

# Exhibit A

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES  
3 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE  
4

5 DOTCONNECTAFRICA TRUST, )  
6 PLAINTIFF, )  
7 VS. ) NO. BC607494  
8 INTERNET CORPORATION FOR )  
9 ASSIGNED NAMES AND NUMBERS, )  
ET AL., )  
DEFENDANTS. )  
\_\_\_\_\_ )

10  
11 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
12 WEDNESDAY, AUGUST 9, 2017  
13

14 APPEARANCES:

15 FOR PLAINTIFF: BROWN, NERI, SMITH & KHAN, LLP  
16 BY: ETHAN J. BROWN, ESQ.  
17 BY: SARA COLON, ESQ.  
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SUITE 1670  
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19 FOR DEFENDANT ICANN: JONES DAY  
20 BY: JEFFREY A. LEVEE, ESQ.  
21 BY: AMANDA PUSHINSKY, ESQ.  
22 555 SOUTH FLOWER STREET  
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LOS ANGELES, CALIFORNIA 90071

24 FOR INTERVENOR ZACR: KESSELMAN BRANTLY STOCKINGER, LLP  
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27 MANHATTAN BEACH, CALIFORNIA 90266

28 PAMELA L. MYERS, CSR NO. 12940  
OFFICIAL REPORTER PRO TEMPORE

1 CASE NUMBER: BC607494  
2 CASE NAME: DOTCONNECTAFRICA TRUST VS. ICANN  
3 LOS ANGELES, CA WEDNESDAY, AUGUST 9, 2017  
4 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE  
5 REPORTER: PAMELA L. MYERS, CSR NO. 12940  
6 TIME: A.M. SESSION  
7

8 APPEARANCES: AS HERETOFORE NOTED.  
9

10 THE COURT: NEXT IS NUMBER 4 ON THE CALENDAR,  
11 DOTCONNECTAFRICA TRUST VERSUS INTERNET CORPORATION FOR  
12 ASSIGNED NAMES AND NUMBERS, CASE NUMBER BC607494.  
13 PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

14 MR. BROWN: GOOD MORNING, YOUR HONOR. ETHAN BROWN  
15 AND SARA COLON FOR THE PLAINTIFF DOTCONNECTAFRICA.

16 MS. COLON: GOOD MORNING, YOUR HONOR.

17 MR. LAVEE: GOOD MORNING, YOUR HONOR. JEFF LAVEE  
18 AND AMANDA PUSHINSKY FROM JONES DAY ON BEHALF OF  
19 DEFENDANT ICANN.

20 MR. KESSELMAN: GOOD MORNING, YOUR HONOR. DAVID  
21 KESSELMAN ON BEHALF OF INTERVENOR ZACR.

22 THE COURT: IT'S GOOD TO SEE ALL OF YOU AGAIN.

23 MR. LAVEE: THANK YOU, YOUR HONOR. NICE TO BE  
24 SEEN AND SEE YOU.

25 THE COURT: I SEE YOU'RE ALL TAKING YOUR  
26 RESPECTIVE POSITIONS. WE HAVE A COURT REPORTER FOR  
27 TODAY'S PROCEEDINGS. THIS WOULD BE PAM MYERS. WELCOME  
28 TO DEPARTMENT 53. COURT HAS SIGNED THE ORDER APPOINTING

1 THE COURT: OKAY. I APPRECIATE THE ARGUMENTS THAT  
2 WERE MADE, AND THE ARGUMENTS WERE EXCELLENT ARGUMENTS,  
3 EACH OF THEM, BUT I'M GOING TO STAY WITH THE TENTATIVE  
4 RULING. AND IN THAT REGARD, I WISH THERE WAS A  
5 PROCESS -- IT WOULD BE NICE IF YOU CAN DEVISE SOME TYPE  
6 OF A PROCESS WHERE WE CAN TEASE OUT THE ISSUE OF  
7 JUDICIAL ESTOPPEL AS MAYBE DEFENSE UNDER CCP SECTION 597  
8 AND HAVE A TRIAL ON THAT. SEEMS TO ME THAT YOU MIGHT BE  
9 ABLE TO SAVE A LOT OF TIME AND MONEY IF WE GET THAT  
10 RESOLVED BEFORE WE LAUNCH INTO EVERYTHING ELSE. SO YOU  
11 MIGHT WANT TO JUST THINK ABOUT IT, MEET AND CONFER, AND  
12 SEE IF THERE'S SOME WAY THAT YOU CAN COME UP WITH A PLAN  
13 SHORT OF A FULL-BLOWN TRIAL.

14 MR. LAVEE: I THINK IN TWO DAYS, YOUR HONOR, WE  
15 COULD HAVE A -- LITERALLY A TWO-DAY BENCH TRIAL, MAYBE  
16 EVEN ONE WHERE WE PUT TWO OR THREE WITNESSES ON EACH FOR  
17 LESS THAN AN HOUR.

