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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11
12 DOTCONNECTAFRICA TRUST,
13 Plaintiff,
14 v.
15 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS, *et*
16 *al.*,
17 Defendants.
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CASE NO. BC607494
Assigned to Hon. Howard L. Halm
**ICANN'S TRIAL BRIEF (JUDICIAL
ESTOPPEL BENCH TRIAL)**
FSC: February 20, 2018
Time: 8:30 a.m.
Dept.: 53
Complaint Filed: January 20, 2016
Bench Trial Date: February 28, 2018
Jury Trial Date: August 22, 2018

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INTRODUCTION

The doctrine of judicial estoppel is designed to prevent litigants from “playing fast and loose” with the judicial system by taking two inconsistent positions in order to gain an advantage. The incontrovertible facts in this case demonstrate that this is precisely what plaintiff DotConnectAfrica Trust (“DCA”) has done and, for this reason, this lawsuit should be dismissed. When the Court decided on August 9, 2017 to convert defendant Internet Corporation for Assigned Names and Number’s (“ICANN”) motion for summary judgment into a bench trial, it was clear that the Court was troubled by evidence that DCA had told one tribunal that DCA did not have the legal ability to file this lawsuit (because it had agreed to relinquish the right to sue ICANN when it applied for a gTLD), and yet DCA then proceeded to file this lawsuit. Since that August hearing, ICANN has amassed even more evidence regarding DCA’s inconsistent positions, including the deposition testimony of DCA’s Chief Executive Officer. The truth is—what DCA has done in filing a lawsuit after *repeatedly* telling another tribunal that it could not do so, under any circumstances amounts to nothing short of gross misconduct.

That other tribunal was a three-member panel (“Panel”) that was formed pursuant to ICANN’s Bylaws to adjudicate an Independent Review Process (“IRP”) proceeding that was initiated by DCA challenging ICANN’s Board of Directors acceptance of the “consensus advice” from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application for the “.AFRICA” generic top-level domain (“gTLD”) should not proceed. For new gTLD applicants such as DCA, IRPs are available to those who believe that ICANN’s Board has violated its Bylaws or its Articles of Incorporation. The members of the IRP Panel that presided over the IRP were a former California superior court judge, a French law professor specializing in international arbitration law and international alternative dispute resolution, and one of Canada’s leading arbitrators.

Over a twenty-one month period, the IRP Panel received numerous written submissions from the parties, including on the specific question of whether the IRP Panel’s final decision would be binding on the parties. DCA argued that the declaration should be binding.

1 Specifically, DCA informed the IRP Panel that because of the litigation waiver in the New gTLD
2 Applicant Guidebook (“Guidebook”) that DCA agreed to when it applied for .AFRICA, the IRP
3 was DCA’s only recourse to pursue a dispute against ICANN; DCA then argued that because it
4 could not sue ICANN, the IRP must result in a binding decision. The following are direct quotes
5 from statements DCA made to the IRP Panel in support of this argument:

- 6 • “For DCA and other gTLD applicants, the IRP is their only recourse; no other
7 legal remedy is available.”
- 8 • “As a condition of applying for a gTLD, DCA *unilaterally surrendered all of its*
9 *rights to challenge ICANN in court or any other forum outside of the*
10 *accountability mechanisms in ICANN’s Bylaws.*” (emphasis in original)
- 11 • “If the panel were to determine that this IRP was non-binding, DCA would
12 effectively be deprived of any remedy.”

13 ICANN argued that the IRP Panel’s final decision should not be binding, but the IRP
14 Panel agreed with DCA and, based in no small part on DCA’s representations, found that its final
15 decision would be binding on the parties. Then, following a two-day evidentiary hearing with
16 live witness testimony and opening and closing statements, the IRP Panel also agreed with DCA’s
17 claim that ICANN had violated its Bylaws, and the IRP Panel issued a 63 page ruling finding in
18 DCA’s favor. In accordance with the IRP Panel’s ruling, ICANN returned DCA’s application
19 for .AFRICA to processing, and ICANN paid DCA’s costs for the IRP. Nevertheless, when
20 DCA’s application later failed evaluation (because DCA lacked the requisite support (or non-
21 objection) of 60% of the governments of Africa as required by the Guidebook), DCA sued
22 ICANN – doing exactly what it told the IRP Panel it could never do.

23 For DCA to be able to tell one forum that it cannot sue ICANN in order to achieve DCA’s
24 desired result, and then tell another forum that it *can* sue ICANN to achieve a different desired
25 result, is exactly the reason that the courts developed the doctrine of judicial estoppel: to prevent
26 the gross unfairness that can result when a litigant manipulates the judicial system for its own
27 self-serving ends.

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FACTUAL BACKGROUND

A. The New gTLD Guidebook And The Covenant Not To Sue

DCA applied for .AFRICA in 2012 through ICANN's New gTLD Program, the program pursuant to which applicants could apply for new gTLDs. The Guidebook dictates the requirements for new gTLD applications to be approved, and the criteria by which they are evaluated. As part of the development of the Guidebook, ICANN published multiple drafts of the Guidebook on ICANN's website so that the public could provide feedback and comments on the provisions in the Guidebook. (December 1, 2016 Deposition of Sophia Bekele ("12/1/16 Bekele Dep.") at 23:3-24:2.) Ms. Bekele, along with hundreds of members of the Internet community, provided feedback to ICANN on these drafts. (*Id.*)

In order to submit an application for a new gTLD, each applicant is required to agree to be bound by the terms and conditions set forth in the Guidebook:

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

(Guidebook § 6.) DCA admits that by submitting its application for .AFRICA, it agreed to be bound by the terms and conditions of the Guidebook. (12/1/16 Bekele Dep. at 17:18-20, 24:3-7.)

Module 6 of the Guidebook contains the Covenant Not To Sue ("Covenant"), which bars lawsuits against ICANN arising "in any way" out of ICANN's evaluation of new gTLD applications:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. **APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND**

1 IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT
2 OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER
3 LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES
4 WITH RESPECT TO THE APPLICATION. . . .

(Guidebook Module § 6.6.)

5 The Covenant specifically provides that, in lieu of legal action, applicants will be able to
6 use any of the alternative dispute resolution mechanisms, or “accountability mechanisms,”
7 contained in ICANN’s Bylaws.¹ (Guidebook Module 6 § 6.) One of these mechanisms, the IRP,
8 allows an aggrieved applicant to ask an independent three-member panel to adjudicate whether an
9 action or inaction of ICANN’s Board was inconsistent with ICANN’s Articles of Incorporation,
10 Bylaws or the Guidebook. (Bylaws (Art. IV, § 2).)

