IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 4

DotConnectAfrica Trust,

Appellant,

v.

Internet Corporation for Assigned
Names and Numbers,

Respondent.

Court of Appeal Case No.
B302739

Trial Court Case No.
BC607494

On Appeal From a Judgment of the Superior Court,
County of Los Angeles, Honorable Robert B. Broadbelt, III

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APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, Rule 8.208, the following entities and persons may have an interest in this case: ZA Central Registry, a South African non-profit company; DotAfricaRegistry Ltd., a company organized and incorporated under the laws of Kenya and which is affiliated with Plaintiff-Appellant DotConnectAfrica Trust, incorporated in Mauritius.

Dated: October 30, 2020

Respectfully submitted,

By: /s/ *Anna Q. Do*

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INTRODUCTION

This is a case of judicial estoppel gone haywire. Plaintiff-Appellant DotConnectAfrica Trust ("DCA") brought this suit after Defendant-Respondent, the Internet Corporation for Assigned Names and Numbers ("ICANN"), rigged an application and bidding process for the rights to the .AFRICA Internet generic top-level domain ("gTLD") in favor of a competing application and to DCA's detriment.

Pursuant to ICANN's requirements for participating in the bidding process, DCA invoked a tailor-made, ICANN-created accountability mechanism that ICANN calls an Independent Review Process ("IRP") to vindicate its rights. A three-member IRP panel issued a decision in favor of DCA, which required ICANN to provide an effective remedy for the harm it had caused to DCA when it failed to adhere to published standards, rules, and policies in ICANN's Articles of Incorporation ("Articles"), Bylaws, and the Applicant Guidebook for New gTLDs (the "Guidebook"). Instead of complying with the panel's decision, ICANN treated the panel's ruling as an advisory opinion with no binding effect. ICANN then engaged in *further* deception and anticompetitive and retaliatory conduct to shut DCA out of the bidding process for the .AFRICA gTLD.

When DCA filed this lawsuit following ICANN's refusal to abide by the IRP panel's decision, ICANN invoked the doctrine of

judicial estoppel—arguing that DCA had stated in the IRP that a litigation waiver it had accepted as a condition for applying for the .AFRICA gTLD barred DCA from pursuing any lawsuit on any basis against ICANN in any court of competent jurisdiction worldwide. The trial court erroneously agreed with ICANN.

ICANN's arguments and the lower court's decision turned the equitable doctrine of judicial estoppel on its head. In the IRP, DCA never suggested that the litigation waiver immunizes ICANN *forever* from *all* suits *anywhere*, including those based on fraud and anticompetitive conduct, and certainly not for conduct *after* the conclusion of the IRP. DCA simply could not have anticipated that ICANN would treat the IRP result as nonbinding, and then engage in further wrongdoing.

At every turn, the lower court's ruling was wrong as a matter of law and should be reversed. Judicial estoppel is "an extraordinary and equitable remedy" that "must be 'applied with caution and limited to egregious circumstances'" because it "can impinge on the truth-seeking function of the court and produce harsh consequences." (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449 (hereinafter *Minish*), quoting *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170 (hereinafter *Jogani*).) Rather than abide by this standard, the court improperly applied the doctrine broadly in a manner that would inequitably block DCA from pursuing its claims before any judicial body.

Judicial estoppel requires courts to consider four factors, none of which are met here, as well as an equitable balancing that the lower court here never conducted. *First*, the party must have taken two "totally inconsistent" positions. (See *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986 (hereinafter *Aguilar*).) Yet, here, DCA's statements about the litigation waiver made during the IRP could not have referred to causes of action and conduct that arose *after* that IRP concluded. *Second*, both the positions must have been made before "judicial or quasi-judicial administrative proceedings." (See *ibid.*) But ICANN, the party that now seeks to invoke judicial estoppel on the basis that the IRP was a judicial or quasi-judicial administrative proceeding, itself treated the IRP's outcome as nonbinding. *Third*, the party against whom estoppel is asserted must have been "successful in asserting the first position" in terms of outcome and effect. (See *ibid.*) But any "success" that DCA achieved in the IRP was fleeting and illusory, as ICANN intentionally distorted the rules of the IRP and the Guidebook to deny DCA an effective remedy for the harm that the IRP panel found ICANN had caused to DCA. *Fourth*, the party's position must not have been "taken as a result of ignorance, fraud, or mistake." (*Ibid.*) DCA's arguments in the IRP were based on ICANN's representations that, as a condition of accepting the litigation waiver, an aggrieved party like DCA would be able to obtain an effective

remedy through the IRP. And ICANN's conduct following the outcome of the IRP shows that ICANN's representations were simply untrue. ***Finally***, because "judicial estoppel *is an equitable doctrine,* . . . its application, even where all necessary elements are present, is discretionary." (*Minish*, *supra*, 214 Cal.App.4th at p. 449.) But the Superior Court completely ignored this requirement: it neither weighed the equities nor explained why this "harsh" and "extraordinary" doctrine was warranted here. (See *ibid.*)

For years now, DCA has sought to hold ICANN accountable before a tribunal that could offer real, effective relief, while ICANN's procedural gamesmanship and intentional distortions of DCA's positions have denied it that right. But it cannot be that DCA is estopped from suing ICANN at all because of comments made on an ancillary issue in an IRP that ICANN itself treated as non-binding and that took place before much of the malfeasance at issue even occurred. Estopping DCA now would be manifestly unjust, would reward ICANN for abusive and contradictory procedural tactics, and would only embolden ICANN to engage in similar gamesmanship in future proceedings.

Respectfully, this Court should reverse, allow DCA to prove in court how it has been wronged, and thereby obtain a remedy that ICANN will be powerless to ignore.

STATEMENT OF FACTS

This case involves many twists and turns, spanning nearly a decade of DCA's efforts to hold ICANN accountable. To provide an overview:

ICANN promised DCA that it would hold a fair and unbiased bidding process to delegate a unique and valuable Internet resource, the .AFRICA gTLD. As a condition for applying for .AFRICA, ICANN required a litigation waiver. DCA accepted this condition, relying on ICANN's promise that, if ICANN violated its promises, DCA would be able to hold ICANN accountable through an IRP—a dispute resolution procedure designed to mimic a full-fledged and binding international arbitration process.

Yet, despite ICANN's assurances that it would evaluate DCA's application even-handedly, fairly, and transparently, ICANN instead preselected a rival application for .AFRICA and relied on pretextual reasons to reject DCA's application. DCA then instituted an IRP to hold ICANN accountable using the very system that ICANN had represented would be available for such purposes. But rather than participate in the IRP in good faith, ICANN pulled every trick in the book in its effort to strip the IRP of basic procedural protections.

In response, DCA argued that for the IRP to serve the purposes for which it was created—ICANN accountability—it

Document received by the CA 2nd District Court of Appeal.

was imperative that the IRP panel implement a robust procedure reflecting international arbitration practice and the applicable procedural rules for IRPs: the Rules of Arbitration of International Centre for Dispute Resolution of the American Arbitration Association (as supplemented by certain bespoke rules created by ICANN). In this context, DCA also referenced the litigation waiver that ICANN had required it to accept, noting that the waiver could be an additional factor for the IRP panel to consider. The IRP panel ultimately accepted most of DCA's procedural proposals, mainly because these were plainly required by the applicable procedural rules and the circumstances of the dispute before it. On the merits of DCA's claims, the IRP panel concluded that ICANN had wronged DCA and that its decision had binding effect on ICANN.

Rather than treat the IRP panel's decision as binding, ICANN proceeded to undermine it and treat it as merely advisory. ICANN then, once again, threw out DCA's .AFRICA application on similarly pretextual grounds as it had done the first time. Because it hardly made any sense for DCA to initiate yet another IRP, given how ICANN had treated the outcome of the first IRP, DCA sued ICANN in court to hold it accountable for its fraud and anticompetitive conduct. Then, when DCA got to court, ICANN turned around and claimed that DCA was judicially estopped from suing ICANN at all because of

statements it had made before the IRP panel about the litigation waiver—and the trial court agreed.

As a result, ICANN has succeeded in having it both ways, treating the IRP as a non-binding advisory decision when it suited its needs, and now exalting that same IRP as the equivalent of a binding judicial proceeding, in order to continue depriving DCA of any meaningful forum for relief.

A more detailed account of the facts follows.

A. The Parties

DCA is a non-profit organized under the laws of Mauritius, dedicated to bridging the Digital Divide in Africa. Its primary purpose is to educate the African public about the Internet and to promote access to the Internet across Africa. (Ex. 3, at p. 8.) In accordance with that mission, it has sponsored initiatives such as Generation.Africa and Miss.Africa that seek to empower a new generation of Internet users in Africa and improve young Africans'—particularly young African women's—ability to benefit from the Internet. (Ex. 3, at p. 8-9.) DCA's founder and executive director, Sophia Bekele, is widely recognized as the intellectual parent of the .AFRICA gTLD and its most fervent advocate.

ICANN is a California not-for-profit corporation. It was established by the U.S. government in 1998 to coordinate the global Internet's system of unique identifiers, including gTLDs

like .COM, .NET, .ORG and .AFRICA. (19 CT 4257.) Until 2016, it was subject to U.S. Government oversight and control. Today, ICANN is a self-governing organization that operates based on a multi-stakeholder policy-making model. ICANN is bound to conduct all of its activities in strict compliance with its Articles and Bylaws, as well as applicable principles of international and California law.

Top-level domains, including gTLDs, are essential to the functioning of the Internet. They allow users to access specific websites by inputting unique web addresses into computers—for example, www.google.**com** is different from www.google.**org**. (*Ibid.*; 6 CT 1277-78.) They are highly valuable commercially, and also enable the growth of virtual communities and online innovation. In accordance with its mission, ICANN supervises these gTLDs, coordinates them to ensure the stability of the Internet, and approves the creation of new gTLDs when it—and it alone—deems appropriate. (6 CT 1277-78; 19 CT 4257.) Given its authority over the Domain Name System, ICANN wields significant and unparalleled influence over the functioning and development of the Internet.