18 THE COURT: I CAN EASILY SCHEDULE THAT AT SOME  
19 TIME, YOU KNOW, DURING THE TIME THAT THE CASE IS SET FOR  
20 TRIAL. BUT TO GO THE OTHER ROUTE, I THINK -- WHAT I'M  
21 GOING TO DO NOW IS I'M GOING TO ORDER A 597 DEFENSE  
22 TRIAL ON THE JUDICIAL ESTOPPEL, AND SO THE FIRST TRIAL  
23 WILL BE LIMITED TO THAT. WOULD THAT BE A JUDGE OR JURY  
24 TRIAL?

25 MR. LAVEE: THAT'S A JUDGE TRIAL.

26 MR. BROWN: I THINK THAT'S RIGHT, ALTHOUGH I WANT  
27 TO RESERVE LOOKING AT IT, BUT MY INCLINATION IS THAT'S  
28 CORRECT.

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
2 FOR THE COUNTY OF LOS ANGELES  
3 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE  
4

5 DOTCONNECTAFRICA TRUST, )  
6 )  
7 PLAINTIFF, ) NO. BC607494  
8 )  
9 VS. )  
10 )  
11 INTERNET CORPORATION FOR )  
12 ASSIGNED NAMES AND NUMBERS, )  
13 ET AL., ) REPORTER'S  
14 ) CERTIFICATE  
15 DEFENDANTS. )  
16 )  
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28 )

11 I, PAMELA L. MYERS, OFFICIAL REPORTER OF THE  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE  
13 COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT I DID  
14 CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN AND  
15 THAT THE FOREGOING PAGES 1 THROUGH 37, INCLUSIVE,  
16 COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE  
17 PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE  
18 ABOVE-ENTITLED CAUSE ON WEDNESDAY, AUGUST 9, 2017.  
19

20 DATED THIS 23RD DAY OF AUGUST, 2017.  
21  
22  
23  
24  
25

26 

27 PAMELA L. MYERS, CSR NO. 12940  
28 OFFICIAL REPORTER PRO TEMPORE

# Exhibit B

## DEPARTMENT 53 LAW AND MOTION RULINGS

Tentative rulings are sometimes, but not always, posted. The purpose of posting a tentative ruling is to help focus the argument. The posting of a tentative ruling is not an invitation for the filing of additional papers shortly before the hearing.

Case Number: BC607494 Hearing Date: May 07, 2018 Dept: 53

DOTCONNECT AFRICA TRUST vs. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.; BC607494, MAY 7, 2018

[TENTATIVE] STATEMENT OF DECISION RE: TRIAL OF SPECIAL DEFENSE—JUDICIAL ESTOPPEL

### BACKGROUND

This action involves the award and delegation of the generic top-level domain name (“gTLD”)[1] “.AFRICA.” Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) is a California not-for-profit public benefit corporation that oversees the technical coordination of the Internet’s domain name system. Both Plaintiff DotConnectAfrica Trust (“DCA”) and ZA Central Registry (“ZCAR”) were applicants for the gTLD .AFRICA.

The Court borrows heavily from ICANN’s timeline of the relevant events from its Post-Trial Brief:

#### A. June 2011

After six years of development, which included consultations with the ICANN community at every stage, ICANN proceeds with the New gTLD program. As Ms. Willett testified, the ICANN community “is this very large set of volunteers who span from all areas of the world and they represent variety of interests, . . . intellectual property interests. It includes people with education backgrounds, and various public policy interests.” (3/1/18 Trial Tr. at 55:24-56:8.)

ICANN proceeds with the New gTLD Program. The New gTLD Program allows interested applicants to apply for the rights to operate generic top-level domain names. The Guidebook, which was created over a number of years in a collaborative, online process that was open to the public, sets forth the requirements for new gTLD applicants, as well as the evaluation rules and procedures. The application window opens in January 2012, and ICANN receives 1,930 applicants for new gTLDs. (3/1/18 Trial Tr. at 55:8-56:22, 57:28-59:28, 65:8-10.)

#### B. March – June 2012

Plaintiff DCA and intervener ZACR, each separately apply for the rights to .AFRICA. Over the next year and a half, DCA and ZACR’s applications undergo evaluation. Both applications pass four of the evaluation phases (background screening, financial evaluation, technical evaluation, and a “DNS” evaluation that looks at how

the gTLD will be operated by the applicant.) (Stipulated Facts 1, 3; 3/1/18 Trial Tr. at 65:11-66:5, 67:20-22, 69:21-28.)