11 **B. The GAC Advice and the IRP**

12 The GAC, which consists of representatives and organizations from countries around the
13 world, issued “consensus advice” to the ICANN Board in 2013 that DCA’s application should not
14 proceed. ICANN’s Board then voted to accept the GAC advice and halt the processing of DCA’s
15 application before ICANN had completed its evaluation of the application. In response, DCA
16 initiated an IRP in October 2013.

17 The IRP was administered by the International Centre for Dispute Resolution (“ICDR”),
18 which is the international arm of the American Arbitration Association. It was conducted
19 pursuant to the terms of ICANN Bylaws, the ICDR’s International Arbitration Rules, and the
20 Supplementary Procedures for ICANN’s IRP that the ICDR adopted. DCA and ICANN each
21 nominated one Panelist to preside over the IRP. DCA nominated Dr. Catherine Kessedjian, the
22 Deputy Director of the College of Paris and Professor of European Business law, Private
23 International Law, International Dispute Resolution, and International Commercial Arbitration.
24 Prior to joining the European College of Paris, Dr. Kessedjian was the Deputy Secretary General

25 ¹ For purposes of this bench trial, the operative Bylaws are ICANN’s Bylaws, as modified
26 effective April 11, 2013. All references in this brief to the Bylaws are to this version of the
27 Bylaws. Extensively revised ICANN Bylaws came into effect on 1 October 2016 but do not apply
28 here because the events at issue in this case, including DCA’s 2012 application for .AFRICA and
the IRP proceeding initiated by DCA in 2013, occurred prior to the 2016 revision. Although
modifications were made to ICANN’s Bylaws between December 2011 and October 2016, there
were no substantive modifications to the portions of ICANN’s Bylaws that are relevant to this
motion.

1 of the Hague Conference on Private International Law. ICANN nominated the Honorable
2 Richard C. Neal, a retired California court of appeal justice. When Justice Neal passed away part
3 way through the proceedings, ICANN nominated Judge Cahill, a retired California Superior
4 Court judge. The ICDR appointed the third Panelist, a Canadian lawyer and seasoned arbitrator
5 named Babak Barin, to chair the IRP Panel. Mr. Barin not only had extensive experience as a
6 commercial litigator and arbitrator, but was listed by Global Arbitration Review as being “highly
7 regarded” among Canada’s top arbitration names.

8 The IRP took over two years and was a complex and hard-fought adversarial process. It
9 involved the production of thousands of pages, numerous written submissions, witness
10 declarations, and a two-day live hearing, at which the parties gave opening statements, put on the
11 testimony of live witnesses (DCA’s CEO, Ms. Bekele; an ICANN Board member; and the former
12 chair of the GAC) each of whom was sworn in by the IRP Panel before giving testimony and
13 subject to examination and questioning from the IRP Panel and opposing counsel, and made
14 closing arguments. (See 9/6/17 Bekele Dep. at 42:2-14, 87:22-89:6; See generally May 22, 2015
15 IRP Tr.; May 23, 2015 IRP Tr.)

16 DCA repeatedly argued throughout the IRP that DCA was unable to sue ICANN in court.
17 In its Request for Emergency Arbitrator and Interim Measures of Protection (“Request”), DCA
18 argued that the relief it requested was necessary to protect DCA’s procedural rights because
19 “DCA has a right to be heard in a meaningful way in the *only proceeding available* to review
20 ICANN Board’s decision.” (Request ¶ 29) (emphasis added.)²

21 Then, the IRP Panel asked the parties various questions regarding the appropriate
22 procedures for an IRP. ICANN and DCA both submitted responses to the IRP Panel on May 5,
23 2014. DCA argued that the IRP was an arbitration under California law in all but name – “[t]he
24 IRP has all the characteristics of an arbitration under California law and widely accepted
25 international arbitral practice and procedure” – and therefore should have certain features,
26

27 ² The specific request DCA made of the IRP Panel is not relevant; however, for context, DCA
28 asked that an emergency IRP Panel be convened in order for DCA to seek a stay of the
assignment of .AFRICA during the pendency of the IRP.

1 including a binding resolution. (DCA’s Submission on Procedural Issues (“Submission”), May 5,
2 2014 at ¶ 1, 4, 22.) In support of its arguments, DCA wrote:

3
4 It is also critical to understand that ICANN created the IRP as an alternative to
5 allowing disputes to be resolved by courts. By submitting its application for a
6 gTLD, DCA agreed to eight pages of terms and conditions, including a nearly
7 page-long string of waivers and releases. Among those conditions was the
8 waiver of all of its rights to challenge ICANN’s decision on DCA’s
9 application in court. ***For DCA and other gTLD applicants, the IRP is their
10 only recourse; no other legal remedy is available.***

11 (*Id.* at 22) (emphasis added).

12 On May 12, 2014, the IRP Panel narrowed its procedural questions to a few remaining
13 points of contention, which it asked the parties to brief. (Declaration on the IRP Procedure
14 (“Procedure Declaration”) ¶ 15-18.) Among these was this question: “[i]s the Panel’s decision
15 concerning the IRP Procedure and its future Declaration on the Merits in this proceeding
16 binding?” (Procedure Declaration ¶ 19.) Both parties submitted responses on May 20, 2014.
17 ICANN took the position that the IRP declaration should not be binding. (Procedure Declaration
18 ¶ 97.) DCA again argued that any decision by the IRP Panel must be binding, because due to the
19 Covenant, DCA was unable to sue ICANN and therefore the IRP was DCA’s sole means of
20 disputing a decision by ICANN:

21 Module 6 of the Guidebook contains eight pages of terms and conditions that
22 an applicant “agrees to . . . without modification” by submitting an application
23 for a gTLD, including significant waivers of rights... In exchange for waiving
24 these significant legal rights, Section 6 of Module 6 grants applicants the right
25 to challenge a final decision of ICANN through the accountability
26 mechanisms set forth in ICANN’s Bylaws, including the IRP. ***As a result, the
27 IRP is the sole forum in which an applicant for a new gTLD can seek
28 independent, third-party review of Board actions. . . .***

29 (DCA’s Response to the Panel’s Questions on Procedural Issues” (“Response”), May 20, 2014,
30 ¶¶5- 6) (emphasis added.) On this basis, DCA argued that the IRP Panel’s decision must be
31 binding in order to both justify the waiver and remain consistent with California law. (Response
32 ¶ 5-7.) Specifically, DCA argued that “[i]t is fundamentally inconsistent with California law,
33 U.S. federal law, and principles of international law for ICANN to require applicants to waive all
34 rights to challenge ICANN in court or any other forum and not provide a substitute accountability

1 mechanism capable of producing a binding remedy. . . Thus, in order for this IRP not to be
2 unconscionable, it must be binding.” (Response ¶ 7.)

