue resulted from ICANN's position after the IRP that the IRP Panel final ruling was in no way binding on ICANN and from the fact that the claims before this Court are outside the scope of an IRP. Because ICANN has failed to show any evidence of bad faith or fraudulent actions on the part of DCA and has in fact acknowledged DCA's good faith actions during the IRP [Joint Ex. 33 at ¶138.], this element is not satisfied, which is sufficient in itself to reject the application of judicial estoppel.

To the contrary, at trial DCA presented evidence that its positions regarding the IRP as the sole forum for disputes with ICANN were based on mistake and/or fraud by ICANN:

- DCA could not have brought this case before the IRP, which adjudicates whether board action or inaction violated ICANN's own rules, because it involves wrongdoing by ICANN staff and the ICC [Joint Ex. 4, Section 4, ¶ 2; *see also* 2/07/19 Transcript of Sophia Bekele Trial Testimony at 234:2 – 24; Transcript of Christine Willet Trial Testimony at 353:12-19]; it was not the ICANN board that ultimately rejected DCA's application. [Transcript of Christine Willet Trial Testimony at 360:21-361:10].
- Sophia Bekele, the CEO of DCA is not a lawyer and before this lawsuit had no litigation experience. [Transcript of 2/07/19 Sophia Bekele Trial Testimony at 189:7 – 16].
- The litigation waiver relevant to the judicial estoppel trial was drafted by ICANN; Ms. Bekele had no involvement in the drafting or creation of the waiver. [Transcript of Christine Willet Trial Testimony at 338:10-12; Transcript of 2/07/19 Sophia Bekele Trial Testimony at 197:14 - 19].
- At the time of the IRP, DCA was unaware of any court ruling as to the scope of ICANN's litigation waiver, nor has ICANN ever pointed to any. In fact, the *DCA v. ICANN* IRP

was the first IRP proceeding under ICANN's new gTLD program. [*See* Joint Ex. 33 at ¶ 143; *see also* Transcript of 2/07/19 Trial Testimony at 204:6 - 22].

- This Court subsequently ruled, while denying in part ICANN's Motion for Summary Judgment, that the claims now pending in the instant lawsuit are outside the scope of the litigation waiver. [Court's 08/09/2017 Order on ICANN's Motion for Summary Judgment].
- At the time of the IRP, DCA was ignorant or mistaken as to the scope of the litigation waiver. [Transcript of Sophia Bekele's 2/07/19 Trial Testimony at 205:11 - 18].
- ICANN speciously presented the IRP as an alternative to court litigation but never intended to be bound by an IRP ruling, because in truth ICANN believes that its IRP procedures are not a binding arbitral mechanism. [*See* Joint Exhibit No. 2 at Module 6 ("Applicant agrees not to challenge, in court or in any other judicial for a, any final decision made by ICANN with respect to the application...provided that applicant may utilize an accountability mechanism set forth in ICANN's bylaws for purposes of challenging any final decision made by ICANN with respect to the application"); *see* Section II.4.C].

DCA did not act with bad faith, did not take inconsistent positions, and, contrary to ICANN's arguments during the MSJ, was not attempting to play 'fast and loose' with the judicial system. *See Kelsey v. Waste Mgmt. of Alameda Cty.* (1999) 76 C.A.4th 590, 598 (rejecting judicial estoppel, despite inconsistency, because defendant failed to show that plaintiff's failure to list claim was intentional and not result of ignorance); *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018 (rejecting judicial estoppel, despite inconsistency, because defendant "did not act with the intent to play fast and loose with the courts that is required for application of the judicial estoppel doctrine") (internal citations omitted).

DCA did not act in bad faith. DCA also presented evidence that it was ignorant or mistaken in taking its position with regard to the litigation waiver, and that it was also mistaken and ignorant on the binding nature/applicability of the final IRP outcome since ICANN did not accept the final IRP decision as binding on it. Because of that, ICANN has failed to prove this

prong of judicial estoppel. Accordingly, the Court should not apply the doctrine of judicial estoppel to DCA's case.

4. DCA's positions are consistent.

The doctrine of judicial estoppel has a "limited purpose: to protect the integrity of the judicial process, primarily by precluding a party from taking inconsistent positions that pose a *risk of inconsistent court determinations*." *Jogani, supra,* 141 Cal.App.4th at 188 (emphasis added). Judicial estoppel is applied only against a party that has taken positions or made statements that are "totally inconsistent." *Jackson, supra,* 60 Cal.App.4th at 183. Put another way, the party must have taken positions that are so irreconcilable that "one necessarily excludes the other." *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 962–963. Ultimately, this element is a "very high threshold" and a "rigorous standard." *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1387. Furthermore, if the litigant can explain how the positions are consistent, generally the court will not apply judicial estoppel. *Cleveland v. Policy Mgmt. Sys. Corp.* (1998) 526 U.S. 795, 798.

a. DCA has always taken the position that the waiver is invalid if the IRP is not binding.