C. April 2013

Both DCA and ZACR understand that because it was applying for a geographic name (".AFRICA"), the Guidebook required DCA and ZACR to demonstrate that it had the support or non-objection of 60% of the governments of the continent. They further understood that ICANN's Governmental Advisory Committee ("GAC"), a body consisting of well over 150 international governments and organizations, was formed to consider and provide advice on the activities of ICANN and, with respect to new gTLDs, is permitted to provide advice relating to "applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities." (Joint Tr. Ex. 2 at §3.1.)

The GAC addresses a total of ten gTLD applications and issues "consensus advice" to ICANN that two of the new gTLD applications should not proceed through the evaluation process. DCA's application is one of the two.

Under the Guidebook, if the GAC issues consensus advice against an application, it creates a "strong presumption" that the application should not proceed. At the time the GAC issued its consensus advice, the applications of DCA and ZACR were still undergoing the Geographic Names Review, which evaluates whether an applicant for a geographic gTLD such as .AFRICA has the required support or non-objection of 60% of relevant governmental authorities. (3/1/18 Trial Tr. at 66:14-67:16; 72:5-10; Guidebook §3.1 (Joint Tr. Ex. 2.)

D. June 2013:

ICANN's Board accepts GAC's advice. DCA is informed that its application will no longer be evaluated, and the Geographic Names Review process of DCA's application is stopped. (ICANN Tr. Ex. 51 at p. 2; 3/1/18 Trial Tr. at 23:5-20.)

E. June-July 2013:

DCA moves for reconsideration of the ICANN Board's decision to accept the GAC's consensus advice regarding DCA's application. The Board denies DCA's request. (2/28/18 Trial Tr. at 50:20-51:6.)

F. October 2013:

DCA initiates an IRP ("Independent Review Process") to address the ICANN Board's decision to accept the GAC consensus advice regarding DCA's application. (Stipulated Fact 8.)

G. October 2013-May 2015:

ICANN and DCA engage in the IRP proceeding, culminating in a live two-day hearing in May 2015. (Stipulated Facts 10-15.)

H. July 9, 2015:

The IRP Panel issues a Final Declaration in DCA's favor. The IRP Panel declares that: (1) DCA's application should be returned to processing; (2) ICANN should refrain from delegating .AFRICA while DCA's application



completes processing; and (3) ICANN should pay the entirety of DCA's IRP costs. (3/1/18 Trial Tr. at 75:24-76:8; Final Declaration ¶¶149, 150 (Joint Tr. Ex. 43).)

I. July 16, 2015:

The ICANN Board adopts the IRP Panel's declaration in full and passes a resolution providing for ICANN to: (1) return DCA's application to processing; (2) refrain from delegating the .AFRICA gTLD while DCA's application completes processing; and (3) pay the entirety of DCA's IRP costs. (3/1/18 Tr. Tr. at 77:22-29:23.)

J. July 2015:

ICANN returns DCA's application to processing. DCA's application is placed exactly where it had been in 2013 when the GAC had issued its advice – the Geographic Names Review. The independent company hired by ICANN to evaluate geographic gTLDs (including the .AFRICA applications), InterConnect Communications ("ICC"), resumes evaluation of DCA's application and the letters that DCA submitted with its application for .AFRICA in 2012 that DCA claimed were letters of support. (3/1/18 Trial Tr. at 79:28-81:12.)

K. September 2015:

The ICC determines that DCA letters of support, which are from 2008 and 2009 (before the Guidebook was completed and years before DCA's application was submitted) do not contain all the information necessary to conform to the Guidebook's requirements. The ICC issues "Clarifying Questions," indicating what is missing from the support letters and asking DCA to obtain new, conforming letters. (ZACR had been asked to do the same regarding its letters of support during SACR's Geographic Names Review in 2013.) DCA refuses to submit new letters, taking the position that its 2008/2009 letters are sufficient despite the ICC's explicit directive that such letters were insufficient. (2/28/18 Trial Tr. at 108:7-17; 3/1/18 Trial Tr. at 81:13-83:3.)

L. October 2015:

ICANN notifies DCA that it has failed the Geographic Names Review but offers to allow DCA to have "Extended Evaluation," which DCA accepts. Because DCA has not submitted new letters, the ICC issues the same Clarifying Questions. DCA again refuses to submit updated letters. (2/28/18 Trial Tr. 108:18-109:8; 3/1/18 Trial Tr. at 83:4-84:24.)

M. January 2016:

DCA files this lawsuit.

N. February 2016:

ICANN informs DCA that, because its application for .AFRICA did not pass Geographic Names Review, its application has failed.

After DCA filed the lawsuit, ICANN then removed the case to the Central District of California. While this case was pending before the district court, DCA moved for and was granted a temporary restraining order and subsequently a preliminary injunction, enjoining ICANN from delegating the rights to .Africa until the case was resolved. ZACR filed a motion to reconsider the preliminary injunction order which ICANN joined. The motion

for reconsideration was denied. On October 19, 2016, the district court remanded the case to this Court due to lack of jurisdiction.