3 The IRP Panel then asked the parties to further brief the issue of why this IRP should be
4 binding when a prior IRP between ICANN and another party was not. In response, DCA stated
5 that there was an important factual distinction – unlike here, the waiver and release signed by the
6 party in the prior unrelated IRP did not deprive that party of access to courts. (May 29, 2014
7 Letter from DCA to IRP Panel.) “In contrast,” DCA wrote, “as a condition of applying for a
8 gTLD, DCA *unilaterally surrendered all of its rights to challenge ICANN in court or any other*
9 *forum outside of the accountability mechanisms in ICANN’s Bylaws*. As a result, the IRP is the
10 *sole forum* in which DCA can seek independent, third-party review of the actions of ICANN’s
11 Board of Directors.” *Id.* (emphasis in original.) DCA concluded by stating, “[i]f the panel were
12 to determine that this IRP was non-binding, DCA *would effectively be deprived of any remedy.*”
13 *Id.* (emphasis added).

14 The IRP Panel agreed with DCA’s position, finding that because of the Covenant, “[t]he
15 avenues of accountability for applicants that have disputes with ICANN do *not* include resort to
16 the courts,” and that “the ultimate ‘accountability’ remedy for applicants is the IRP.” (Procedure
17 Declaration ¶ 39) (emphasis in original.) Thus, the IRP Panel held that its decision would be
18 binding on the parties. (Procedure Declaration ¶ 131) (“Based on the foregoing and the language
19 and the content of the IRP Procedure, the Panel concludes that this declaration and its future
20 Declaration on the Merits of this case is binding on the parties.”)

21 DCA also used this same position (that the IRP was the only means by which it could
22 raise a claim against ICANN) in support of its arguments on other issues. For example, DCA
23 argued that the IRP Panel should apply an objective standard, or “de novo” standard of review,
24 because, according to DCA, “[t]his is the only opportunity that a claimant has for independent
25 and impartial review of ICANN’s conduct, the only opportunity. And within that context of that
26 only opportunity, really, there should [not] be a deferential standard [of] review, deference to the
27 regulator, whose very conduct is being questioned. I think that is wrong.” (May 22, 2015 IRP Tr.
28

1 at 22:16 –23: 3) (also noting that the litigation waiver provided ICANN “with a protection from
2 the public courts”); *see also* (May 23, 2015 IRP Tr. at 490:13–491:3) (stating that “at the end of
3 the day, the only people that ICANN is accountable to are the three of you...the Independent
4 Review Panels.”) And in its Submission on Costs, DCA argued that ICANN should pay DCA’s
5 full costs should DCA prevail based on ICANN’s conduct during the IRP, “which is the only
6 independent accountability mechanism available parties such as DCA.” (July 1, 2015 Submission
7 on Costs.)

8 On July 9, 2015, the IRP Panel issued a Final Declaration (the “IRP Final Declaration”),
9 finding in DCA’s favor. (Final Declaration ¶ 150.) The IRP Panel declared that ICANN should
10 “continue to refrain from delegating the .AFRICA gTLD and permit [DCA’s] application to
11 proceed through the remainder of the new gTLD application process.” (*Id.* ¶ 149.) Additionally,
12 and in accordance with DCA’s argument in its Submission on Costs, the IRP Panel held that
13 ICANN was to pay DCA’s IRP costs. Just a few days later, ICANN’s Board voted to adopt the
14 IRP Panel’s Declaration in full, and ICANN paid DCA’s IRP costs and placed DCA’s application
15 back into processing.³

16 C. DCA’s Lawsuit Against ICANN

17 DCA’s application for .AFRICA was ultimately unsuccessful.⁴ When DCA learned its
18 application would not pass evaluation, it filed this lawsuit, completely contradicting its explicit
19 statements to the IRP Panel that it could not file a lawsuit against ICANN related in any way to its
20 application for .AFRICA.

21 The complaint initially involved a total of ten causes of action against ICANN, including
22 breach of contract claims and claims for declaratory relief. (*See* DCA’s First Amended
23

24 ³ Any evidence regarding the post-IRP conduct of ICANN is irrelevant to the judicial estoppel
25 inquiry. *See* Motion *in Limine* No. 2, filed on January 29, 2018. As a result, information
regarding events following the IRP are provided here solely for context.

26 ⁴ The reason DCA’s application failed the new gTLD evaluation process is not relevant to this
27 judicial estoppel bench trial. However, the basis for DCA’s rejection is detailed in prior
28 pleadings, including ICANN’s Opposition to Plaintiff’s Motion for Preliminary Injunction, filed
on December 9, 2016. DCA failed to meet the Guidebook requirement that it demonstrate the
support (or non-objection) of 60% of the governments of Africa, an absolute requirement for a
geographic string name such as .AFRICA.

1 Complaint (“FAC”), filed February 26, 2016.) All of the claims relate to ICANN’s processing of
2 DCA’s application for .AFRICA. On May 26, 2017, ICANN moved for summary judgment on
3 the grounds that DCA’s lawsuit was barred both by the Covenant, and by the doctrine of judicial
4 estoppel due to DCA’s contradictory positions on whether it was permitted to sue ICANN. The
5 Court granted ICANN’s motion in part, finding that the Covenant barred DCA’s non-fraud
6 claims, but denied ICANN’s motion as to DCA’s fraud-based claims. (August 9, 2017 Order.)
7 As to the judicial estoppel portion of the motion, the Court elected to set a bench trial on the issue
8 of whether DCA’s lawsuit was barred by the doctrine of judicial estoppel so that the parties could
9 present evidence before the Court ruled. *Id.*

10 LEGAL STANDARD

11 There should be no disagreement about the purpose of the judicial estoppel doctrine or the
12 importance of enforcing the doctrine when litigants take exactly opposite positions before
13 different tribunals:

14 Judicial estoppel precludes a party from gaining an advantage by taking one
15 position, and then seeking a second advantage by taking an incompatible
16 position. The doctrine’s dual goals are to maintain the integrity of the judicial
17 system and to protect parties from opponents’ unfair strategies. Courts apply
18 the doctrine to prevent internal inconsistency, preclude litigants from playing
19 ‘fast and loose’ with the courts, and prohibit ‘parties from deliberately
20 changing positions according to exigencies of the moment.’