Due to that power, ICANN is required by its governance documents and applicable law to function as a neutral arbiter, approving new gTLDs without bias or favoritism. (E.g., Ex. 1, at p. 2; Ex. 4, at pp. 1-3.) It promises to employ open and

transparent policies and processes that are neutral, objective, and fair. (Ex. 1, at p. 2; Ex. 4, at pp. 1-3.) And it represents that it has accountability mechanisms in place to ensure that applicants for gTLDs have access to due process in the event of disputes with ICANN over non-compliance with its policies and rules. (E.g., Ex. 4, at p. 3.)

B. ICANN's New gTLD Process

In 2012, in connection with the largest expansion of the Internet domain space, ICANN announced that it was accepting applications for hundreds of new gTLDs. (See Ex. 2, at p. 2.) To implement this program, ICANN issued the gTLD Applicant Guidebook, which comprises 338 pages of comprehensive guidelines and processes for applicants, as well as standards and procedures that would apply to ICANN's review of applications ("New gTLD Rules"). Under the requirements set out in its Articles and Bylaws, ICANN committed to implement the New gTLD Rules fairly, neutrally, transparently, and without discrimination, bias, or favoritism, as well as in accordance with California law and applicable principles of international law. (See Ex. 2; e.g., *id.* at pp. 83-84.)

The New gTLD Rules required applicants to submit a detailed application, to show that they could run and maintain the gTLD. For applications pertaining to geographic identifiers, such as .AFRICA, applicants had to demonstrate support from

60% of the region's national governments. (*Id.* at pp. 67-69.)
Applicants also had to pay a $185,000 application fee and agree
to a Prospective Release of ICANN "from any and all claims by
applicant that arise out of, are based upon, or are in any way
related to any action . . . by ICANN . . . in connection with
ICANN's . . . review of this application." (15 CT 3302; 19 CT
4258; Ex. 2, at p. 44.)

The Guidebook also provided that ICANN would allow
applicants to seek review of ICANN's decisions through an
"Independent Review Process." (19 CT 4259.) ICANN was
required to participate in that process in good faith. It
represented that the process would function like an international
arbitration, and that it would allow independent third-party IRP
panels to hold ICANN accountable. (Ex. 1, at p. 2; Ex. 4, at pp. 3,
13-17; Ex. 23, at p. 20.) Throughout these proceedings, ICANN
has represented that applicants could use only the IRP (or other
ICANN internal processes) to obtain relief for a grievance with
ICANN. (15 CT 3220-3239.)

C.   DCA's Application for .AFRICA

In accordance with its charitable mission of serving the
African continent through expanded Internet access and training,
and Ms. Bekele's status as the chief proponent of the .AFRICA
gTLD, DCA applied for the .AFRICA gTLD in June 2012. (See
generally Ex. 3.) As it stated in its application, DCA planned to

maintain the .AFRICA gTLD in a way that would expand Internet use in Africa. (Ex. 3, at p. 8.) It intended to use any surplus proceeds from .AFRICA to fund its charitable projects, such as providing low-cost computers, Internet bandwidth, and user training for disadvantaged communities in Africa. (*Ibid.*) And, more broadly, it intended to use .AFRICA to "promote an African identity on the Internet" while selling domain registrations (or website names) to users at lower prices that would be "commensurate with the income levels of Africans." (*Id.* at pp. 9-10.)[1]

When DCA submitted its application, it did so in reliance on ICANN's representations in its Bylaws that it would undertake its review and processing of DCA's application "neutrally and objectively, with integrity and fairness." (15 CT 3303-04, 3348.) When DCA accepted ICANN's litigation waiver, it did so based on the understanding that ICANN would participate in the IRP in good faith, that any IRP would afford real accountability, and that ICANN would not seek to undermine the IRP in any way. (*Ibid.*) Thus, when incurring the significant expense in preparing its application and raising the

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[1] In particular, DCA represented that it would sell domain registrations under .AFRICA for a substantially lower price than its competitors' bids allowed. (Compare Ex. 3, at 10 [$10 per domain], with 16 CT 3619 [$18 per domain].)

capital required for .AFRICA, DCA believed that ICANN would accept applications and judge them on their merits, without bias.

D. ICANN Preselects a Rival Application

Despite its promises, ICANN acted neither fairly nor without bias. Instead, it preselected a rival entity—ZA Central Registry ("ZACR")[2]—as the winner of .AFRICA. Throughout the application process, ICANN favored ZACR, even going so far as to draft application documents for ZACR and to ask ZACR for advice on how ICANN should handle DCA's application. (See Ex. 33; Ex. 137; 16 CT 3648-17 CT 3650; 02/08/2019 Tr. at pp. 372:24-375:7.) Moreover, ICANN turned a blind eye to the fact that ZACR was serving as a proxy applicant for the African Union Commission ("AUC")—an entity to which ICANN had already refused to delegate .AFRICA.[3] (5 CT 1054; 15 CT 3291.)

As part of ICANN's evaluation criteria, applicants for .AFRICA had to obtain letters of endorsements from 60% of the region's national governments, showing that those governments supported the applicant. (Ex. 2, at pp. 67-69.) These letters had

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[2] ZACR is a non-profit entity that is responsible for running the Internet registry for .ZA, the country-code top-level domain for South Africa.

[3] The AUC is the secretariat for the African Union, an inter-governmental organization comprising 55 member states across the African continent. ICANN refused to delegate .AFRICA to the AUC, however, saying that it could not give the AUC "the special treatment [it had] requested." (5 CT 1054.)

to "clearly express the government's or public authority's support" for the applicant. (*Id.* at 71.) DCA accordingly obtained and timely submitted numerous endorsements, including letters from both the AUC and the United Nations Economic Commission for Africa ("UNECA"). (16 CT 3546, 3553-56.)

By contrast, when ZACR needed to secure its endorsement letters, ICANN delayed its evaluation of ZACR's application to give ZACR time to get its act together. ICANN even went so far as to ghostwrite an endorsement letter for the AUC to use in endorsing ZACR—thus helping ZACR's application outside the neutral process promised by the New gTLD Rules and ICANN's Bylaws. (16 CT 3648-17 CT 3650; see generally Ex. 2.)[4]

Part of the evaluation process for .AFRICA called for input from ICANN's Government Advisory Committee ("GAC")—an ICANN advisory body composed of representatives from the

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[4] After first endorsing DCA, the AUC later provided an endorsement letter for ZACR's application for .AFRICA. (16 CT 3626-27.) Nothing in the Guidebook prohibited a government or public authority from endorsing two applicants. (See generally Ex. 2.) The AUC then purported to revoke its endorsement of DCA, saying that the AUC "no longer endorses individual initiatives" (despite endorsing ZACR's application). (16 CT 3549.) But ICANN's Guidebook said that a government could withdraw its support for an applicant only "if the registry operator has deviated from the <u>conditions</u> of original support." (*Ibid.*; Ex. 2, at p. 71.) Because DCA's original letter had no conditions, DCA could not have violated any.

world's governments and international organizations. (19 CT 4257; Ex. 33, at p. 38.) The AUC—whose own application for .AFRICA had been rejected—is a member of the GAC. (Ex. 33, at p. 38.) Despite having previously endorsed DCA, the AUC manipulated the GAC to issue a formal, purportedly consensus-based statement to ICANN that DCA's application should be thrown out. The GAC statement, however, was not the result of GAC consensus, as not all members of that body agreed with the advice, and some of the governments were not even present at the relevant meeting. (Ex. 6, at pp. 18-19; Ex. 37, at p. 10.) Despite the lack of consensus and the AUC's clear conflict of interest (because it was itself applying for .AFRICA through a proxy applicant, ZACR), ICANN relied on the GAC's communication to reject DCA's application. (Ex. 6, at pp. 18-20; Ex. 33, at pp. 43-46.) As the IRP panel would later find, ICANN failed to undertake any reasonable due diligence to investigate the AUC's conflict of interest or whether the GAC's advice was truly consensus advice.

E.   The Independent Review Process

DCA invoked ICANN's IRP in October 2013. (Ex. 6; Ex. 11, at p. 10.) In its triggering notice, DCA brought a simple, straightforward claim: ICANN had violated its Articles, Bylaws, and the New gTLD Rules by blindly accepting the GAC's advice and ignoring the AUC's clear conflicts of interest. (Ex. 6, at pp.

23-25.) According to DCA, ICANN had taken the GAC's advice without inquiring at all into its rationale or whether its advice had been tainted by bias. (*Ibid.*)

Under ICANN's Bylaws, the IRP panel was charged with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." (Ex. 4, at pp. 13-14.) The IRP was supposed to mimic the procedures of an international arbitration, overseen by a three-member panel and administered by an international dispute resolution provider appointed by ICANN. (*Ibid.*) In DCA's case, this meant that the IRP was conducted under the International Dispute Resolution Procedures of the International Centre for Dispute Resolution ("ICDR"),[5] as well as ICANN's Supplementary Procedures for the Review Process and the IRP panel's own procedural orders. (19 CT 4259.)

DCA invoked the IRP because it believed that ICANN would participate in the process in good faith and in accordance with its own procedural framework. But before the IRP panel had even been convened, ICANN tried to short-circuit the entire process by delegating .AFRICA to ZACR. (Ex. 33, at p. 3, Ex.

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[5] The International Centre for Dispute Resolution is the international division of the American Arbitration Association. (19 CT 4259.)

100, at pp. 1-2.) DCA requested emergency injunctive relief under the ICDR's special rules for such purposes, asking that ICANN be required to refrain from taking any steps to execute a registry contract with ZACR until DCA had had a chance to be heard. (Ex. 11; Ex. 100.) The IRP panel agreed and ordered ICANN to refrain from any further delegation of .AFRICA until the IRP was completed. (Ex. 33, at p. 4.)