Upon remand, DCA moved for the same preliminary injunction that the district court previously entered—an order enjoining ICANN from issuing the .Africa gTLD until this case has been resolved. DCA initially sought this relief under its ninth cause of action for declaratory relief. A hearing on this motion was held on December 22, 2016 and the matter was argued at length. The Court denied the motion.

Thereafter, DCA moved again for the same preliminary injunction which was substantially the same as the motion which was denied on December 22, 2016. The only meaningful difference was that DCA moved under alternative causes of action: its second and fifth causes of action for intentional misrepresentation and unfair business practices. The motion was opposed by Defendant ICAAN and by intervenor ZACR.

That motion was directed to DCA's FAC which asserted causes of action for: (1) breach of contract; (2) intentional misrepresentation; (3) negligent misrepresentation; (4) fraud and conspiracy to commit fraud; (5) unfair competition (violation of Cal. Bus. & Prof. Code § 17200); (6) negligence; (7) intentional interference with contract; (8) confirmation of IRP award; (9) declaratory relief; (10) declaratory relief; and (11) declaratory relief. The Court denied Plaintiff's motion for preliminary injunction on February 3, 2017.

In March, 2017, the parties stipulated that ICANN may bring a Motion for Summary Judgment, on the sole issue whether the entire action is barred because DCA acknowledged and accepted a covenant not to sue and release ("the Covenant") which bars all the claims in the First Amended Complaint because they "arise out of, are based upon, or are in [some] way related to, any action, or failure to act, by ICANN" in connection with ICANN's review, investigation or verification of, its decision not to, approve or recommend DCA's application. In opposition, DCA argued that the Covenant is unenforceable under CCP §1668 because it is both procedurally and substantively unconscionable.

On August 9, 2017, the Court granted ICANN's Motion for Summary Judgment as to the all causes of action except: (2) intentional misrepresentation; (3) negligent misrepresentation; (4) fraud and conspiracy to commit fraud; (5) unfair competition, BP §17200; and (10) declaratory relief.

The parties then agreed that the Court would phase the trial of the case under CCP §597. The first phase would be whether DCA is subject to the doctrine of judicial estoppel by its conduct during the IRP process.

## LEGAL STANDARD

ICANN argues that the remaining causes of action in the FAC are barred in their entirety because DCA argued in the IRP process that the IRP decision was "binding" because it was the sole forum to challenge ICANN's actions as applicants, under the Covenant, waive their right to sue in the judicial system. ICANN contends that, by making this argument at many critical times in the IRP forum, DCA is now estopped from holding a contrary position, which is that the IRP was not the sole forum to seek independent review.

Judicial estoppel applies when "(1) the same party has taken two positions (2) the positions were taken in judicial or quasi-judicial administrative proceedings (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true) (4) the two positions are totally inconsistent and (5) the first position was not taken as a result of ignorance, fraud, or mistake" (Jackson v. Cty. of Los Angeles (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is an extraordinary remedy that should be applied with

caution.” (Mercury Interactive Corp. v. Klein (2007) 158 Cal.App.4th 60, 85-86.) Even where all elements are present, its application is discretionary. (MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 422.)

“The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. The policies underlying preclusion of inconsistent positions are general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings. Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts.” [citation] “It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.” [citation].” (Jackson v. County of Los Angeles, supra, 60 Cal.App.4th at p. 181 [internal citations omitted].)

## THE EVIDENCE

Trial began on February 28, 2018. Ethan J. Brown and Sara Colin of Brown Neri Smith & Khan, LLP represented Plaintiff DCA. Jeffrey A. LeVee, Erin L. Burke, Kelly Ozurovich and Amanda Pushinsky of Jones Day represented Defendant ICAAN. David W. Kesselman of Kesselman Brantly Stockinger, LLP represented the Intervenor ZCAR.

At the onset, the parties stipulated to the following facts:

1. In March 2012, DCA applied to ICANN for the gTLD known as .AFRICA in conjunction with ICANN’s “New gTLD Program.” ICANN began accepting applications for the New gTLD Program in January 2012.
2. The operative New gTLD Guidebook that was in effect when DCA submitted its .AFRICA application was version 9, last updated in January 2012.
3. Applicants, including DCA, were required to agree to the terms of the Guidebook in order to apply for a new gTLD, including any updates and changes that ICANN made to the Guidebook after an Applicant submitted its application (unless the “Applicant [could] demonstrate to ICANN that compliance with such updates or changes would present a material hardship to Applicant, then ICANN [would] work with Applicant in good faith to attempt to make reasonable accommodations in order to mitigate any negative consequences for the Applicant to the extent possible consistent with ICANN’s mission to ensure the stable and secure operation of the Internet’s unique identifier systems”). (Guidebook, Module 6, including ¶ 14.)
4. Module 6 of the Guidebook contains the Covenant Not to Sue, and states:

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 IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT’S NONENTITLEMENT TO PURSUE

ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

5. Under the Guidebook, applicants for gTLDs were entitled to utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to its application. Under the ICANN Bylaws applicable to this matter, an applicant can pursue an Independent Review Process ("IRP") to evaluate whether an action or inaction of ICANN's Board was inconsistent with ICANN's Articles, Bylaws, or the Guidebook.