21 *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 102 Cal. App. 4th 181, 189 (2002) (internal
22 citations omitted), as modified (Oct. 4, 2002); *Jackson v. Cty. of Los Angeles*, 60 Cal. App. 4th
23 171, 181 (1997) (“It seems patently wrong to allow a person to abuse the judicial process by first
24 [advocating] one position, and later, if it becomes beneficial, to assert the opposite”) (citations
25 omitted); *Thomas v. Gordon*, 85 Cal. App. 4th 113, 118 (2000) (“The essential function and
26 justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means
27 of obtaining unfair advantage in a forum provided for suitors seeking justice.”) (Citation omitted.)

28 The justification for the doctrine “is to prevent the use of intentional self-contradiction as
a means of obtaining unfair advantage in a forum... The doctrine is directed against those who
would attempt to manipulate the court system[.]” *Nat’l Bldg. Maint. Specialists, Inc. v. Hayes*,

1 653 S.E. 2d 772, 774 (2007). “A fortiori, whether to apply the doctrine of judicial estoppel
2 *depends entirely on the actions of the plaintiff.*” *Id.* (emphasis added); *see also Gottlieb v. West,*
3 141 Cal. App. 4th 110, 131 (2006) (“[T]he doctrine is primarily concerned with the connection
4 between a party and the judicial system, not the relationship between the parties.”)

5 Judicial estoppel applies where:

- 6 (1) the same party has taken two positions;
- 7 (2) the positions were taken in judicial or quasi-judicial administrative proceedings;
- 8 (3) the party was successful in asserting the first position (i.e., the tribunal adopted the
9 position or accepted it as true);
- 10 (4) the two positions are totally inconsistent; and
- 11 (5) the first position was not taken as a result of ignorance, fraud, or mistake.

12 *Jackson*, 60 Cal. App. 4th at 183; *Thomas*, 85 Cal. App. 4th at 118.

13 ARGUMENT

14 The undisputed facts show that DCA repeatedly stated during the IRP that the Covenant
15 prevented DCA from suing ICANN in court. DCA stated this fact as support for their argument
16 that the IRP Panel should issue a binding declaration (which the IRP Panel then did), as well as in
17 support of several other arguments. Then, when DCA’s application for .AFRICA later did not
18 pass the evaluation stage, DCA filed this lawsuit – thereby doing exactly what DCA repeatedly
19 told the IRP Panel it could not do. DCA’s reversal of position easily meets all the requirements
20 for the doctrine of judicial estoppel.

21 **I. DCA HAS TAKEN TWO TOTALLY INCONSISTENT POSITIONS.**

22 The first inquiry of judicial estoppel combines the first and fourth elements, and looks at
23 whether DCA took two clearly inconsistent positions. *Jackson*, 60 Cal. App. 4th at 182 (“[F]or
24 the doctrine [of judicial estoppel] to apply, the seemingly conflicting positions ‘must be clearly
25 inconsistent so that one necessarily excludes the other.’”) (citation omitted). Here, DCA’s own
26 pleadings and deposition testimony conclusively demonstrate that DCA has done exactly that.
27
28

1 **A. DCA Indisputably Told The IRP Panel That It Was Unable To Sue ICANN**
2 **In Court.**

3 At every step of the way, DCA took the position in the IRP that the Covenant prevented
4 DCA from suing ICANN in court.

5 First, DCA argued that its requested interim relief was necessary to protect DCA’s
6 procedural rights because “DCA has a right to be heard in a meaningful way in the only
7 proceeding available to review [the] ICANN Board’s actions.” (DCA’s Request for Emergency
8 Arbitrator and Interim Measures of Protection ¶ 29.)

9 Then, when arguing to the IRP Panel that its final decision should be binding, DCA cited
10 the “eight pages of terms and conditions” it had agreed to be bound by, including the Covenant,
11 and stated that as a result, “[f]or DCA and other gTLD applicants, the IRP is their only recourse;
12 no other legal remedy is available.” (Submission ¶ 22.) When asked to further brief the issue,
13 DCA again told the IRP Panel that, by agreeing to the Covenant, DCA waived the right to sue
14 ICANN, and that as a result the IRP was the sole forum in which DCA could seek independent,
15 third party review. (Response ¶ 6.) DCA’s next communication to the IRP Panel argued that the
16 non-binding nature of a previous IRP was not relevant because, unlike the waiver signed by that
17 applicant in 2005, the waiver DCA agreed to in 2012 “unilaterally surrendered all of [DCA’s]
18 rights to challenge ICANN in court” and that if the IRP was not binding, “DCA would effectively
19 be deprived of any remedy.” (May 29, 2014 DCA Letter to Panel.)

20 DCA also argued at the live IRP hearing that the IRP Panel should apply an objective
21 standard, or “de novo” standard of review because the IRP was DCA’s “only opportunity” for a
22 remedy, the Covenant “protected ICANN from the courts,” and “at the end of the day, the only
23 people that ICANN is accountable to are the three of you...the Independent Review Panels.”
24 (May 22, 2015 Tr. at 22:16 –23: 3; May 23, 2015 Tr. at 490:13-491:3). And in its Submission on
25 Costs, DCA stated that the IRP was “the only independent accountability mechanism available to
26 parties such as DCA.” (July 1, 2015 Submission on Costs.)

27 DCA cannot present any evidence to controvert the plain language of its own pleadings
28 and statements. Moreover, Ms. Bekele admitted in deposition that DCA’s lawyers took the

1 positions reflected in DCA’s pleading and arguments, and that DCA did not once voice
2 disagreement with any of the above positions. (9/6/17 Bekele Dep. at 33:4-34:12, 34:16-35:11,
3 35:14 -36:10, 39:21-41:7)

4 **B. DCA Reversed That Position When It Sued ICANN.**

5 Despite repeatedly informing the IRP Panel that DCA was unable to sue ICANN in court,
6 when its application for .AFRICA ultimately did not pass evaluation following the IRP, DCA
7 reversed its position and decided it could sue ICANN after all. (*See* FAC.) These two positions
8 are clearly inconsistent and mutually exclusive. DCA cannot both be prevented from suing
9 ICANN, and be allowed to sue ICANN.