Even so, ICANN's gamesmanship continued. In spite of its commitment to due process and accountability, ICANN argued that the IRP panel needed only to conduct a single telephonic hearing, that there should be no form of discovery, witness examination, additional briefing, or any other basic procedural safeguards. ICANN also argued that the outcome of the IRP would not be binding on it, because the process was merely an "internal accountability mechanism." (See Ex. 109; Ex. 121, at 7-17; Ex. 124.)

DCA opposed ICANN's position on several grounds. It argued that the IRP was designed to resemble arbitration, and that universally-recognized principles of due process required more procedural safeguards than ICANN was willing to accept. (E.g., Ex. 16, at p. 10.) It pointed to numerous provisions in ICANN's own Bylaws and the New gTLD Rules, raising legal arguments like *contra proferentem* and the plain meaning canon to argue that the very rules that ICANN had promulgated

contemplated a binding process with the chance for discovery and examining witnesses. (E.g., Ex. 15, at pp. 22-32; Ex. 16, at pp. 1-2, 6-11.) It relied on claims of fairness and equity, arguing that DCA should be given a fair chance to present its case. (E.g., Ex. 15, at p. 29.) And it pointed to ICANN's agreement to adhere to the Rules of Arbitration of the International Centre for Dispute Resolution. (Ex. 15, at pp. 6-7.)

To buttress their various arguments as to what procedure the IRP panel should adopt, DCA and ICANN *both* pointed to the litigation waiver that ICANN had required DCA and other applicants to accept. (*Id.* at p. 14; 19 CT 4261; Ex. 121, at p. 2 n.1; Ex. 122, at pp. 8-9.) For example, ICANN said in its written submission to the IRP panel: "DCA voluntarily applied for a gTLD and lawfully waived its right to sue ICANN for claims arising out of its gTLD application." (Ex. 122, at p. 8; Ex. 121, at p. 2 n.1.) DCA, in turn, acknowledged that "[b]y 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 those conditions was the waiver of all 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." (Ex. 15, at pp. 6-7; Ex. 17;

Ex. 38; Ex. 39.)[6] Yet the thrust of DCA's argument was plainly that ICANN's Bylaws, Guidelines, Supplemental Procedures, and the ICDR Arbitration Rules required the procedures that DCA was requesting—arguing, for example, that "[t]he Panel should be guided *first and foremost* by the text of the ICDR Rules and Supplementary Procedures." (E.g., Ex. 32, at p. 2; Ex. 16, at pp. 6-11; Ex. 17; Ex. 38; Ex. 39; see also 19 CT 4260-63.)

DCA's position was self-evidently premised on DCA's expectation that ICANN would participate in a procedure that would truly and meaningfully hold ICANN accountable. DCA argued that ICANN must not be "judgment proof" and must adhere to its own Articles and Bylaws, which require basic fairness and accountability. (See Ex. 16, at pp. 5-6.) And DCA argued that it would be unconscionable to allow ICANN to act without accountability or a recourse to a neutral, fair, and binding process. (*Ibid.*)

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[6] At a hearing on these procedural issues, counsel for DCA (who is also one of the authors of this brief) made an offhand comment—in response to a panelist's question—that DCA could not take ICANN "to Court" and could not "sue you for anything." (Ex. 36, at p. 30.) DCA's counsel had been making similar arguments about the basic requirements of fairness and transparency, and mentioned the litigation waiver in passing; a panelist asked counsel to clarify what he meant by "the litigation waiver," which prompted the above comment. (See Ex. 36, at p. 29-30.)

The IRP panel largely—but not completely—sided with DCA regarding these procedural questions, saying that its decision should be considered "binding" on ICANN. (Ex. 18, at pp. 32-33.) In so doing, it pointed to the provisions of ICANN's Bylaws and the ICDR Arbitration Rules (as supplemented by ICANN's additional rules for IRPs), noting that ICANN's own Articles required it to operate "through open and transparent processes," in accordance with basic principles of fairness and due process. (E.g., *id.* at p. 14, 17, 21, 32; Ex. 32, at p. 4.)

Among its many detailed findings and legal conclusions, the IRP panel recognized that DCA had signed a litigation waiver, but also went on to caveat the relevance of the waiver by stating: "***assuming*** 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 itself. (See Ex. 18, at pp. 11-12; Ex. 32, at pp. 5-6.)[7] The panel made no

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[7] The IRP panel repeated this language in both its principal declaration on the Review procedures, see Ex. 18, and in its declaration on having witnesses appear for testimony, see Ex. 32. In both statements, the IRP panel provided dozens of paragraphs of reasoning about specific provisions of the relevant Bylaws, Articles of Incorporation, Supplementary Procedures, and International Centre for Dispute Resolution Rules—and then devoted only a single paragraph to the assumption that the litigation waiver might be binding and enforceable.

specific finding on the effect of the litigation waiver, but foresaw that ICANN might not agree to be bound by the panel's decision.

The panel also sided with DCA on the merits, explaining that the GAC statement to ICANN's Board had been issued without any reasoning, that there were problems with the statement, and that ICANN had accepted it without any investigation or inquiry at all. (Ex. 33, at pp. 53-54.) The panel thus declared that "both the actions and inactions of the [ICANN] Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN," and recommended that ICANN permit DCA's application to go forward. (*Id.* at pp. 61-62.)

F.   ICANN Again Rejects DCA's Application

Despite the panel's ruling, ICANN's procedural maneuverings were far from over. A few days after the IRP panel's decision, ICANN contacted ZACR to ask it for "input into [the ICANN] Board's consideration" of the Panel's recommendations. (Ex. 137; 02/08/2019 Tr. at pp. 372:24-375:7.) There is nothing in the New gTLD Rules or ICANN's Articles and Bylaws that permits this. (See Ex. 2, at pp. 151-57.) Unsurprisingly, ZACR replied that the panel's "recommendation is surely not binding on ICANN" and asked that ICANN proceed with delegating .AFRICA to ZACR. (Ex. 138, at pp. 1-2.) In the

alternative, ZACR suggested that ICANN proceed with the application process "within the shortest permissible timeframe," flagging requirements for geographic endorsements as a reason to deny DCA's application. (*Id.* at pp. 2, 4-5.)

ICANN's Board then bypassed its scheduled meeting to properly review the IRP panel's ruling. It instead called an emergency meeting on whether (or not) to adopt what the Board characterized as the panel's "recommend[ations]." (Ex. 41.)[8] Thus, rather than treating the IRP as binding, ICANN viewed it as a mere suggestion. ICANN's Board then purported to accept the Panel's recommendations, allowed DCA's application to go forward, but then shortly thereafter rejected it on similar pretextual grounds as it had done previously. Clearly, following ZACR's "input," ICANN had no intention of letting DCA's application proceed fairly and on a level playing field.

In September 2015, ICANN sent DCA lists of "clarifying questions," which variously suggested that DCA's multiple letters

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[8] Specifically, after "consider[ing]" the Panel's declaration, ICANN's Board "determined to take the following actions based on that consideration": to refrain from delegating .AFRICA, to permit DCA's application to proceed through the remainder of the application process, and to reimburse DCA for its IRP costs. (Ex. 41.) And it also (despite the IRP's ruling) asked the GAC whether it wished "to refine [its] advice and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised" by the IRP's declaration. (Ex. 41.)

of endorsement were now somehow deficient. (16 CT 3569-80.) But per ICANN's own evaluator, DCA's application had passed the Guidebook's requirements in all material respects. (16 CT 3582-83.) Before the IRP, ICANN had not suggested that any of DCA's letters of endorsement were insufficient or wanting. In fact, during the IRP, ICANN had specifically represented that it would accept the UNECA's endorsement of DCA, and ICANN had previously accepted a UNECA endorsement of ZACR. (Ex. 33, at pp. 36-67; Ex. 126, at p. 26; 17 CT 3681-82.)

Yet, now influenced by ZACR's "input," ICANN latched onto a new pretextual technicality to reject DCA's application. In its "input," ZACR had argued that DCA's letters of endorsement did not satisfy one non-mandatory factor[9] for a qualifying endorsement. (See Ex. 138, at p. 4, ¶ 26.) Although this had previously raised no concern, ICANN now suddenly claimed that this non-mandatory factor somehow rendered all of DCA's letters worthless. Then, in a remarkable about-face, ICANN claimed

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[9] The rules for the letters required that all letters express (1) the government's support for the application, (2) the government's understanding of the string requested, and (3) the government's understanding of the string's intended use; they also suggested that the letters (4) "should demonstrate the government's or public authority's understanding that the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available." (16 CT 3570.) ICANN said only that DCA's letters were somehow insufficient under the fourth condition. (*Ibid.*)

that the UNECA letter was also insufficient. (16 CT 3598, 3570-71.) DCA replied that its letters were sufficient, only to learn that the AUC had improperly contacted ICANN to lobby for its proxy applicant ZACR and had attacked DCA's endorsements, including the one that the AUC had itself provided to DCA. (See 2 CT 337; 15 CT 3303-05.) In February 2016, ICANN threw out DCA's application for the second time. (16 CT 3598.)

G. DCA Files the Present Lawsuit

DCA brought the present lawsuit in the Los Angeles County Superior Court on January 20, 2016. (1 CT 36.) In its Amended Complaint,[10] DCA sued ICANN for eleven causes of action: breach of contract, three claims of misrepresentations, unfair competition, negligence, intentional interference with contract, confirmation of the Independent Review Process award, and three claims for declaratory relief.[11] (Ex. 37.)

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[10] After ICANN removed the case to federal court, DCA filed an amended complaint, and ZACR successfully intervened (because DCA's lawsuit could interfere with ZACR's contract to obtain .AFRICA), which caused a remand to the Superior Court (because ZACR and DCA were both foreign citizens, destroying diversity jurisdiction)—where DCA had filed its case in the first place. (See Ex. 37; 1 CT 222-32.)

