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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al.*,

Defendants.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

ICANN'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Statement of Undisputed Facts, Declaration of Jeffrey A. LeVee, and [Proposed] Order Filed Concurrently Herewith]

Date: August 9, 2017
Time: 8:30 a.m.
Dept: 53

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on August 9, 2017, at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department 53 of this Court, located at 111 N. Hill Street, Los Angeles, CA 90012, defendant Internet Corporation for Assigned Names and Numbers ("ICANN") will and hereby does move for summary judgment in its favor on plaintiff DotConnectAfrica Trust's ("DCA") First Amended Complaint ("FAC") in its entirety.

This motion is made pursuant to California Code of Civil Procedure section 437c, on the ground that, because the New gTLD Applicant Guidebook's Covenant Not To Sue ("Covenant") bars DCA's FAC in its entirety, there are no triable issues as to any material fact and ICANN is entitled to judgment as a matter of law. Cal. Code Civ. Proc. § 437c. This motion is further made on the ground that, because DCA argued in a prior proceeding that the Covenant prevented it from filing suit in a court of law, the claims in the FAC are blocked in their entirety by the doctrine of judicial estoppel.

This motion is based upon this notice of motion, the accompanying memorandum of points and authorities, the declaration and exhibits concurrently filed in support thereof, the papers, pleadings and other records on file herein, and such further evidence and argument as may be presented to the Court.

Dated: May 26, 2016

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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INTRODUCTION

When Plaintiff DotConnectAfrica Trust ("DCA") applied to the Internet Corporation for Assigned Names and Numbers ("ICANN") to operate the generic top-level domain ("gTLD") .AFRICA, DCA expressly agreed to be bound by a Covenant Not To Sue and Release ("Covenant"). All applicants for new gTLDs are bound by this Covenant, which bars any legal action arising out of the processing and evaluation of a new gTLD application such as DCA's application to operate .AFRICA, which is the sole basis for this action. Instead, applicants are offered several alternative dispute resolution mechanisms. Drafts of the New gTLD Applicant Guidebook ("Guidebook"), which included the Covenant, were posted for public comment years prior to DCA's application for .AFRICA, and DCA, a sophisticated entity, was an active participant in the drafting of the Guidebook.

Despite DCA's agreement to abide by the Covenant – and despite having taken advantage of two of the alternative dispute resolution mechanisms, and succeeded in one – DCA filed this lawsuit against ICANN when its application was denied. Although teeming with sensational allegations of deceit, conspiracy, and general unfairness, every cause of action in DCA's First Amended Complaint ("FAC") directly relates to the processing and consideration of DCA's application for .AFRICA and, as such, is barred by the Covenant. This Court already has ruled ***twice*** on this issue by denying DCA's motions for preliminary injunction and indicating that the second, fourth, fifth and ninth causes of action – for misrepresentation, unfair competition, and declaratory relief – are likely to be barred by the Covenant. The purpose of this motion is to confirm the Court's previous rulings, apply them to the remaining causes of action (each of which arises out of ICANN's processing of DCA's application), and put an end to this litigation.

Interpreting the Covenant as preventing DCA's claims in this lawsuit would be entirely consistent with DCA's position in the alternative dispute resolution mechanism that DCA successfully pursued against ICANN – the Independent Review Process ("IRP"). In the IRP, DCA argued that the IRP was the ***only*** independent forum in which DCA could challenge ICANN's actions because the Covenant barred DCA from filing a lawsuit. Based on this argument and others, the three-member panel of neutrals selected to hear the IRP ("IRP Panel")

issued a declaration in DCA's favor, which resulted in the ICANN Board returning DCA's application to processing. Having prevailed in the IRP, DCA is barred by the doctrine of judicial estoppel from taking the exact opposite position in this lawsuit.

As such, summary judgment is appropriate for two independent reasons: the Covenant bars this lawsuit; and the doctrine of judicial estoppel bars this lawsuit. ICANN therefore urges the Court to grant this motion and to enter summary judgment on all claims of DCA's FAC.