6. The GAC is formed under the ICANN Bylaws, and is composed of representatives and organizations from countries around the world. Pursuant to the ICANN Bylaws, the GAC is tasked with "consider[ing] and provid[ing] advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."

7. In April 2013, the GAC issued what the GAC described as "consensus advice" that DCA's application should not proceed. This advice was then transmitted to ICANN's Board, which in June 2013 voted to accept the advice.

8. DCA initiated an IRP in October 2013.

9. The ICANN Bylaws that were in effect during the IRP were the April 11, 2013 Bylaws (the "4.11.13 Bylaws").

10. The IRP was conducted pursuant to the ICANN Bylaws applicable to the matter, the International Dispute Resolution Procedures ("ICDR Rules") of the International Centre for Dispute Resolution ("ICDR"), the Supplementary Procedures for ICANN Independent Review Process, and the procedural orders issued by the IRP Panel. The ICDR is the international division of the American Arbitration Association.

11. The IRP Panel consisted of three panelists, one appointed by each of the parties and a third appointed by the ICDR, to hear the dispute.

12. During the IRP proceedings, the parties conducted some discovery, specifically through the exchange of documents.

13. During the IRP proceedings, the parties submitted written briefs and written witness declarations to the IRP Panel.

14. The IRP between DCA and ICANN included a two-day evidentiary hearing on May 22 and 23, 2015.

15. At the IRP hearing, both parties made opening statements, closing arguments, and put forth witnesses who testified under oath, including under cross-examination by the other party's counsel. A total of three witnesses testified at the hearing: DCA's chief executive officer (Sophia Bekele); an ICANN Board Member (Cherine Chalaby); and the former chairperson of the GAC (Heather Dryden). The IRP Panel also asked questions of the witnesses.

16. After DCA initiated the IRP proceedings, the IRP Panel issued lists of questions for the parties to brief regarding the IRP procedures.

17. Among the IRP Panel's questions was: "[i]s the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?"

18. ICANN argued that the IRP should be non-binding.

19. In DCA's May 5, 2014 Submission on Procedural Issues, DCA stated at Paragraph 1: "As set forth below, under the rules that ICANN has established for the IRP, this IRP is an arbitration, notwithstanding the nomenclature ICANN has devised to distinguish it from ordinary international commercial arbitration proceedings. The IRP has all the characteristics of an arbitration under California law and widely accepted international arbitral practice and procedure. It is the only third-party and truly independent review process available to applicants for new generic Top-Level Domains ('gTLDs') under ICANN's framework."

20. In DCA's May 5, 2014 Submission on Procedural Issues, DCA stated at Paragraph 4: "Under California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision."

21. In DCA's May 5, 2014 Submission on Procedural Issues, DCA stated at Paragraph 16: "The IRP is the final accountability and review mechanism available to parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party. Thus, the IRP is distinct from the review procedures leading up to it in that it provides for external and independent review of actions taken by ICANN's Board. In other words, the IRP is not simply another layer of internal review under ICANN's control, but functions like any other arbitration to exert external review and control on ICANN's activities."

22. In DCA's May 5, 2014 Submission on Procedural Issues, DCA stated at Paragraph 22: "It is also critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions."

23. In DCA's May 5, 2014 Submission on Procedural Issues, DCA stated at Paragraph 68: "Furthermore, these proceedings are presumptively the first and last opportunity for DCA to have its rights determined by an

independent decision-maker. DCA thus urges the Panel to exercise its authority pursuant to the ICDR Rules to order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate.”

24. In DCA’s May 20, 2014 Response to the Panel’s Questions on Procedural Issues, DCA stated at Paragraphs 5 & 6: “The New gTLD Applicant Guidebook (the ‘Guidebook’) shepherds applicants through the new gTLD application and evaluation process. Module 6 of the Guidebook contains eight pages of terms and conditions that an applicant ‘agrees to . . . without modification’ by submitting an application for a gTLD, including significant waivers of rights:

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 IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A [SIC] ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

Applicants also forgo the right to recover ‘any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD.’ In exchange for waiving these significant legal rights, Section 6 of Module 6 grants applicants the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN’s Bylaws, including the IRP. As a result, the IRP is the sole forum in which an applicant for a new gTLD can seek independent, third-party review of Board actions. . . .”