[11] DCA moved for a preliminary injunction; its motion was granted in federal court but, after the remand, its renewed motion for the preliminary injunction was denied after oral argument before the lower court (despite an initial tentative

Some of DCA's claims involved background material that had been presented to the IRP panel, such as ICANN's decision to blindly accept the conflicted GAC advice. (*Id.* at pp. 10-11.) DCA also raised certain issues that had been presented in the IRP, but which had not been specifically addressed by the panel, such as the implications of ICANN having drafted an endorsement letter for ZACR. (*Id.* at p. 2.)

DCA also raised new issues that it had never presented, and could not have presented, to the IRP panel. For example, DCA's claims include that ICANN (1) had failed to abide by the IRP panel's decision, (2) failed to adhere to its promise of having a real accountability mechanism with proper due process, (3) lied about its intention to participate in the IRP in good faith, (4) acted after the IRP to deny DCA's application on nothing but pretext and favoritism towards ZACR, and (5) fundamentally acted in a way that constituted unfair competition. (E.g., *id.* at pp. 12-13, 17-18.) Moreover, a great deal of DCA's requested relief was not, and could not have been, sought during the IRP, including a confirmation of the IRP panel's declaration, compensatory and punitive damages, and specific performance. (E.g., *id.* at pp. 28-29.)

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ruling that would have granted DCA's motion). (*DotConnectAfrica Trust v. Internet Corp. for Assigned Names and Numbers* (Apr. 12, 2016, C.D. Cal.,No. 2:16-cv-00862, ECF No. 75) 6 CT 1313, 1317.)

H. ICANN's Motion for Summary Judgment

In May 2017, ICANN moved for summary judgment on two grounds: first, that DCA's entire lawsuit was barred by the litigation waiver it had signed when applying for .AFRICA, and second, that DCA's entire lawsuit was barred by judicial estoppel. (15 CT 3220-43.)

The Superior Court largely denied ICANN's motion. It first concluded that the litigation waiver did not encompass claims of fraud or willful injury because such acts "take ICANN outside the process governed by its bylaws." (17 CT 3851-52.) It therefore concluded that the litigation waiver did not apply to DCA's second, third, fourth, fifth, seventh, and tenth causes of action— i.e., the "fraud and unfair competition" claims. (*Ibid.*) It then held that the litigation waiver precluded DCA's remaining causes of action. (*Id.* at p. 3851.) As for judicial estoppel, the court, "in its discretion, denie[d] ICANN's request to apply it," noting "the caution required in applying the 'extraordinary remedy' of judicial estoppel." (*Id.* at p. 3855.) The upshot of this was that the court allowed about half of DCA's claims to proceed to trial.

I. The Judicial Estoppel Bench Trial and Decision

At ICANN's insistence, the court then ordered a bifurcated trial on DCA's remaining claims: a phase-one trial on ICANN's defense of judicial estoppel, with a phase-two trial on the merits of DCA's claims. (08/09/2017 Tr. at p. 32.) An initial two-day

trial on judicial estoppel took place in February and March of
2018, with the judge issuing a tentative ruling at the end of that
trial. (03/01/2018 Tr. at pp. 137-38.)[12] However, that trial was
declared a mistrial when the initial trial judge suddenly
announced his retirement before any phase-two trial on the
merits could be held. (18 CT 4044-46; 19 CT 4236-37.) Though
DCA was willing to allow a different judge to preside over the
merits trial, ICANN refused, rendering the entire first, phase-one
trial a nullity. (See 19 CT 4114, 4122.)

The second phase-one trial on judicial estoppel took place in
February 2019 under a new trial judge, with closing arguments
in August 2019. At that trial, the parties stipulated to a set of
facts and introduced numerous exhibits, largely recounted above.
One of ICANN's employees, Christine Willet, testified that DCA
could not have appealed to any court from the IRP (as was
obvious from ICANN's position throughout these proceedings).
(02/08/2019 Tr. at p. 346:9-25.) ICANN's former head of Global
Domains Divisions, Akram Atallah, confirmed during his
testimony that ICANN had not treated IRPs as binding until
nine months *after* DCA filed this lawsuit, when ICANN changed

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[12] Both DCA and ICANN stipulated below to not reference the
initial tentative rulings "in the re-trial of judicial estoppel." (19
CT 4253-54.) That stipulation, however, does not prohibit the
parties from providing this appellate Court with a full procedural
history of the case.

its own Bylaws to make IRPs binding. (02/08/2019 Tr. at p. 372:11-20.)

DCA's founder and Director, Sophia Bekele, testified that she had understood DCA's position to be that the litigation waiver would be unconscionable if the IRP panel's decision was not binding. (02/07/2019 Tr. at pp. 205:1-18; 234:8-13.)[13] In other words, Ms. Bekele believed that DCA could not sue ICANN only because she thought that ICANN would allow the IRP to hold it accountable with respect to DCA's application, like any other international arbitration. (*Ibid.*) Her expectations were dashed, however, when ICANN did not treat the IRP as binding (despite the Panel's declaration to the contrary) and took even further actions against DCA after the IRP had finished—revealing that ICANN had never planned to accept the IRP results as binding or allow DCA to obtain .AFRICA. (*Id.* at pp. 209:9-210:7; *id.* at pp. 213:21-214:11.)

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[13] ICANN also introduced a public comment submitted from Ms. Bekele in 2009 in which she noted that the litigation waiver may be unenforceable. (See Ex. 60; 02/07/2019 Tr. at p. 266:28-267:3.) Regardless of that comment—which was not made before any kind of quasi-judicial forum—Ms. Bekele clearly understood DCA's position *in the IRP* to be that the waiver would be unconscionable if the IRP was not binding. (*Id.* at p. 209:9-211:1; 214:24-215:15.)

The trial court ruled that judicial estoppel precluded all of DCA's claims. (20 CT 4523-24.)[14] Notably, at no point did the court explain why applying judicial estoppel was *fair* or *equitable* given the circumstances, including ICANN's own conduct in the IRP or its actions thereafter. Nor did it ever hold that DCA had acted in bad faith, with malice, or with any intent to manipulate the judiciary to its advantage.

DCA appealed from that final judgment in December 2019.

ARGUMENT

Judicial estoppel is an "extraordinary and equitable remedy" that is sparingly applied. (See *Minish, supra*, 214 Cal.App.4th at p. 449.) The party invoking the doctrine must meet an especially high bar by proving four elements: (1) the same party has taken two positions that were "totally inconsistent"; (2) both positions "were taken in judicial or quasi-judicial administrative proceedings"; (3) that party "was successful in asserting the first position"; and (4) "the first position was not taken as a result of ignorance, fraud, or mistake." (*Aguilar, supra*, 32 Cal.4th at pp. 986-87.) The purpose of the doctrine is to "maintain the purity and integrity of the judicial process." (*Jackson v. Cty. of Los Angeles* (1997) 60

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[14] This decision was seemingly at odds with the trial court's initial summary judgment ruling. (See 17 CT 3855.)

Cal.App.4th 171, 182 (hereinafter *Jackson*).)[15] Thus, the typical case of judicial estoppel involves "the intentional assertion of an inconsistent position that perverts the judicial machinery." (*Jogani*, *supra*, 141 Cal.App.4th at p. 170.)

Because judicial estoppel is an equitable doctrine, even when all four factors are met, its application remains "discretionary." (*Ibid.*) This is because judicial estoppel "can impinge on the truth-seeking function of the court and produce harsh consequences." (*Minish*, *supra*, 214 Cal.App.4th at p. 449.) Accordingly, the doctrine "must be 'applied with caution and limited to egregious circumstances.'" (*Ibid.*, quoting *Jogani*, *supra*, 141 Cal.App.4th at p. 170.) That is far from the case here.

When an appellate court reviews questions of judicial estoppel, it reviews all questions of law—including "whether judicial estoppel can apply to the facts"—*de novo.* (See *Miller v. Bank of Am., N.A.* (2013) 213 Cal.App.4th 1, 10 (hereinafter *Miller*).) It reviews "the findings of fact upon which the application of judicial estoppel is based . . . under the substantial evidence standard of review." (*Ibid.*) And, because the ultimate application of judicial estoppel is discretionary, the appellate

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[15] Because of this focus, judicial estoppel differs from collateral estoppel, which is "focuse[d] on the relationship between the parties" and thus requires "privity, reliance, and prejudice." (*Jackson*, *supra*, 60 Cal.App.4th at p. 183.)

court reviews "whether it should be applied" at all for "abuse of discretion." (*Ibid.*)

Here, the basic facts are largely undisputed, but the legal import of those facts is fiercely contested. **First**, the trial court wrongly found that DCA's positions were "totally inconsistent" without any regard for the context of those positions. **Second**, the trial court incorrectly concluded that the IRP was a "quasi-judicial administrative proceeding," and disregarded ICANN's own actions in treating the IRP as a non-binding advisory process. **Third**, the trial court held that DCA had succeeded on its "first position" because the IRP panel had **assumed** that the litigation waiver was valid in defining the procedure for the IRP, but disregarded the fact that the IRP panel made no mention of the litigation waiver when discussing the merits of the case. **Fourth**, the trial court decided that DCA had not acted out of ignorance, fraud, or mistake, but without any finding that DCA had acted out of bad faith or with an intent of "playing fast and loose with the courts." (See *Jogani*, *supra*, 141 Cal.App.4th at p. 169, citation and internal quotations omitted.)