10 In its Opposition to ICANN’s Motion for Summary Judgment (“Opposition”), DCA
11 attempted to argue that it did not really change positions by filing this lawsuit, because the IRP
12 was about ICANN following its Bylaws, while this lawsuit is about fraud. This argument is
13 entirely without merit. First, DCA stated during the IRP that it was unable to sue ICANN in court
14 with 100% certitude, and *without qualification*. DCA did not say it was prevented from suing
15 ICANN *except* for certain claims, or *except* in the event of fraud.⁵

16 Second, DCA’s current fraud claims include many of the *exact same allegations*
17 underlying its claims during the IRP. (*See, e.g.*, FAC ¶ 29 (claiming that ICANN conspired with
18 the AUC on how to defeat any applications for .AFRICA other than the AUC’s), and Amended
19 Notice of IRP ¶ 20, 45 (same), Bekele IRP Witness Statement ¶¶ 63-64 (same), DCA’s IRP
20 Memorial on the Merits ¶ 13 (same); FAC ¶ 44 (claiming ICANN allowed the GAC to be used as
21 a vehicle for the issuance of advice against DCA’s application by the AUC), and Amended
22 Notice of IRP at ¶¶ 26-28 (same), Bekele IRP Witness Statement, ¶ 65 (same), 5/22/15 IRP
23 Hearing Transcript at pp. 33-42 (same); FAC ¶¶ 44-45 (claiming that the GAC advice was not
24 “consensus” because Kenya’s true representative was absent), and DCA’s Memorial on the
25

26 ⁵ DCA took this same position – without qualification – outside the IRP as well. For example, in
27 a letter to the U.S. Congress asking for oversight of the New gTLD Program, DCA wrote that
28 “[t]he program has been designed in such a way that an applicant (participating in the program)
cannot sue ICANN on the basis of its application or matters relating to the new gTLD program,
thus constricting any possible avenues of legal redress for any aggrieved application.” (February
21, 2013 Letter from DCA to Congress.)

1 Merits, ¶¶ 19-22 (same), 5/22/15 IRP Hearing Transcript 42:16-48:3 (same); FAC ¶ 76 (claiming
2 that ICANN never intended to treat the applicants the same, but rather chose applicants based on
3 its own wishes and in exchange for political favors), and Bekele IRP Witness Statement, ¶¶ 90-91
4 (same), 5/22/17 IRP Transcript at 17:1-11, 21-24 (same); and so on.)⁶ Indeed, as DCA admits, at
5 the time of the IRP *DCA believed ICANN had committed fraud*. (9/6/17 Bekele Dep. at 44:5-12,
6 44:22-45:9, 45:11-46:15, 47:6-48:21, 65:9-66:3.) Thus, when DCA told the IRP Panel in no
7 uncertain terms that it was unable to sue ICANN because of the Covenant, DCA's claims already
8 included allegations of fraud against ICANN – meaning that, when DCA told the IRP Panel that it
9 could not, under any circumstances, file a lawsuit against ICANN related to ICANN's processing
10 of DCA's application for .AFRICA, DCA was referencing all of its claims, including its fraud
11 claims. DCA did not advise the IRP Panel that there might be exceptions to DCA's across-the-
12 board restriction on filing lawsuits against ICANN pursuant to the Covenant.⁷

13 DCA also attempted to argue in opposing summary judgment that its position at the IRP
14 was actually that *if* the Covenant was enforceable, *then* the IRP must be binding. This a gross
15 misrepresentation of DCA's very unequivocal statements during the IRP. A plain reading of
16 DCA's pleadings and arguments shows that DCA never qualified its assertion that it was unable
17 to sue ICANN. Where DCA raised the enforceability of the Covenant at all, it was to *reinforce*
18 that position, not qualify it. For example: under the heading "As The Sole Process Through
19 Which DCA Can Pursue Its Claims Against ICANN, The IRP Must Be Capable Of Providing A
20 Final And Binding Decision In This Matter," DCA's Response to the Panel's Questions on
21 Procedural Issues argues that the IRP must be binding in order for the Covenant to comport with
22 California law:

23 _____
24 ⁶ ICANN maintains that DCA's fraud allegations are completely irrelevant to the judicial estoppel
25 inquiry. Reference to DCA's fraud claims is only made here for purposes of rebutting DCA's
26 anticipated argument that the context or circumstances have changed since it took its first
27 position.

28 ⁷ DCA cannot now say that the context is different because this lawsuit asserts fraud claims. The
only real changed circumstance is that even though DCA won the IRP, DCA's application
nonetheless ultimately did not pass the evaluation process. That does not give DCA the right to
deliberately change positions before this Court.

1 “[i]t is fundamentally inconsistent with California law, U.S. federal law, and
2 principles of international law for ICANN to require applicants to waive all rights
3 to challenge ICANN in court or any other forum and not provide a substitute
4 accountability mechanism capable of producing a binding remedy . . . Thus, in
5 order for this IRP not to be unconscionable, it must be binding.”

6 (Response ¶ 7.) Notably, DCA does not state that the Covenant might be unenforceable or that
7 DCA might be able to sue ICANN later on.⁸

8 There simply is no way to characterize DCA’s two positions as anything but inconsistent
9 and mutually exclusive. DCA repeatedly and successfully told the IRP Panel that DCA was
10 contractually unable to sue ICANN. DCA then filed a lawsuit against ICANN, thereby telling
11 this Court that DCA was able to sue ICANN.

12 **II. DCA WAS SUCCESSFUL IN ASSERTING ITS FIRST POSITION.**

13 **A. The IRP Pleadings Alone Demonstrate that DCA’s First Position Was 14 Successful.**

15 The third element of judicial estoppel is met where the party was successful in asserting
16 the first position, “i.e., [that] the tribunal adopted the position or, accepted it as true[.]” *Jackson*,
17 60 Cal. App. 4th at 183. The rendering of judgment in that party’s favor is one way that
18 “success” is shown for purposes of this element. *See People ex rel. Sneddon*, 102 Cal. App. 4th at
19 189 (“The party invoking judicial estoppel must show that . . . the position was adopted by the
20 first tribunal in some manner *such as by rendering a favorable judgment.*”) (emphasis added.)

21 Here, the IRP pleadings conclusively demonstrate that DCA was successful in asserting its
22 first position. As described above, DCA argued repeatedly to the IRP Panel that the IRP should
23 be binding based on its position that DCA was unable to sue ICANN in court. The IRP Panel
24 agreed with DCA’s position, and accordingly found that its final decision would be binding on
25 the parties. DCA admitted in deposition that the IRP Panel concluded that its declaration would
26 be binding on the parties, in accordance with DCA’s position. (9/6/17 Bekele Dep. at 53:13-16.)