25. In DCA’s May 20, 2014 Response to the Panel’s Procedural Questions, DCA stated at Paragraph 7: “It is fundamentally inconsistent with California law, U.S. federal law, and principles of international law for ICANN to require applicants to waive all rights to challenge ICANN in court or any other forum and not provide a substitute accountability mechanism capable of producing a binding remedy. . . Thus, in order for this IRP not to be unconscionable, it must be binding.”

26. In ICANN’s May 20, 2014 Further Memorandum Regarding Procedural Issues at p. 1 it stated: “IRP Panel declarations are not binding on ICANN. The plain language of the IRP provisions set forth in Article IV, section 3 of ICANN’s Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP Panel declarations are not binding on ICANN. There is no ambiguity on this issue. And the ICM IRP Panel recognized the proper scope and authority of an IRP panel when it correctly stated: ‘The holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.’”

27. In ICANN’s June 2, 2014 Supplemental Letter Brief at n. 6, ICANN stated “As ICANN has noted, even if IRPs were arbitrations, which they are not, under the Federal Arbitration Act and the California Arbitration Act, ‘enforceability of an arbitration agreement is ordinarily to be determined by the court’ unless it is established ‘by clear and unmistakable evidence that the parties intended to delegate the issue to the arbitrator.’ ICANN’s Further Memorandum Regarding Procedural Issues ¶ 11 n. 18 (quoting *Ajamian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 781-82 (2012)). The authorities that DCA cites for the proposition that the Panel may find the terms of the waiver unconscionable actually speak only of the right of courts to do so. DCA’s response on Procedural Issues ¶ 15 n.47.”

28. In ICANN’s June 2, 2014 Supplemental Letter Brief, at p. 1, ICANN stated “ICANN reiterates that it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board. Further the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this

proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”

29. In ICANN’s June 2, 2014 Supplemental Letter brief, at n. 5, ICANN stated “And while the 2012 gTLD application (like the 2004 sTLD application) required DCA to waive its right to sue ICANN in court, it did not deprive DCA of remedies with respect to its application for .AFRICA. As ICANN has repeatedly emphasized, while this Panel’s declaration is not “binding” on ICANN’s Board, the Board takes all IRP declarations very seriously (and, in fact, followed the declaration of the ICM IRP Panel).”

30. After reading the Parties’ submissions and supporting material and listening to arguments, on or about August 14, 2014, the IRP Panel issued its Declaration on the IRP Procedure, in which it concluded that “this Declaration and [the Panel’s] future Declaration on the Merits of this case are binding on the Parties.” (Declaration on the IRP Procedure (14 August 2014) at ¶ 20, p. 5; see also (Declaration on the IRP Procedure (14 August 2014) at ¶ 131, p. 32.)

31. In ICANN’s December 3, 2014 Response to DCA’s Memorial on the Merits at ¶ 55, ICANN stated: “IRP Panels do not have authority to award affirmative relief. Rather an IRP Panel is limited to stating its opinion as to ‘whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws’ and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel’s recommendations.”

32. In its June 1, 2015 Letter to the Panel, ICANN stated: “...the Bylaws mandate that the Board has responsibility of fashioning the appropriate remedy once the panel has declared whether or not it thinks the Board’s conduct was inconsistent with ICANN’s Articles of Incorporation or Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.”

33. The IRP Panel issued its Final Declaration on July 9, 2015.

34. In its Final Declaration, the IRP Panel ruled that, rather than defer to the GAC’s advice, ICANN should have “investigate[d] the matter further.” The IRP Panel recommended that ICANN “continue to refrain from delegating the .AFRICA gTLD and permit [DCA’s] application to proceed through the remainder of the new gTLD application process.” (Final Declaration at ¶ 113; see also *id.* at p. 18). In its Final Declaration, Section V titled “Declaration of the Panel”, the IRP Panel stated:

“¶ 148 Based on the foregoing, after having carefully reviewed the Parties’ written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference class and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 may 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN’s Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

¶ 149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.

¶ 150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider . . .

As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.”

35. On January 20, 2016, DCA filed a lawsuit against ICANN in California state court.

#### PARTIES' CONTENTIONS

At the conclusion of the evidence, the Court expressed a tentative, indicated ruling that judicial estoppel did not apply because the Court has discretion not to apply it and that Defendant had not carried its burden of proving that the IRP was a quasi-judicial proceeding because the result was not binding in that in February 2016, ICANN's Board informed DCA that, because its application for .AFRICA did not pass Geographic Names Review, its application has failed.