In addition, the trial court abused its discretion by applying the harsh remedy of judicial estoppel without **any** consideration of the equities. This is not a case where DCA advocated "one position and later, [when it became] beneficial, [asserted] the opposite." (*Ibid.*, citation and internal quotations omitted.) DCA

has consistently sought an independent forum that would provide real accountability for ICANN's mistreatment of its application and flagrant disregard of its own promises. It first thought that the IRP could be such a forum, but those expectations were proven untrue when ICANN treated the IRP as non-binding and then took further acts to throw out DCA's application on pure pretext. DCA thus brought the present lawsuit in an attempt to obtain a fully independent and binding forum and to hold ICANN to account for its misconduct—including its actions *after* the IRP. By failing to even consider whether judicial estoppel would be equitable and just in these circumstances, the trial court committed a patent abuse of discretion.

I. DCA's Positions Were Not "Totally Inconsistent."

The standard for proving that a party's two positions are "totally inconsistent" imposes "a very high threshold." (*Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1388 (hereinafter *Bell*).) The two positions must have been "so irreconcilable" that "'one *necessarily* excludes the other.'" (*Ibid.*, quoting *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 960 (hereinafter *Prilliman*), emphasis added.) Thus, "prior to applying the doctrine of judicial estoppel, a court must consider the legal context and provide the party an opportunity to explain any apparent inconsistent position when the inconsistent position does not concern a purely factual statement." (*Levin v.*

Ligon (2006) 140 Cal.App.4th 1456, 1473 (hereinafter *Levin*), citing *Cleveland v. Policy Mgmt. Sys. Corp.* (1999) 526 U.S. 795, 802.) If it is at all "possible to reconcile the statements made by plaintiff at different times," then the statements are not "totally inconsistent." (*Bell, supra*, 62 Cal.App.4th at p. 1388.)

This is especially true where (as here) the party's statements are legal in nature, and not factual. "The inconsistent position generally must be factual in nature." (*ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832-33 (hereinafter *ABF Capital Corp.*).) As some courts have put it, "[i]f the challenge is merely a legal challenge that reflects two different positions in two lawsuits, this may be a 'reasonable' litigation tactic, which does not undermine the integrity of the judicial process." (*Levin, supra*, 140 Cal.App.4th at p. 1468, quoting *Cal. Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 118 (hereinafter *Cal. Amplifier, Inc.*).) Rather than applying these principles, the lower court ignored them to rule in ICANN's favor. That legal error alone warrants reversal.

A.   **Many of DCA's Current Claims Are Based on Conduct that Occurred after the Review Process Finished, or Claims Not Brought before the Review Process.**

DCA's positions, when viewed in context, are not "totally inconsistent." DCA's prior statements plainly related to the claims it was asserting *before* the IRP panel—not about different

claims it had not brought, or conduct that did not occur until *after* the IRP had concluded. And those statements were made in the context of arguments regarding the proper procedure to be followed by the IRP panel to address DCA's claims.

Before the IRP panel, ICANN's rules limited DCA's case to a discrete claim that ICANN had acted inconsistently with its Articles of Incorporation or Bylaws. It based that claim largely on ICANN's blind acceptance of the GAC's advice, which was arbitrary and rooted in a conflict of interest. (Ex. 4, at pp. 13-14; Ex. 6, at pp. 18-24.) Thus, when DCA said it could not sue ICANN "for anything," that "[f]or DCA and other gTLD applicants, the IRP is their only recourse," or that the IRP was the only "opportunity for DCA to have its rights determined by an independent decisionmaker," it was making those statements in the context of the claims it had brought: that ICANN had violated its Articles of Incorporation and Bylaws by blindly accepting the GAC's advice. (E.g., Ex. 6, at pp. 23-25; Ex. 38, at p. 2.)

Here, by contrast, DCA claims that ICANN engaged in fraud, intentional misrepresentations, and unfair competition by (a) colluding with ZACR, (b) effectively ignoring the result of the IRP, and (c) acting *after* the IRP to deny DCA's application on pure pretext. (E.g., Ex. 37, at pp. 17-18, 26.) Those are obviously different claims than those asserted in the IRP, which could only

address whether ICANN had acted inconsistently with its Articles and Bylaws. It would have been impossible for DCA to bring certain claims that it is now asserting in these proceedings in the IRP, not only because they were outside the jurisdiction of the IRP panel, but also because significant aspects of those claims turn on conduct that ***had not yet occurred***.[16]

B. DCA's Statements Were Based on the Expectation that ICANN Would Treat the IRP as Binding.

Moreover, DCA's positions both before the IRP and in this proceeding are far from inconsistent. They fundamentally amount to the ***same*** basic point—that DCA must have access to a binding, neutral forum with adequate process in which to challenge ICANN's conduct and obtain redress. Before the IRP, DCA's position was that it would be unconscionable for DCA to be left without recourse to a binding, neutral forum with real due process. (E.g., Ex. 16, at pp. 5-6.) And, in this proceeding, DCA's position is that the litigation waiver is invalid and ICANN is subject to suit because ICANN did not treat the IRP as binding, thus undermining its decision and outcome. (15 CT 3262.)

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[16] By simple analogy, an attorney who said that his client could not sue his neighbor "for anything" during a dispute about playing loud music surely would not be understood as meaning that his client could ***never*** sue, even if the neighbor set off dynamite in his backyard.

Indeed, DCA repeatedly told the IRP panel that "[i]t is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights . . . and not provide a substitute accountability mechanism capable of producing a binding remedy." (E.g., *ibid.*; Ex. 17, at p. 3.) DCA's ultimate position was therefore about unconscionability—*i.e.*, that fundamental equity and fairness require DCA to have its day before some binding neutral decisionmaker. (See also Ex. 38, at p. 7 ["DCA has a right to be properly heard . . . and not by ICANN as judge, jury and executioner."].) Though DCA said that, under the litigation waiver, the IRP was the "only" forum in which it could bring suit, it did not say that the litigation waiver was legally valid or enforceable under California Civil Code § 1668. (E.g., Ex. 15, at p. 14; 19 CT 4261.) And the IRP itself took DCA's statements as such—it concluded only that DCA had signed the litigation waiver and that, "[a]ssuming that the foregoing waiver of any and all judicial remedies is valid and enforceable," the IRP would be DCA's only possible remedy. (Ex. 18, at pp. 11-12.)

In this proceeding, by contrast, DCA argued that the litigation waiver is not valid or enforceable—crucially, because "ICANN refuse[d] to recognize any binding effect of the IRP's decisions" and the IRP had "provided [DCA] with an illusory one-sided form of redress." (15 CT 3262.) ICANN's conduct negated

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the very assumption underlying the IRP panel's decision. Indeed, DCA pointed to ICANN's actions **after** the IRP as evidence that the IRP's result was ultimately ineffective because of ICANN's refusal to treat it as binding and to twist the results against DCA. (*Id.* at pp. 3258-59.)

Thus, DCA's positions are far from "totally inconsistent." If anything, they are remarkably **consistent**. Before the IRP, DCA argued that equity and unconscionability required a binding, fair process with procedural protections. Before the trial court, DCA argued equity and unconscionability prevents application of the litigation waiver because ICANN prevented the IRP from providing fair and binding relief. Especially because DCA made its statements about the waiver in the face of ICANN's persistent effort to deny DCA of due process, it would be wholly inequitable to allow ICANN to have it both ways and now preclude DCA from suing ICANN for its **later** misdeeds—especially when ICANN is now trying to argue that the IRP it disregarded is somehow "quasi-judicial."

C.   This Situation Is Analogous to Other Cases that Rejected Judicial Estoppel.

This situation is like many others where the California courts have rejected claims of judicial estoppel because the party's positions were not "totally inconsistent." For example, in *Daar & Newman v. VLR International* (2005) 129 Cal.App.4th

482, 486-87 (hereinafter *Daar & Newman*), a law firm moved to quash a lawsuit in California by claiming that the California courts lacked personal jurisdiction over the client, because the client had no residence in California and the injury occurred abroad. The trial court granted his motion to quash. (*Ibid.*) Then, in a second action, that law firm sued that same client in California for breach of contract. (*Ibid.*) The client responded that the law firm's prior representations estopped it from claiming that California courts had jurisdiction over the client, and the trial court agreed. (*Ibid.*)

But this Court disagreed and reversed. It explained that "the claim asserted [in the second action]" was "***based on a different claim and different facts***." (*Id.* at pp. 490-91, emphasis added.) In the first action, the law firm denied that California courts had general or specific jurisdiction over the client—but the argument about specific jurisdiction turned on the facts and claims at issue in that action (*i.e.,* an injury occurring abroad). In the second action, specific jurisdiction turned on different facts and claims (*i.e.,* the firm's defense work in California courts), and thus the positions were not "inconsistent." (*Id.* at 487-88.)[17]

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[17] See also *State Farm Gen. Ins. Co. v. Watts Regulator Co.* (2017) 17 Cal.App.5th 1093, 1102 (hereinafter *State Farm Gen. Ins. Co.*) (holding that a party was not judicially estopped from claiming that a second arbitration agreement governed certain

The same is true here: DCA's representations about the scope of the litigation waiver were made in the context of claims and facts then before the IRP panel; its claims before this Court are different. And just like specific jurisdiction turns on the underlying claims and facts, the scope of a litigation waiver turns on which facts and claims are being discussed.

Moreover, courts have rejected claims of judicial estoppel where, as here, the facts in between the two proceedings changed. For example, in *Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238-39 (hereinafter *Montegani*), one party first represented that the other party was the beneficiary of a trust. But after the admission, the courts found that the "beneficiary" had violated a no-contest clause in the trust and thus forfeited her interest to it. (*Id.* at pp. 1234, 1238.) Thus, though that "admission" had been correct when made, it did not preclude that party from later asserting that the "beneficiary" had forfeited her interests. (*Id.* at p. 1239.) Courts have similarly held that judicial estoppel cannot apply "where the first position was based upon ignorance of facts" or where a claim arose after the

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claims, even though that party had "consented" to a first agreement governing "this claim," in part because it was unclear whether "this claim" was the same claim as the later claims).

termination of the prior proceedings. (See *Ng v. Hudson* (1977) 75 Cal.App.3d 250, 258 (hereinafter *Ng*).)[18]

The same is true here. Before the IRP, DCA assumed that ICANN would treat that process as binding, which could meaningfully constrain ICANN's behavior and hold ICANN accountable under rules, procedures, and policies promulgated by ICANN itself. After the IRP, DCA discovered that its assumption was profoundly mistaken, and ICANN was determined to subvert any chance of real, meaningful victory. And only **after** the IRP did ICANN engage in **many** of the misdeeds that form the basis of DCA's current lawsuit. Plainly, DCA's current suit is based on facts and circumstances that were unknown at the time it made its prior statements.