27 ⁸ In its Opposition to ICANN’s MIL No. 2, DCA also argues that its positions were not
28 inconsistent because they were taken in response to ICANN’s positions – that DCA argued it
could not sue ICANN because of the Covenant, and then sued when ICANN did not view the IRP
as binding. However, a basic review of the facts shows that DCA told the IRP Panel, without
qualification, that it could not sue ICANN multiple times *after* it knew ICANN did not think the
IRP should be binding. (*See ICANN’s Reply In Support Of Motion In Limine No. 2 at 7-8.*)
Then, DCA filed suit against ICANN six months after the IRP Final Declaration was issued, and
only after its application did not succeed due to lack of governmental support. *Id.*

1 Nor was the issue of whether the IPR would be binding the only time DCA used the fact
2 that the IRP was its only opportunity to seek redress against ICANN. DCA argued that its
3 requested interim relief in the IRP was necessary to preserve DCA’s procedural rights because the
4 IRP was DCA’s sole opportunity to bring claims against ICANN; the IRP Panel granted the
5 requested relief. DCA argued that the IRP Panel should apply a “de novo” standard of review,
6 because it would be wrong to use a deferential standard when an IRP was an applicant’s “only
7 opportunity for independent and impartial review of ICANN’s conduct”; the IRP Panel agreed
8 and applied a “de novo” standard. (May 22, 2015 IRP Tr. at 22:16 – 23:3; Final Declaration
9 ¶¶ 72, 76 (citing the Covenant and an applicant’s inability to pursue judicial remedies as a basis
10 for its holding).) And DCA argued that because ICANN had taken certain positions in “the only
11 independent accountability mechanism available to parties such as DCA,” ICANN should pay
12 DCA’s full costs if DCA prevailed at the IRP. (DCA’s July 1, 2015 Submission on Costs.)
13 When DCA prevailed, the IRP Panel granted DCA’s request – citing DCA’s argument – and
14 ordered ICANN to pay DCA’s costs. (Final Declaration ¶ 140 (quoting DCA’s argument); ¶ 144
15 (finding that ICANN should bear the “totality of costs of this IRP and the totality of the costs of
16 the IRP Provider”).

17 Because the IRP Panel accepted DCA’s repeated statements that DCA was unable to sue
18 ICANN in court as true, and rendered several procedural and substantive decisions that were
19 favorable to DCA based on DCA’s statements and arguments, DCA was indisputably successful
20 in asserting its initial position.⁹

21 **B. ICANN’s View Regarding Whether The IRP Was Binding Is Irrelevant To**
22 **Whether The Tribunal Accepted DCA’s Position.**

23 DCA will argue that, because ICANN did not view the IRP as binding, DCA was not

24 ⁹ In its Opposition to the Motion for Summary Judgment, DCA intimated that the IRP Panel’s
25 ruling that the IRP Final Declaration would be binding on the parties somehow hinged upon
26 whether the Covenant was ultimately found to be enforceable. (Opp. at 18 (“the IRP ruling
27 assumed that *if* the Prospective Release was valid, the IRP had to be binding. That very issue is
28 being decided through this motion”).) Any argument that this Court’s August 9, 2017 order
regarding the Covenant somehow had an impact on the IRP Panel’s 2014 ruling (three years
earlier) is not only meritless, it is nonsensical. The fact is – DCA took the position that the
Covenant prevented it from suing ICANN and, on that basis, that the IRP Panel decision should
be binding. The IRP Panel accepted DCA’s position and ruled in DCA’s favor.

1 successful. (See Opp. at 18; DCA's Opposition to ICANN's Motion *in Limine* No. 2 at 6.)
2 However, any conduct by an opposing party – to the extent there is conduct – is completely
3 irrelevant to this element of judicial estoppel. Indeed, courts have applied judicial estoppel where
4 a party's first position was taken in a proceeding where there was no opposing party. See, e.g.,
5 *People ex rel. Sneddon*, 102 Cal. App. 4th 181 (judicially estopped party's first position taken in
6 applications for project permits); see also *Helson v. Nuvel Fin. Servs. Corp.*, No. 8:05-
7 CIV1788T17MAP, 2006 WL 1804583, *2-3 (M.D. Fla. June 27, 2006) (judicially estopped
8 party's first position taken in bankruptcy filings). The fact that DCA prevailed in convincing the
9 IRP Panel that its decision should be final, despite ICANN's opposition, actually underlines
10 DCA's success in asserting its initial position. ICANN's views on whether the IRP should be, or
11 in fact was, binding on the parties is utterly irrelevant to whether DCA succeeded in taking its
12 initial position – which the IRP pleadings unequivocally demonstrate it did.

13 The relevant fact is that the *tribunal* (here, the IRP Panel) accepted DCA's position and
14 rejected ICANN's position. How ICANN viewed the IRP Panel's decision is irrelevant. The
15 concept of judicial estoppel would be rendered meaningless if a party could say “even though I
16 won the argument, the fact that you disagreed defeats the application of judicial estoppel,” or
17 “even though the court decided the case in my favor, since you disagree with the judgment I can
18 now reverse my position.” The entire point of the judicial estoppel doctrine is that one party
19 takes a position and *wins* that position, only to then take a different position later. The focus is on
20 the party that wins and whether, by its conduct in the future, it is essentially defrauding the
21 judicial system. Here, there is simply no doubt that DCA should be barred from prosecuting this
22 lawsuit having definitively told the IRP Panel that it could never file a lawsuit against ICANN.¹⁰
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25
26 ¹⁰ DCA's Opposition to ICANN's Motion for Summary Judgment also makes the bizarre
27 argument that it did not succeed in asserting its first position because ICANN's attorney later
28 stated that whether the IRP was binding became a moot issue once ICANN's Board elected to
follow the IRP Panel's recommendations. Putting aside the utter irrelevance of Mr. LeVee's out
of context, after-the-fact statement, again – the inquiry focuses on whether the first tribunal
accepted DCA's position. Here, the IRP Panel indisputably did.

1 **III. DCA’S FIRST POSITION WAS TAKEN IN A “QUASI-JUDICIAL**
2 **ADMINISTRATIVE PROCEEDING.”**

3 **A. Undisputed Facts Show That The IRP Is A Quasi-Judicial Proceeding.**

4 To qualify for judicial estoppel, a party’s statements need not be made in a court of law,
5 but can be made in a “quasi-judicial administrative proceeding.” *Jackson*, 60 Cal. App. 4th at
6 183. What constitutes a “quasi-judicial administrative proceeding” is not strictly defined under
7 California law, in keeping with the notion that judicial estoppel is an equitable, and therefore
8 inherently flexible, doctrine. *See, e.g., Thomas*, 85 Cal. App. 4th at 118 (noting that because
9 judicial estoppel is an equitable doctrine, courts could not rule out the possibility that
10 circumstances may warrant application of the doctrine even if one of the *Jackson* factors were not
11 met). However, the Ninth Circuit (in addition to other circuits) has found that certain
12 proceedings, such as arbitrations, can constitute “quasi-judicial administrative proceedings” for
13 purposes of judicial estoppel where they bear the “formal hallmarks of a judicial proceeding” –
14 such as, the swearing of an oath of truthfulness by the parties, the calling of witnesses, and a
15 neutral party presiding over the hearing. *Tri-Dam v. Schediwy*, No. 1:11-CV-01141-AWI, 2014
16 WL 897337, at *6 (E.D. Cal. Mar. 7, 2014); *see also Keshish v. Allstate Ins. Co.*, 959 F. Supp. 2d
17 1226, 1242 (C.D. Cal. 2013) (citing *Hartford Lloyd’s Ins. Co. v. Teachworth*, 898 F.2d 1058,
18 1062 (5th Cir. 1990), for the proposition that unlike some other proceedings, “an arbitration is a
19 quasi-judicial proceeding”); *In re Siller*, 427 B.R. 872, 886 (Bankr. E.D. Cal. 2010) (stating that
20 “[t]here is no persuasive reason why an arbitration adjudicatory in nature should be viewed
21 differently than the quasi-judicial administrative proceeding on which an estoppel can be based”),
22 *rev’d and remanded on other grounds, Cotchett, Pitre & McCarthy v. Siller*, Nos. CIV S–10–
23 0779 KJM, CIV S–10–0780 KJM, 2012 WL 1657620 (E.D.Cal. May 10, 2012).