ICANN did not show that DCA's positions were so inconsistent as to warrant judicial estoppel. In fact, DCA presented evidence at trial that it took the same positions in the IRP and this litigation with respect to the waiver. For example, DCA has consistently taken the position that ICANN should not be judgment proof:

> It is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights to challenge ICANN in court or any other forum and not provide a substitute accountability mechanism capable of producing a binding remedy. Such one-sided terms imposed on parties signing litigation waivers have been flatly rejected by California courts. Where California courts have considered and upheld broad litigation waivers, the alternative to court litigation provided by the parties' contract is inevitably a binding dispute resolution mechanism.

See Joint Ex. 16 at ¶ 7; *see also* Joint Ex. 17, page 3 ("If the Panel were to determine that this IRP was non-binding, DCA would effectively be deprived of any remedy").

During trial ICANN took DCA's statements about the IRP being the "sole forum" out of the context of the aforementioned positions. Ms. Bekele testified that her understanding of DCA's position with regard to the waiver throughout the IRP was that it was unconscionable if the IRP was not binding. [Transcript of Sophia Bekele Trial Testimony at 213:23 – 215:20; 216:4 – 12]. The *DCA v. ICANN* IRP declaration is not binding, and therefore DCA took exactly the same position with respect to the waiver in the IRP and in this Court.

b. Many of the facts supporting DCA's claims in this lawsuit had not occurred at the time of the IRP.

During trial ICANN also sought to portray DCA's statements as applying to all of its future claims, including fraud, even though the IRP was limited to adjudicating the ICANN board's acceptance of the GAC objection advice. **Generally, litigants are not judicially estopped from changing their positions when the circumstances surrounding the litigation have also changed**. For instance, litigants have been allowed to change prior statements not addressing the current scenario of the litigation. *Miller v. Bank of Am.* (2013) 213 Cal.App.4th 1, 10. The IRP panel focused entirely on whether the ICANN *Board* followed its own Bylaws and Articles of Incorporation *and the IRP Panel did not analyze whether the Covenant was enforceable;* this litigation focuses on whether ICANN is liable for actions by a number of actors in addition to the ICANN Board (including staff, ICANN Board Committees, the ICANN Geographic Names Panel, and individual board members, ICANN community affiliates/partners/ collaborators) - under multiple theories including fraud, not excluding intentional misconduct - in handling DCA's application (and including possible collusion by parties with a vested interest to deny DCA's application) and issues related thereto.

Further, there is no risk of inconsistent judicial determinations here because the issue the IRP decided and the issues DCA asks this Court to decide are different. The IRP Panel only made determinations regarding the binding nature of the IRP and whether the ICANN Board followed its Bylaws, and Articles of Incorporation with respect to the ICANN Board deliberation and consideration of the ICANN GAC decision against DCA's new gTLD application. [Joint Ex. 33, ¶¶ 148-151]. **DCA's remaining causes of action in the lawsuit do not require the Court**

to rule on either of those issues. Furthermore, the IRP panel's ruling was not binding. *See Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 454 (finding that there was no risk of inconsistent judicial determinations when one of the determinations was not binding).

c. DCA could not have brought this lawsuit as an IRP against ICANN, and even if it could have, it would have been a pointless exercise.

The former president of the Global Domains Division at ICANN admitted at trial that the decisions made during the evaluation process by Interconnect Communications ("ICC") at issue in the instant litigation could not be the subject of an IRP. [Transcript of Christine Willet's Trial Testimony at 353:8-11]. ICANN's liability for fraud, the other causes of action at issue in this litigation, and the enforceability of the Covenant, were never adjudicated by the IRP. [*See* Joint Ex. 33 at ¶¶ 112 – 117; Transcript of 2/07/19 Sophia Bekele Trial Testimony at 218:14 – 219:12]. Moreover, much of the harmful and injurious conduct committed by ICANN against DCA that forms the basis for DCA's claims in the instant lawsuit took place *after* the IRP Panel issued its final declaration [Transcript of Sophia Bekele 2/0719 Trial Testimony at 209:4 – 7:25 – 208:7; Joint Ex. 37 ¶¶ 57-61]. **For example, DCA saw that ICANN actively sought its competitor ZACR's opinion as to how ICANN should treat DCA's application post-IRP and the ICANN instructed ICANN to consider the very GAC objection advice that the IRP said ICANN improperly accepted in the first place.** Exs. 137 and 138; Joint Ex. 41 at page 2 ("Whereas, in addition to the Declaration, the Board must also take into account other relevant information, including but not limited to: (i) that ICANN received and accepted GAC consensus advice that DCA's application for .AFRICA should not proceed"); and Joint Ex. 41 Resolution 2015.07.16.04 at page 2. Therefore, like in *Miller*, DCA should not be held to a position taken with respect to an entirely different set of claims and where circumstances changed after the proceedings in the first forum.