Lastly, courts have repeatedly held that the two positions "must be clearly inconsistent so that one necessarily excludes the other." (*Prilliman, supra*, 53 Cal.App.4th at p. 960.) If the statements can even "possibl[y]" be "reconcile[]d," then judicial estoppel will not apply. (*Bell, supra*, 62 Cal.App.4th at p. 1388.) Even in the context of disability lawsuits, the courts generally

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[18] See also *Kitty-Anne Music Co. v. Swan* (2003) 112 Cal.App.4th 30, 35-36 (hereinafter *Kitty-Anne Music Co.*) (judicial estoppel did not apply where one party claimed that there were triable issues of fact when resisting summary judgment, and then moved for summary judgment, because the evidence presented by the opposing party "convinced [the moving party] to move for summary judgment").

hold that a prior disability claim stating that the claimant is "unable to perform 'his regular and customary work'" does ***not*** necessarily preclude a later lawsuit against an employer for failure to accommodate, reasoning that the meaning of any disability claim "cannot be determined without knowing what plaintiff meant" by claiming a disability and an inability to perform his work. (E.g., *Bell, supra*, 62 Cal.App.4th at pp. 1387-88; *Prilliman, supra*, 53 Cal.App.4th at pp. 962-63; *Ng, supra*, 75 Cal.App.3d at p. 258.)

The same is (once again) true here. DCA's statements are not so "clearly inconsistent . . . that one necessarily excludes the other." (*Prilliman, supra*, 53 Cal.App.4th at p. 960.) To the contrary, DCA has been able to fully explain the purported differences in its statements: the statements before the IRP stemmed from the (mistaken) assumption that the IRP could provide meaningful relief, and its statements now relate to different claims and different conduct than what was at issue before the IRP. DCA plainly was referring to certain claims and conduct when it told the IRP panel that it could not sue ICANN— and thus its statements about being unable to sue ICANN for certain ***previous*** claims and conduct should not preclude its ***current*** claims, based on different conduct. To exclude DCA's claims as the court below did would only reward ICANN for its

bait-and-switch tactics, which runs counter to the purpose of judicial estoppel.

D. Context Matters When Analyzing Whether Two Positions Are "Totally Inconsistent."

In its ruling, the trial court gave no reasoning for its conclusion, and instead merely said that "DCA's lawsuit against ICANN is totally and logically inconsistent with DCA's first position that it could not sue ICANN"—ignoring that DCA's first position was that it could not sue ICANN *for certain previous claims and conduct, assuming that the IRP could provide meaningful, binding relief.* (20 CT 4535.) Though the trial court completely failed to address DCA's legal arguments, it referred to ICANN's brief in its decision. (*Ibid.*) There, ICANN had claimed that "'context' is irrelevant to the application of judicial estoppel." (*Id.* at p. 4431.) But that is simply wrong under California law and this Court's own precedents. Context *does* matter to whether two positions are "totally inconsistent," and the cases ICANN cited do not support its legally erroneous argument.

As this Court has squarely held, two positions are not inconsistent when "[t]he operative facts and law relating to this action are different from the prior action." (*Daar & Newman, supra*, 129 Cal.App.4th at p. 486.) When the "cases involved different circumstances," the Court has declined to apply judicial estoppel. (*State Farm Gen. Ins. Co., supra*, 17 Cal.App.5th at p.

1102.) Similarly, if the facts or circumstances change between the representations, then the positions are not "totally inconsistent." (E.g., *Montegani, supra*, 162 Cal.App.4th at p. 1239; *Kitty-Anne Music Co., supra*, 112 Cal.App.4th at pp. 35-36.)

This Court's precedents are indisputable on this point. Indeed, only context explains why the statement "specific jurisdiction does not exist over a party" does not preclude a later claim that "specific jurisdiction *does* exist over that party." (See *Daar & Newman, supra*, 129 Cal.App.4th at p. 491.) Only context explains why the statement "this party is a beneficiary to the trust" may not preclude a later claim that "this party is not a beneficiary to the trust." (See *Montegani, supra*, 162 Cal.App.4th at p. 1239.) And only context explains why saying a certain arbitration agreement "governs this claim" may not preclude later saying that the arbitration agreement does not govern "these claims." (See *State Farm Gen. Ins. Co., supra*, 17 Cal.App.5th at p. 1102.) In short, context plainly matters.

To argue the contrary, ICANN cited a string of cases that show only the obvious proposition that judicial estoppel can apply when a party takes two different positions in two different proceedings. (E.g., *Cal. Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 258 [saying that a commission had authority over certain property precludes later saying that it lacked authority over that same property]; *Conrad v. Bank of Am.* (1996)

45 Cal.App.4th 133, 148 [noting that a debtor in bankruptcy may be judicially estopped from bringing claims he fails to identify in bankruptcy]; *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* (9th Cir. 2012) 692 F.3d 983, 998-99 (hereinafter *Milton H. Greene Archives, Inc.*) [noting that repeated positions that Marilyn Monroe died domiciled in New York precluded later saying that she died domiciled in California].) Most of those cases involved factual assertions that are obviously inconsistent—such as where Marilyn Monroe was domiciled at her death—and the fact that the assertions were made in different proceedings plainly did not matter. But that is far different from DCA's situation here. ICANN's effort to suggest otherwise attacks a strawman.

ICANN also argues that the legal context does not matter because judicial estoppel has sometimes been applied when the claims in each lawsuit were different. (20 CT 4431-32, citing *Milton H. Greene Archives, Inc.*, *supra*, 692 F.3d at pp. 998-99.) But, to make that argument, it cites cases involving obviously inconsistent ***factual*** positions that were then applied in different contexts. (E.g., *ibid.* [domicile at the time of death applied in different cases]; *Furia v. Helm* (2003) 111 Cal.App.4th 945, 956 [whether a party withdrew from a construction project in different cases]; see also *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 557-58 (hereinafter *Ferraro*) [party admission

that two causes of action were "the same"].)[19] These cases show only that the mere fact of different proceedings does not matter; yet as shown above, context matters about whether statements are "*totally* inconsistent."

At bottom, the trial court's adoption of ICANN's flawed view of the law was legal error and a patent abuse of discretion. Unlike the cases cited by ICANN, DCA's statements about its "inability to sue ICANN" because of the litigation waiver were plainly about being unable to sue ICANN for certain claims before the IRP, assuming the litigation waiver was enforceable and that ICANN would abide by the IRP's outcome. Those statements are thus not totally inconsistent with DCA's effort to sue ICANN for *different* claims and conduct, much of which occurred *after* the IRP and after DCA discovered that ICANN would *not* treat the IRP as binding. And because DCA's statements were made only in response to ICANN's blatant

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[19] ICANN also cited *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950. But that case examined the context of the plaintiff's statements, finding that the plaintiff's prior claim that he could not perform any stressful job functions—viewed *in context*—meant that he could not later claim that he could perform the functions of a police safety officer. (*Id.* at 956-57.) Critically, the court noted that the plaintiff had admitted that *all* of the functions of police safety officers involve stress. (*Id.* at 957, emphasis added.) Thus, *Drain* only confirms that context matters—and it is therefore inapposite, as there were no allegations of changed circumstances or a mistaken assumption.

attempt to twist the IRP—and the current lawsuit is in response to ICANN's decision to distort the *results* of the IRP—it would be wholly inequitable to preclude DCA's lawsuit.

E. Courts Are Especially Reluctant To Apply Judicial Estoppel to Legal Arguments.

Moreover, DCA's supposed "change in position" was legal in nature, not factual, and judicial estoppel generally applies only if the "inconsistent position [is] factual in nature." (*ABF Capital Corp.*, *supra*, 130 Cal.App.4th at pp. 832-33; see also *In re Cass* (9th Cir. Bankr., Apr. 11, 2013, No. 12-1513) 2013 WL 1459272, at *13, citing *Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037.) Thus, this court has rejected a claim of judicial estoppel because the parties changed only their "legal arguments, which resulted from their different positions in the two lawsuits." (*Cal. Amplifier, Inc.*, *supra*, 94 Cal.App.4th at p. 118.)

In *California Amplifier*, for example, the party patently changed its litigating position as to whether a statute required knowledge or negligence, yet the party had not "misrepresent[ed] or conceal[ed] material facts." Instead, it had changed only its "legal arguments, which resulted from [its] different positions in the two lawsuits." (*Ibid.*)[20] And that change was "a reasonable

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[20] The party changed from defending against a class action, in one lawsuit, to suing its insurer for denying coverage, in the second lawsuit. (*Ibid.*)

litigation tactic [that] does not undermine the integrity of the judicial process." (*Ibid.*)

So too here. The statements at issue are about whether the litigation waiver is binding on various claims or not. That is a legal argument, and the circumstances in the two proceedings were significantly different. Before the IRP, DCA was forced to assume the litigation waiver would be enforced and therefore was trying to ensure that the IRP would provide an independent, binding, and fair forum. DCA made its comments about the waiver in the context of addressing the proper procedure for the IRP. Before this Court, DCA is trying to hold ICANN accountable for its failure to honor the results of the IRP and for engaging in misconduct ***after*** the IRP, which disregarded the IRP process. There is nothing about DCA's position here that would "undermine the integrity of the judicial process." (*Ibid.*) If anything, it is ICANN's decision to cripple the IRP, engage in further misconduct, and then claim that DCA's lawsuit is precluded that would undermine the integrity of the judiciary.