24 The manner in which this IRP was conducted confirms that it was a quasi-judicial
25 proceeding. The IRP was administered by the ICDR, the international division of the American
26 Arbitration Association. The IRP Panelists nominated by the parties and the ICDR included: a
27 French law professor whose legal expertise included International Commercial Law and
28 International Dispute Resolution; a retired California Court of Appeals justice, who was replaced

1 by a retired California superior court judge; and a highly experienced Canadian commercial
2 litigator and arbitrator. In addition, the IRP Panel set the schedule for the proceeding by issuing
3 multiple orders setting deadlines for document requests, objections, and document production;
4 setting deadlines for the submission of various materials, including pleadings, witness lists, and
5 witness statements, as well as setting forth the requirements for each; and scheduling dates for a
6 prehearing conference and the two-day live hearing. (*See, e.g.*, Procedural Order No. 3.)

7 In the course of the two-year IRP, ICANN and DCA each produced documents responsive
8 to its adversary's requests (in ICANN's case, producing thousands of pages) and submitted
9 briefing to the Court on procedural issues concerning the conduct of the IRP hearing, as well as
10 the merits of the IRP itself. Along with their original briefs on the merits, both sides provided the
11 IRP Panel with witness statements, which were required to contain an affirmation of the truth of
12 the statement. (Procedural Order No. 3 ¶ 6(x)(c)). During the IRP final hearing, the parties gave
13 opening and closing statements, and all three of the witnesses who submitted witness statements
14 (DCA's CEO, a member of ICANN's Board, and the former chair of the GAC) were sworn in by
15 the IRP Panel before giving live testimony, and underwent questioning by DCA's counsel,
16 ICANN's counsel, and the IRP Panel. (*See generally* May 22, 2015 IRP Tr.; May 23, 2015 IRP
17 Tr.)

18 DCA has admitted each of these facts during the course of this litigation. DCA admitted
19 that the parties exchanged document requests, produced documents, and submitted formal
20 briefing to the IRP Panel. (9/6/17 Bekele Dep. at 54:16-55:5 (confirming that during the course
21 of the IRP proceedings and the IRP hearing, the parties exchanged documents, filed pleadings,
22 witnesses testified at the hearing (including Ms. Bekele herself), and the IRP Panel issued a Final
23 Declaration).) DCA admitted that witnesses testified live at the IRP hearing. (*Id.*; 9/6/17 Bekele
24 Dep. at 53:21-54:15 (confirming that three witnesses testified live at the IRP hearing).) DCA
25 admitted that the IRP Panel constituted a neutral third-party decision-maker selected by the
26 parties that afforded both parties an opportunity to be heard before the IRP Panel issued a binding
27 declaration. (9/6/17 Bekele Dep. 16:17-17:13.) And DCA admitted that the IRP Panel ruled that
28

1 its Final Declaration would be binding on the parties. (9/6/17 Bekele Dep. at 53:13-16
2 (confirming DCA’s memory that the IRP Panel concluded that its declaration would be binding
3 on the parties).)

4 DCA also argued at multiple points during the IRP that the IRP proceedings were
5 equivalent to an arbitration. In DCA’s Submission on Procedural Issues, DCA stated that “[t]he
6 IRP has all the characteristics of an arbitration under California law and widely accepted
7 international arbitral practice and procedure.” (Submission ¶ 1) DCA went on to state:

8 [Under] California law and applicable federal law, this IRP
9 qualifies as an arbitration. It has all the characteristics that
10 California courts look to in order to determine whether a
11 proceeding is an arbitration: 1) a third-party decision-maker; 2) a
12 decision-maker selected by the parties; 3) a mechanism for assuring
13 the neutrality of the decision-maker; 4) an opportunity for both
14 parties to be heard; and 5) a binding decision.

15 (Submission ¶ 4.)

16 In deposition, DCA admitted that it equated the IRP to an arbitration during the IRP. (*See*
17 9/6/17 Bekele Dep. at 15:19-16:13 (confirming that DCA compared the IRP to an arbitration);
18 16:17-17:13 (confirming that DCA affirmatively stated that the IRP had a third-party decision
19 maker selected by the parties, a mechanism for assuring the neutrality of the decision maker, and
20 an opportunity for both parties to be heard in a binding decision); 9/6/17 Bekele Dep. at 24:18-24
21 (confirming DCA’s lawyers took the position that the IRP was an arbitration in all but name).)

22 **B. ICANN’s Conduct Is Irrelevant To The Nature Of The IRP Proceeding.**

23 ICANN anticipates DCA will argue that because ICANN opposed some of the features of
24 the IRP proceeding or because ICANN did not view the IRP Final Declaration as binding or
25 because ICANN allegedly did not follow the IRP Final Declaration after the IRP concluded, then
26 the IRP should not qualify for judicial estoppel.

27 The relevant inquiry for this element is what the proceeding entailed – whether it
28 contained those “formal hallmarks” cited by the Ninth Circuit. Those hallmarks do not include,
and are not dependent upon, whether one party agreed that the proceeding should bear those
hallmarks. Although ICANN argued that the IRP should not be binding on ICANN, and ICANN

1 also argued that the IRP should not involve live witnesses, ICANN *lost* these arguments.¹¹ The
2 IRP Panel – the neutral third-party that presided over the proceeding – ruled that there would be
3 a live hearing, that witness statements would be submitted with an affirmation of the truth of the
4 statement, that witnesses would testify live, and that its Final Declaration would be binding on the
5 parties. And that is precisely what happened.