##### A. Plaintiff:

Plaintiff argues that ICANN did not meet its burden of proving all of the elements of judicial estoppel at trial. Specifically, Plaintiff contends that it is without dispute that the IRP was a non-binding proceeding that subjected ICANN Board actions and inactions to accountability review by examining whether those actions/inactions complied with ICANN's Bylaws and Articles of Incorporation.

Accordingly, contends Plaintiff, ICANN did not prove that the IRP was a quasi-judicial proceeding or that DCA was successful in its position that the IRP was binding. DCA avers that it introduced evidence at trial that its statements at the IRP were made in the context of claims different from those at issue in the instant lawsuit and therefore DCA's positions in the IRP and this lawsuit are not completely consistent. Finally, DCA also presented evidence at trial that it was mistaken with regard to the scope of ICANN's litigation waiver and that it acted in good faith.

For these reasons, Plaintiff DCA asks this Court to adopt its tentative ruling as the final ruling and decline to apply judicial estoppel here.

##### B. Defendant:

Defendant ICANN contends that this Court should apply the doctrine of judicial estoppel for four reasons:

(1) "DCA's statements to the IRP Panel involved strategic decisions argued for material purposes. DCA argued that it could not file a lawsuit against ICANN in order to persuade the IRP Panel to issue seven critical and substantive rulings, without which the Panel might have reached a different result on those rulings and/or on the merits. Instead, as ICANN catalogs below, DCA argued multiple times that it could not file a lawsuit against ICANN, and DCA prevailed each time it made this argument. ICANN has not found a reported decision where the statements that formed the basis of the judicial estoppel were made so brazenly and so repeatedly as in this instance.



(2) As the Court balances the equities, the unfairness to the courts and to ICANN of allowing DCA to proceed with this lawsuit is manifest: had DCA not repeatedly told the IRP Panel that it could never file a lawsuit against ICANN, the IRP Panel might have reached a different outcome, and this lawsuit would never have been filed to address the events that occurred subsequent to the IRP that DCA now argues to be the basis for its remaining claims.

(3) The IRP Panel ruled in DCA's favor on the merits via a 63-page final determination. ("Final Declaration"), following an exhaustive twenty-month process that included discovery, extensive briefing, and a live hearing with opening statements, witness examination, and closing arguments. The process was truly quasi-judicial.

(4) One week after the IRP Panel issued its Final Declaration (and contrary to the Court's impression as indicated in its tentative), the ICANN Board granted in full the relief that was set forth in the IRP Panel's Final Declaration. While the IRP Panel had determined that its declaration would be binding, there was no indication that the Board was required to address that issue (and the issue was not even contained in the Panel's Final Declaration as the Panel and addressed it much earlier in the proceedings.) And, in fact, the Board did not reach the question of whether the Panel's declaration was binding on ICANN because it was not necessary to do so: the Board did not hesitate to award DCA the full extent of the relief that the IRP Panel had recommended (as demonstrated in the minutes of the Board meeting). For this reason the question of whether the IRP Panel's declaration was 'legally binding' should be a non-issue on whether the IRP was a 'quasi-judicial administrative proceeding' for judicial estoppel purposes because the ICANN Board adopted the Panel's declaration as if it were binding."

## DISCUSSION

As Jackson v. County of Los Angeles, supra, 60 Cal.App.4th at page 183 states, judicial estoppel applies when "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."

### A. The Same Party Has Taken Two Positions:

The evidence established that DCA had taken two different positions during the IRP Panel and litigation in this case.

In the IRP Panel, it argued to the Panel that the proceedings before the Panel were the only opportunity for DCA to obtain the relief sought, i.e., reinstatement in the application process. Defendant's Exhibit A is a chart showing seven occasions where DCA made this argument. (Defendant's Post-Trial Br. Pp. 14:3-16:8.)

By filing and pursuing this case, DCA took the position that it was entitled to pursue damages and declaratory relief through the causes of action pled in its Complaint and operative FAC.

### B. The Positions Were Taken in Judicial or Quasi-Judicial Administrative Proceedings:

The Court is satisfied that the IRP Panel had all of the hallmarks of a judicial or quasi-judicial panel.

The parties disagree whether the result of the IRP Panel was binding on the parties. Defendant contends that the results were binding while DCA argues that the results were not binding.

To resolve this issue, it is necessary to examine the specific facts that apply:

The IRP Panel found that: (1) ICANN should continue to refrain from delegating .AFRICA to ZACR while DCA's application is being processed; (2) ICANN should place DCA's application back into processing; and (3) ICANN should pay DCA's IRP costs. (Joint Tr. Ex. 43 ¶¶149-150.)

The ICANN Board resolved: (1) To continue to refrain from delegating .AFRICA to ZACR while DCA's application is being processed; (2) To place DCA's application back into processing; and (3) to pay DCA's IRP costs. (Joint Tr. Ex. 144.)