II.   ICANN's Own Actions Prevented The IRP Here From Functioning As A Judicial Or "Quasi-Judicial" Proceeding.

Second, and independently, ICANN's own actions prevented the IRP here from functioning as a judicial or "quasi-judicial administrative proceeding[]" as required for judicial estoppel. (*Jackson, supra*, 60 Cal.App.4th at p. 183.) For a proceeding to count as "quasi-judicial," "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. Superior Court* (1999) 21 Cal.4th 815, 829 (hereinafter *Vandenberg*); see also *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 907.) Critically, courts have also said that "the most important hallmark" of a quasi-judicial proceeding is its "ability to make a decision" that binds the parties. (*Nada Pac. Corp. v. Power Eng'g and Mfg., Ltd.* (N.D. Cal. 2014) 73 F. Supp. 3d 1206, 1216-18 (hereinafter *Nada*); *Eaton v. Siemens* (E.D. Cal., May 23, 2007, No. civ.s-07-315) 2007 WL 1500724, at *5 (hereinafter *Eaton*).) Thus, whether a forum acts in a quasi-judicial capacity generally turns on whether it "was binding on both parties, and [whether] both parties had a right to judicial review of the decision." (*Lambert v. Andrews* (9th Cir. 2003) 79 F. App'x 983, 985 (hereinafter *Lambert*).)

Because of ICANN's own intentional conduct, the IRP here lacked both of those critical characteristics: it was not binding on both parties, and neither party had a right to judicial review. To be sure, while the IRP had all the hallmarks of an international arbitration, and even ***said*** it was binding, ICANN never treated it as binding during the IRP and refused to accept the decision as binding after the IRP. Indeed, ICANN sabotaged any binding effect by first meeting and voting on ***whether or not*** to accept the

Review Process's "recommendations," and then throwing out DCA's application on yet further pretext. (See Ex. 41.) Moreover, the Board also invited the GAC and ZACR to give ICANN further advice on how to handle DCA's application, before ICANN's staff erected pretextual hurdles to DCA's application based on ZACR's and the AUC's advice. (*Ibid.*; Ex. 138; 16 CT 3569-80.) Plainly, ICANN itself refused to grant the IRP the necessary characteristics for it to qualify as a quasi-judicial process here.

Moreover, as ICANN itself acknowledged (and in fact argued), DCA did not have any chance for judicial review of the IRP's decision or ICANN's treatment of that decision—other than the present suit, which has yet to reach the merits. This is critical, as DCA would have sought (and now seeks) the opportunity for further review of any further misconduct by ICANN or any actions that departed from the letter and spirit of the Panel's ruling. (See *Wehrli v. Cty. of Orange* (9th Cir. 1999) 175 F.3d 692, 695 (hereinafter *Wehrli*) [without "judicial review, [plaintiff] would have no way of correcting arbitrary administrative action if any occurred"].) In the end, ICANN treated the IRP just as it claimed all along—as an internal corporate governance mechanism from which DCA did not have judicial review, and which ICANN could choose to ignore.

DCA's case is thus similar to cases like *Nada*, *Eaton*, and *Wehrli*, which rejected claims of judicial estoppel. In *Nada*, for

example, the proceeding at issue "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." (*Nada*, *supra*, 73 F. Supp. 3d at p. 1216.) But, as the court explained, the proceeding was ***not*** quasi-judicial because "it lacked the most important hallmark—the ability to make a decision" that would bind the parties. (*Id.* at pp. 1216-17.) Though the proceeding could issue "a nonbinding (albeit written) recommendation," the parties "could accept or reject" that recommendation. (*Id.* at p. 1217.) Similarly, in *Eaton*, a proceeding was not "of a judicial nature" because the parties "could choose to ignore [it]"—even though the relevant party, in that case, "chose to follow" the outcome and "recommendation" of the proceeding. (*Eaton*, *supra*, 2007 WL 1500724, at *1, *5.) And, in *Wehrli*, the court determined that collateral estoppel could not apply if the prior proceeding lacked any chance of judicial review. (*Wehrli*, *supra*, 175 F.3d at p. 695.)

As in those cases, the IRP panel issued a decision that was written. But ICANN then took the view that it could choose to accept or reject that "recommendation," thereby precluding the IRP from assuming a quasi-judicial nature, just as the cases above held. Just like *Eaton*, ICANN purported to "accept" the

IRP's recommendation (with additions that DCA contests). But, as *Eaton* held, pretending to accept the IRP's recommendation did not render the IRP quasi-judicial, when ICANN also claimed the power to wholly ignore the IRP. Last, DCA had no recourse to the courts to claim that ICANN's decision was arbitrary or erroneous (other than the present lawsuit, which ICANN has steadfastly claimed should never reach the merits).

The trial court thus legally erred twice over in finding that the IRP here qualified as "quasi-judicial." *First*, it found that the IRP was binding solely because the IRP panel had said it was binding. (20 CT 4532.) But ICANN's own actions proved that statement illusory. That is not to say that ICANN's IRPs are never binding or can never be binding. Rather, the facts in this particular case establish that ICANN explicitly rejected the notion that *this* IRP was binding. Why else would ICANN's Board vote on whether to "accept" the decision?

Second, the trial court completely *ignored* DCA's lack of any chance for judicial review. That lack of judicial review is critical, especially when considering the cases that ICANN purports to marshal in its defense. In its trial brief, ICANN cited several cases that involved a hearing of some sort that the courts classified as quasi-judicial, even though the hearing was followed by a vote by the directors of an organization or the membership of a union. (E.g., *Risam v. Cty. of Los Angeles* (2002) 99

Cal.App.4th 412, 418-19, 421-22 (hereinafter *Risam*); *Bray v. Int'l Molders & Allied Workers Union* (1984) 155 Cal.App.3d 608, 612, 616 (hereinafter *Bray*); *Powers v. Northside Indep. Sch. Dist.* (W.D. Tex., Jan. 27, 2016, No. A-14-CA-1004-SS) 2016 WL 8788185, at *2-3, 5.) But each of those cases involved an opportunity for judicial review—indeed, *Bray* involved a party seeking administrative mandamus of the underlying proceeding, and *Risam* involved the application of collateral estoppel to a plaintiff who failed to appeal from an agency's decision. (*Bray*, *supra*, 155 Cal.App.3d at pp. 612, 616; *Risam*, *supra*, 99 Cal.App.4th at pp. 418-19, 421-22.) A proceeding is more likely to be "quasi-judicial" if an aggrieved party can seek redress from any arbitrary "implementation" by the directors or membership. Here, by contrast, ICANN is invoking judicial estoppel precisely to **prevent** any judicial review of its actions.

If anything, it would be fundamentally unfair to say that DCA cannot now sue ICANN for contriving to subvert the outcome of the IRP. To do so would allow ICANN to have it both ways, by sabotaging the outcome of DCA's IRP while seeking to deny DCA a day in court.

III. DCA Did Not "Succeed" On Any Prior Position It Took.

Third, the IRP panel never concluded that DCA could not sue ICANN or that the litigation waiver was binding and enforceable. As the courts have repeatedly held, judicial estoppel

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Cal.App.4th 412, 418-19, 421-22 (hereinafter *Risam*); *Bray v. Int'l Molders & Allied Workers Union* (1984) 155 Cal.App.3d 608, 612, 616 (hereinafter *Bray*); *Powers v. Northside Indep. Sch. Dist.* (W.D. Tex., Jan. 27, 2016, No. A-14-CA-1004-SS) 2016 WL 8788185, at *2-3, 5.) But each of those cases involved an opportunity for judicial review—indeed, *Bray* involved a party seeking administrative mandamus of the underlying proceeding, and *Risam* involved the application of collateral estoppel to a plaintiff who failed to appeal from an agency's decision. (*Bray*, *supra*, 155 Cal.App.3d at pp. 612, 616; *Risam*, *supra*, 99 Cal.App.4th at pp. 418-19, 421-22.) A proceeding is more likely to be "quasi-judicial" if an aggrieved party can seek redress from any arbitrary "implementation" by the directors or membership. Here, by contrast, ICANN is invoking judicial estoppel precisely to **prevent** any judicial review of its actions.

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applies only if "the party to be estopped was ***successful*** in asserting the first position." (E.g., *The Swahn Grp., Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845 (hereinafter *The Swahn Grp.*), emphasis added.) "Success" is not merely "prevailing" in the earlier proceedings—it requires that the former "tribunal adopted the position or accepted it as true." (*The Swahn Grp., supra*, 183 Cal.App.4th at p. 845, quoting *Jackson, supra*, 60 Cal.App.4th at p. 183.) Success is also required because "[a]bsent success . . . a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." (*Id.* at p. 846, quoting *New Hampshire v. Maine* (2001) 532 U.S. 742, 750, internal quotations omitted.) Thus, judicial estoppel applies only if the "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled.'" (*Ibid.*)

DCA was not "successful" in this sense. Though DCA obtained a procedure that mimicked an international arbitration, the IRP neither concluded that the litigation waiver was binding nor adopted such a position as true. DCA made many arguments about the IRP's procedural safeguards—most of which dealt with principles of international law, fairness, and ICANN's own Bylaws and Articles of Incorporation. (E.g., Ex. 15, at pp. 4-11,

14-32; Ex. 16, at pp. 6-11.) When granting DCA's request, the IRP panel largely rested on those arguments, devoting dozens of paragraphs to those arguments and only one to the litigation waiver. (See Ex. 18, at pp. 8-12, 14-15.) And when discussing the litigation waiver, the panel said only that it was "**assuming** the foregoing waiver . . . is valid and enforceable"—i.e., the Panel **assumed**, but did not **conclude** that the waiver was valid and enforceable. (*Id.* at p. 11.)