ICANN has argued that DCA's lawsuit is somehow improper because DCA could have filed a second IRP. This argument is a red herring. In addition to the fact that it does not relate to any of the elements of judicial estoppel, it is not true. First, DCA saw after the first IRP that it was not really an accountability mechanism because ICANN did not have to follow the IRP

panel's ruling even after both parties spent years preparing for the final hearing and hundreds of thousands of dollars. Second, there were no rules or procedures set forth in the Guidebook providing that an applicant could enter into more than one IRP with ICANN. Third, the post IRP actions on DCA's application that DCA complains of in this lawsuit were taken by ICANN staff and the ICC and could not be directly adjudicated by the IRP.[3] [2/07/19 Transcript of Sophia Bekele Trial Testimony at 234:2 – 24]. ICANN's own employee testified that she had never heard of an applicant having a second IRP against ICANN. [Transcript of Christine Willet's Trial Testimony at 355:28-356:7].

In the context of a proceeding ICANN claimed at the time was the only available accountability mechanism for relief, it was reasonable and appropriate for DCA to rely on ICANN's position, presumed commitment to accountability and reputation that the IRP would be a trusted and authoritative adjudicative process – until it became clear: (1) how limited it was (to Board action and further consideration); (2) that the IRP Panel lacked the authority to grant affirmative relief; (3) how it was not binding on ICANN if the IRP Panel held otherwise; (4) there was no way to confirm the IRP award if ICANN did not allow it; and (5) ICANN – the wrongdoer – had unfettered discretion as to how or whether to implement the IRP ruling.

B. Whether to Apply Judicial Estoppel is Within the Court's Discretion

"Even if the necessary elements of judicial estoppel are found, because judicial estoppel is an equitable doctrine, whether it should be applied is a matter within the discretion of the trial court." *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 46 – 47 (internal citations omitted). "Because of its harsh consequences, the doctrine should be applied with caution and limited to egregious circumstances." *Id*. at 47 (internal citation omitted).

In the instant litigation DCA alleges that ICANN committed fraud against it. DCA believes that it is entitled to justice and that its case should be heard by a competent court, the place of justice. It would be inequitable to prevent DCA from bringing its claims in court when

[3] ICANN has suggested that DCA could have filed a Reconsideration Request regarding ICANN staff treatment of its application and then filed an IRP if the Board denied the Reconsideration Request. However, the IRP would still have been limited to whether the Board properly rejected the Reconsideration Request pursuant to its bylaws and would not have answered the question of whether ICANN staff or ICANN contractor ICC processed DCA's application unfairly. [Transcript of Christine Willet's Trial Testimony at 336:6-19].

DCA could not have brought the same claims before the *DCA v. ICANN* IRP Panel and, even if the IRP would have adjudicated those claims, the IRP Panel's decision would not have been binding on ICANN.

The IRP Panel never adjudicated whether DCA's endorsements were adequate or whether ICANN treated ZACR and DCA's endorsements fairly despite DCA's complaints regarding substantial irregularities with regard to ICANN's processing of DCA's application as compared to ZACR's. [*See* 2/07/19 Trial Transcript at 258:16 – 26]. However, the question of the adequacy of DCA's and ZACR's government endorsements will be central to Phase II of *this* lawsuit. Therefore, the application of judicial estoppel here would not serve judicial estoppel's primary purpose of preventing inconsistent judgments. It would be inequitable to prevent DCA from bringing its claims in court when DCA was ignorant or mistaken as to the scope of ICANN's litigation waiver. DCA was also mistaken in its belief that ICANN would accept the IRP Panel's Declaration as binding. It would be inequitable to prevent DCA from bringing its claims in court when facts giving rise to DCA's current claims had not even arisen at the time of the IRP.

Finally, ICANN has a history of stretching its complicated rules and procedures to obtain the ends it desires. For example, ICANN created a one-sided waiver to prevent applicants from suing it and then created an internal dispute mechanism as an alternative with no binding effect. ICANN also allowed a GAC objection advice against DCA application without investigation, as ruled by the IRP panel. ICANN's desire to apply judicial estoppel to this case is a continuation of this strategy of throwing any and every procedural hurdle at DCA in the hopes that something will stick. ICANN is now using the doctrine of judicial estoppel in an attempt to end run around the Court's ruling on summary judgment, which did not dismiss all of DCA's claims pursuant to the waiver, as ICANN had hoped.

For the reasons indicated at trial and herein, DCA should not be judicially estopped from bringing the instant litigation.

/ / /

III. CONCLUSION

Accordingly, the Court should find that judicial estoppel does not apply to the instant lawsuit.

Dated: March 1, 2019

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