Thereafter, ICANN: (1) Continued to refrain from delegating .AFRICA to ZACR while DCA's application was being processed; (2) Placed DCA's application back into processing (Geographic Names Review) – the exact place the application had been before the IRP; and (3) Paid DCA's IRP costs.

At the end of the evidence presented in Phase 1, the Court expressed a tentative indicated finding that because the IRP decision was not ultimately binding, the IRP did not meet the requirement of a judicial or quasi-judicial proceeding.

However, the IRP decision was binding because the ICANN Board followed exactly the findings of the IRP Panel.

What caused the ICANN Board to ultimately remove DCA's application from the process were the actions of DCA in not complying with the ICANN Guidebook, not the ICANN Board in failing to follow the IRP decision.

The reasons require a closer examination of the supporting facts:

ICANN returned DCA's application to processing. DCA's application was placed exactly where it had been in 2013 when the GAC had issued its advice – the Geographic Names Review. The independent company hired by ICANN to evaluate geographic gTLDs (including the .AFRICA applications), InterConnect Communications ("ICC"), resumed evaluation of DCA's application and the letters that DCA submitted with its application for .AFRICA in 2012 that DCA claimed were letters of support. (3/1/18 Trial Tr. at 79:28-81:12.)

In September 2015, the ICC determined that DCA letters of support, which are from 2008 and 2009 (before the Guidebook was completed and years before DCA's application was submitted) do not contain all the information necessary to conform to the Guidebook's requirements. The ICC issued "Clarifying Questions," indicating what is missing from the support letters and asking DCA to obtain new, conforming letters. (ZACR had been asked to do the same regarding its letters of support during SACR's Geographic Names Review in 2013.) DCA refused to submit new letters, taking the position that its 2008/2009 letters were sufficient despite the ICC's explicit directive that such letters were insufficient. (2/28/18 Trial Tr. at 108:7-17; 3/1/18 Trial Tr. at 81:13-83:3.)

In October 2015, ICANN notified DCA that it has failed the Geographic Names Review but offered to allow DCA to have "Extended Evaluation," which DCA accepted. Because DCA has not submitted new letters, the ICC issues the same Clarifying Questions. DCA again refused to submit updated letters. (2/28/18 Trial Tr. 108:18-109:8; 3/1/18 Trial Tr. at 83:4-84:24.) DCA was given every opportunity to provide the required documentation, but it did not. (2/28/18 Trial Tr. at 108:7-109:8; 3/1/18 Trial Tr. at 81:13-84:24.) As a result,

six months after the IRP ended, the ICC determined that DCA's application did not pass the Geographic Names Review. In no way was that determination related to ICANN not following the IRP's Panel's Final Declaration.

Instead of submitting updated letters, DCA files suit.

C. DCA Was Successful in Asserting the First Position, i.e., the IRP Adopted the Position or Accepted It As True

As previously discussed, Plaintiff achieved what it sought in the IRP and its application was returned to the place where it had been before the IRP was invoked.

DCA contends that it did not succeed in its first position because the IRP decision was not actually binding on ICANN. As the Court has previously discussed what caused the ICANN Board to ultimately remove DCA's application from the process were the actions of DCA in not complying with the ICANN Guidebook, not the ICANN Board in failing to follow the IRP decision.

D. The Positions Taken by DCA were Totally Inconsistent and The First Position Was not Taken As a Result of Ignorance, Fraud or Mistake

DCA contends that if the Court were to apply judicial estoppel, it should be limited to the issues litigated during the IRP, not the causes of action exempted by the Covenant Not to Sue that survived ICANN's Motion for Summary Judgment. DCA argues that fraud, willful misconduct and claims arising post-IRP were not litigated so they could not have been totally inconsistent and would have been taken with ignorance of ICANN's post-IRP conduct.

The Court agrees. Defendant ICANN has not presented any compelling reason for not doing so. In fact, ICANN takes the position that if the Court is not willing to apply judicial estoppel globally to dismiss DCA's FAC, ICANN requests that, using its equitable powers, the Court hold that DCA is judicially estopped from re-litigating all of the claims it already litigated before the IRP Panel whether or not the Panel made formal findings on the various claims. This Court is not willing to go that far.

CONCLUSION

Based on judicial estoppel, the Court finds that DCA is precluded from litigating claims already litigated before the IRP Panel on which the IRP Panel made findings.

This finding does not preclude DCA from introducing evidence that arose before the Final Declaration so long as the evidence is foundational for a post-IRP claim of fraud or willful misconduct, which will be the primary issues addressed during the jury trial currently set for August 22, 2018.

DATED: May 7, 2018

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Howard L. Halm

Judge of the Superior Court