Therefore, DCA did not "succeed[] in persuading a court to accept" the position that the litigation waiver was valid or enforceable, or that DCA could never sue ICANN on **any** future claims in **any** circumstances. (*The Swahn Grp.*, *supra*, 183 Cal.App.4th at p. 845.) Indeed, it never even suggested that the litigation waiver would apply to ICANN's future conduct. Allowing DCA to sue in this case thus poses no "risk of inconsistent court determinations" or "perception that either the first or second court was misled." (*Id.* at p. 846.) Especially because of ICANN's bait-and-switch, there is no risk to the judiciary's integrity to allow DCA to finally have its day in court.

In ruling to the contrary, the trial court noted only the following: that the IRP panel, when issuing its procedural declarations, said that it would grant DCA's requests "*[b]ased on the foregoing*," referring to the determinations it had already made regarding the Bylaws, Articles of Incorporation, principles

of fairness—and the assumption it took regarding the validity of the litigation waiver. (20 CT 4533-34.) But merely saying "based on the foregoing" does not change an assumption to a conclusion. The trial court never explained (nor could it) how a non-binding IRP panel's reference to an assumption transforms the assumption into an adopted position that would risk inconsistent determinations and undermine the judiciary's integrity.

IV. DCA's Positions Were Not Taken In Bad Faith.

Fourth, ICANN has also failed to show that DCA's prior position "was not taken as a result of ignorance, fraud, or mistake." (*Lee v. W. Kern Water Dist.* (2016) 5 Cal.App.5th 606, 630 (hereinafter *Lee*).) As courts have explained, 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." (*Ibid.*, citing *Haley v. Dow Lewis Motors, Inc.* (1999) 72 Cal.App.4th 497, 509-11.) Accordingly, courts have rejected claims of judicial estoppel where the party's prior position "could be attributed to oversight or neglect as easily as to some ulterior motive." (*Kelsey v. Waste Mgmt. of Alameda Cty.* (1999) 76 Cal.App.4th 590, 599.) Indeed, judicial estoppel is meant to ensure that parties "did not act with the intent to play fast and loose with the courts." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018 (hereinafter *Cloud*).) But

it "is *not* meant to be a technical defense for litigants seeking to derail potentially meritorious claims." (*Ibid.*, emphasis added.)

Applying judicial estoppel here plainly undermines the purpose of this element. There is no evidence—nor did the trial court find—that DCA acted out of "bad faith or intentional wrongdoing" such that allowing DCA a day in court would "result[] in a miscarriage of justice." (*Lee, supra*, 5 Cal.App.5th at p. 630.) In fact, the evidence shows that DCA relied in good faith on ICANN's representations regarding the very mechanism that ICANN itself had created to allow for third-party review of its conduct. Instead, the trial court rested its conclusion on the fact that DCA had referenced its inability to sue about seven times, and that Ms. Bekele had said she was unsure whether the waiver was enforceable in 2009. (20 CT 4534-35.) Moreover, the trial court (like ICANN) concluded that judicial estoppel applies even if a party was mistaken about the law. (*Id.* at pp. 4535-36.)

None of that establishes that DCA acted out of bad faith, or with the intent to mislead the courts. As explained above, each of DCA's statements about the scope of the waiver were to secure a fair and binding process that, in hindsight, ICANN later undermined. DCA was led to invoke the IRP precisely because ICANN had represented both that it would participate in good faith in the IRP and that the IRP panel could hold ICANN accountable after affording due process. But, at every turn,

ICANN sought to undermine and nullify that process. The only reason DCA had to even reference the waiver was ICANN's own misconduct and attempt to railroad a result through the IRP without any meaningful procedural safeguards, in flat contravention of its promises to follow rules from the International Centre for Dispute Resolution and ICANN's own Bylaws.

Moreover, far from accepting accountability, ICANN disrespected the IRP by treating its ruling as non-binding and then contriving further pretexts for excluding DCA's application. Only once DCA realized that it could never have obtained real accountability from an IRP, and that ICANN would never abide by its promises, did it bring the present lawsuit.

Thus, far from playing fast and loose with the courts, DCA has been trying to obtain one thing this whole time—a day before a neutral, binding forum with judicial review that can hold ICANN accountable for its misdeeds.

V. The Equities Compel Reversal.

Last, if nothing else, this is not a case where applying the harsh remedy of judicial estoppel is equitable or just. On the contrary, the lower court's sweeping application of the doctrine— after a second trial on judicial estoppel by a second judge after years of delay—inequitably and unjustly precluded DCA from holding ICANN to account for its abusive and anticompetitive

conduct in a phase-two merits trial. Though appellate courts review "[t]he exercise of discretion for an equitable determination . . . under an abuse of discretion standard," the trial court below gave **no reasons** at all why judicial estoppel was warranted beyond the traditional four-factor test. (See *Miller, supra*, 213 Cal.App.4th at p. 10; 20 CT 4536.) That failure to consider the equities is itself a manifest abuse of discretion. And, as this court and others have repeatedly said, judicial estoppel does not turn on a mechanical test—it is an equitable doctrine that, "even where all necessary elements are present, is discretionary." (See *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132 (hereinafter *Gottlieb*); *Jogani, supra*, 141 Cal.App.4th at p. 170.) Here, the lower court completely ignored this Court's warnings that, "[b]ecause of its harsh consequences, the doctrine should be applied with caution and limited to *egregious* circumstances." (See *Gottlieb, supra*, 141 Cal.App.4th at p. 132, emphasis added.)

Before judicial estoppel is applied, there must be some showing that the party's "inconsistent behavior will otherwise result in a miscarriage of justice." (*Daar & Newman, supra*, 129 Cal.App.4th at p. 491.) The "doctrine rests on the principle that litigation is not a war game unmoored from conceptions of ethics, truth, and justice." (*Ferraro, supra*, 161 Cal.App.4th at p. 558.) Because it is rooted in equity not formalism, judicial estoppel "is not meant to be a technical defense for litigants seeking to derail

potentially meritorious claims." (*Cloud, supra,* 67 Cal.App.4th at p. 1018.)

If anything, *applying* judicial estoppel here would achieve the very evils that judicial estoppel seeks to avoid. As detailed above, ICANN has consistently sought to invoke every conceivable technical and procedural defense to prevent DCA from litigating its case on the merits in court. Before the IRP panel, ICANN first sought to short-circuit the proceedings by delegating .AFRICA before a panel was even convened—and then tried to railroad the proceedings to get a decision before DCA could even get discovery, let alone a hearing or witness testimony. ICANN then purported to "accept" the IRP panel's recommendations, yet engaged in further procedural games as pretext for throwing out DCA's application anyway. And, when DCA sued in California state court, ICANN tried to block DCA's entire suit first because of the litigation waiver (which failed), and then because of judicial estoppel. This Court should not countenance ICANN's effort to deploy judicial estoppel as yet another "technical defense . . . to derail" DCA's claims. (See *Cloud, supra,* 67 Cal.App.4th at p. 1018.)

In contrast to ICANN's strategy of doing anything possible to avoid litigation on the merits, DCA from the start has consistently sought to resolve its dispute with ICANN before a real, binding tribunal. Far from playing "fast and loose with the

courts," DCA has been up front: it acknowledged the statements it made before the IRP panel, but argued that those statements were about different claims and different conduct than those at issue in this lawsuit. (See *ibid.*; 19 CT 4260-63; 20 CT 4454-56.) No miscarriage of justice would result from letting DCA have its day in court. Indeed, DCA has never gotten the chance to litigate much of the conduct and most of the claims it has raised in this lawsuit, and the IRP panel did not even purport to decide that DCA was barred from any lawsuit. If anything, denying DCA its day in court would be a miscarriage of justice, rewarding ICANN for its gamesmanship.

Thus, the trial court's application of judicial estoppel was a clear abuse of discretion. Nowhere did the trial court explain why judicial estoppel was warranted; it instead provided a rote recitation of the necessary factors and then found them satisfied—without ever balancing the equities or considering its discretion not to apply the strong medicine of judicial estoppel. (See 20 CT 4526-36.) That decision harshly prohibits DCA from suing ICANN *at all* and *on any claim* when (1) DCA had referenced the litigation waiver only as ICANN was trying to short-circuit the IRP process to avoid accountability, (2) ICANN still avoided any real accountability from the IRP by treating the panel's decision as non-binding, while considering the GAC's advice anyway and developing another pretext to exclude DCA's

application, and (3) ICANN has now invoked DCA's concerns about a potential lack of accountability as yet another way to avoid any chance of accountability. At bottom, all DCA wishes to do is litigate its case on the merits before a tribunal with the power to hold ICANN accountable—and there is nothing unjust about giving it that chance.

VI.   ICANN Should Not Have Been Awarded Costs.

The court below granted ICANN costs only because it was deemed to have been a prevailing party. (See 2 CT(2nd) 525-28; Cal. Code Civ. Proc. §§ 1032, 1033.5.) However, as shown in this brief, ICANN was not entitled to judicial estoppel, and thus should never have prevailed. Accordingly, because this Court should reverse the award of ICANN's costs. (*Merced Cty. Taxpayers' Ass'n v. Cardella* (1990) 218 Cal.App.3d 396, 402 ["An order awarding costs falls with a reversal of the judgment on which it is based."].)

CONCLUSION

For all the foregoing reasons, DCA respectfully requests that this Court reverse the decision below and allow DCA to litigate its claims on the merits at trial.

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CERTIFICATE OF COMPLIANCE

Appellate counsel herby certifies, pursuant to California Rules of Court, Rule 8.204(c)(1), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 13,869 words, exclusive of the materials stated in Rule 8.204(c)(3), which is less than the 14,000 words permitted by this rule. Counsel relied on the word count of the computer program used to prepare this brief.

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