6 Similarly, whether ICANN viewed the IRP Panel’s Final Declaration as binding, or
7 followed the IRP Panel’s Final Declaration after it was issued, has no bearing on the fact that the
8 IRP Panel found that the IRP would result in a binding decision. While it is true that ICANN
9 continued to disagree that the Final Declaration was binding, ICANN did, in fact, follow the
10 entirety of the IRP Panel’s Final Declaration by placing DCA’s application back into processing
11 (and paying DCA’s IRP fees), de facto treating it as binding. DCA has admitted this in
12 deposition. (December 1, 2016 Deposition of Sophia Bekele (“Bekele Dep.”) at 203:4-7; 206:14-
13 22.) More importantly, even if ICANN had not followed the Final Declaration (which it did), the
14 hallmarks of the quasi-judicial nature of the IRP proceeding would remain the same – and that is
15 all that matters for purposes of this element. ICANN’s conduct following the IRP cannot
16 retroactively alter the nature of the proceeding, any more than a litigant’s choice to follow or
17 default on a judgment against it would change the fact that a judgment was rendered.

18 **IV. DCA’S INCONSISTENT POSITIONS WERE NOT THE PRODUCT OF**
19 **IGNORANCE OR MISTAKE.**

20 **A. DCA’s Own Testimony Demonstrates That Neither Of DCA’s Positions Were**
21 **Taken As A Result Of Ignorance Or Mistake.**

22 There has been literally no evidence indicating that DCA took either of the positions
23 discussed above as a result of ignorance or mistake. DCA has admitted that it was aware of, and
24 did not disagree with, each instance where its counsel unequivocally stated during the IRP that
25 the Covenant prevented DCA from filing suit against ICANN:

- 26
 - 9/6/17 Bekele Dep. at 17:15-18 (witness could not recall an occasion where her

27 ¹¹ While legally irrelevant, as stated in ICANN’s Motion *in Limine* No. 2 and Reply, ICANN will
28 stipulate, or have the Court take judicial notice, that during the IRP ICANN 1) took the position
that the IRP should not be binding; 2) took the position that the IRP should not include live
witness testimony, and 3) took the position that the IRP should not include a live hearing.

1 law firm at the time of the IRP filed a pleading with which she disagreed)

- 2
- 3 • 9/6/17 Bekele Dep. at 19:24-20:3 (other than a dispute over the relief DCA
4 wanted to request from the IRP Panel, witness could not recall a time when she
5 disagreed with something her lawyers told the IRP Panel)
 - 6 • 9/6/17 Bekele Dep. at 20:4-13 (other than the dispute over requested relief,
7 witness could not recall any occasion where she told the IRP Panel that she
8 disagreed with a statement made by her attorneys to the IRP Panel)
 - 9 • 9/6/17 Bekele Dep. at 33:4-34:12 (confirming DCA’s lawyers took the position
10 reflected in DCA’s response to the IRP Panel’s questions, and when asked if she
11 had any memory of disagreeing with the pleading, witness stating “No. It made
12 sense.”)
 - 13 • 9/6/17 Bekele Dep. at 34:16-35:11 (confirming the letter from Weil, Gotshal to
14 the IRP Panel reflected the position DCA took during the IRP, and stating
15 witness did not recall any disagreement with this position when it was taken)
 - 16 • 9/6/17 Bekele Dep. at 38:21-40:10 (to the witness’ knowledge neither she nor
17 anyone from or representing DCA communicated with the IRP Panel following
18 the issuance of the Final Declaration, which stated that the IRP was the only
19 independent third-party process that allowed review of Board actions and that
20 avenues of accountability for applicants that have disputes with ICANN “do not
21 include resort to the courts.”)

22 DCA cannot now argue that its first position was taken as a result of ignorance or mistake.
23 Similarly, DCA cannot (and has not) claimed that it filed this lawsuit as a result of ignorance or
24 mistake. If DCA is now trying to make such a claim, then DCA should voluntarily dismiss this
25 lawsuit.

26 **B. ICANN Has No Affirmative Burden To Establish DCA Acted With
27 Fraudulent Intent.**

28 In its Opposition to the Motion for Summary Judgment, DCA attempted to refute this
element by arguing that ICANN was unable to establish that DCA acted fraudulently. (Opp. at
20.) But no such element exists. ICANN does not have any burden to demonstrate fraudulent
intent.

In determining whether a party was justified in reversing positions, courts look at whether
a party deliberately took inconsistent positions as a means of obtaining unfair advantage. *See*
Levin v. Ligon, 140 Cal. App. 4th 1456, 1483–84 (2006) (finding that plaintiff intended to

1 mislead the court by arguing he was entitled to certain assets, while knowing he told a different
2 court he was entitled to damages because his attorney's negligence resulted in his losing any
3 claim to those same assets); *see also Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995,
4 1017–18 (1998). Thus, to meet this element ICANN need only establish that DCA intentionally
5 took two inconsistent positions – not that DCA acted fraudulently.

6 Here, the IRP pleadings and DCA's deposition testimony unequivocally demonstrate that
7 DCA took two totally inconsistent positions to obtain an advantage. DCA's deposition testimony
8 makes clear that neither position was the result of ignorance or mistake. That is all that is
9 necessary to meet this last element of judicial estoppel.

10 CONCLUSION

11 DCA repeatedly and definitively told the IRP Panel that it could not sue ICANN in order
12 to encourage the IRP Panel to rule that: (a) the IRP Panel's final decision should be binding on
13 the parties; (b) the IRP Panel should apply a *de novo* standard of review; and (c) ICANN should
14 pay DCA's full IRP costs should DCA win the IRP. DCA prevailed on each of those arguments.
15 The IRP Panel ruled that its decision would be binding on the parties; that it would apply a *de*
16 *novo* standard of review in reaching its decision; and then, when DCA ultimately prevailed at the
17 IRP, the IRP Panel issued a Final Declaration ordering ICANN to pay DCA's full IRP costs. The
18 IRP Panel's order also required ICANN to return DCA's application for .AFRICA to processing,
19 which is precisely what ICANN did.

20 Thereafter, because DCA could not demonstrate the required support (or non-objection) of
21 60% of the governments of Africa (as required for a geographic name gTLD), DCA still could not
22 get what it ultimately wanted – the rights to operate .AFRICA. As a result, DCA decided to file a
23 lawsuit against ICANN – in direct contravention of the Covenant and in direct contravention of
24 its repeated statements to the IRP Panel in the quasi-judicial IRP proceeding.

25 DCA's conduct meets every element of judicial estoppel and is exactly the type of self-
26 serving gamesmanship the doctrine was created to prevent. Accordingly, DCA should be
27 estopped from bringing this lawsuit.

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Dated: February 9, 2018

JONES DAY

By: 
Jeffrey A. LeVee

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NAI-1503438164