RELEVANT FACTS

A. The New gTLD Program and Guidebook

DCA applied for .AFRICA through the "New gTLD Program," which ICANN launched in 2012 to allow interested parties to apply for the creation of and opportunity to operate a top level domain (such as .GOV and .ORG).[1] (Statement of Undisputed Facts ("SUF") ¶ 1.) In connection with the New gTLD Program, ICANN published the Guidebook, which dictates the requirements for new gTLD applications to be approved, and the criteria by which they are evaluated. (SUF ¶ 2.) The Guidebook was developed over many years, during which numerous versions were published for public comment beginning in late 2008. (SUF ¶ 20.) DCA participated in the development of the Guidebook: its CEO was actively involved in the ICANN community beginning in 2005, and she helped to "formulat[e] the rules and requirements" for the New gTLD Program, including submitting public comments on drafts of the Guidebook. (SUF ¶ 21.)

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

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

[1] For a more detailed description of ICANN and the New gTLD Program, please see ICANN's Opposition to DCA's Motion for Preliminary Injunction, filed January 9, 2017.

(SUF ¶ 3.) In deposition, DCA specifically admitted that, by submitting its application for .AFRICA, it had agreed to be bound by the terms and conditions of the Guidebook. (SUF ¶ 4.) The New gTLD Program resulted in 1,930 applications for approximately 1,400 new gTLDs. (SUF ¶ 35.)

B. Module 6 And The Covenant Not To Sue

Module 6 of the Guidebook contains the Covenant, which bars lawsuits against ICANN arising out of its evaluation of new gTLD applications:

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

(SUF ¶ 5.) Module 6 also makes clear that ICANN has the absolute discretion to "determine not to proceed with any and all applications for new gTLDs." (SUF ¶ 6.)

Although the Covenant bars lawsuits against ICANN, ICANN's Bylaws[2] provide alternative dispute resolution mechanisms (often referred to as "accountability mechanisms") to ensure that ICANN operates in accordance with its Articles and Bylaws. (SUF ¶ 24.) For example, applicants can request reconsideration of any action or inaction by the ICANN staff or Board, referred to as a Reconsideration Request. (SUF ¶ 26.) An aggrieved applicant can also

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[2] For purposes of this motion and this lawsuit, the operative Bylaws are ICANN's Bylaws, as modified 8 December 2011. (*See* LeVee Decl. Ex. M). Extensively revised ICANN Bylaws came into effect on 1 October 2016. The 2016 Bylaws, however, do not apply here because the events at issue in this case, including DCA's 2012 application for .AFRICA and the IRP proceeding initiated by DCA in 2013, occurred prior to the 2016 revision. Although modifications were made to ICANN's Bylaws between December 2011 and October 2016, there were no substantive modifications to the portions of ICANN's Bylaws that are relevant to this motion.

ask independent panelists to evaluate whether an action or inaction of ICANN's Board was inconsistent with ICANN's Articles and Bylaws, referred to as an Independent Review Process ("IRP"). (SUF ¶ 27.) A new gTLD applicant can also use an IRP to challenge whether the ICANN Board violated the Bylaws by acting on its application: the Covenant specifically notes that applicants will be able to use any of the resolution mechanisms contained in ICANN's Bylaws. (SUF ¶¶ 25, 28.)

C. DCA's Successful Use of ICANN's Alternative Dispute Resolution Mechanisms

DCA made use of two of these alternative dispute resolution mechanisms prior to filing suit against ICANN. In 2013, ICANN's Governmental Advisory Committee ("GAC") issued "consensus advice" that DCA's application should not proceed. (Willett Decl. Ex. D.) The GAC is charged with advising ICANN on "concerns of governments . . . or where they may affect public policy issues." (Atallah Decl. ¶ 5; Guidebook Module 3 § 3.1.) If the GAC issues "consensus advice" against an application, this creates a "strong presumption for the ICANN Board that the application should not be approved." (Guidebook Module 3 § 3.1.) When ICANN's Board accepted the GAC advice, and stopped the processing of DCA's application for .AFRICA, DCA filed a Reconsideration Request. (SUF ¶ 29.) When that was unsuccessful, DCA initiated an IRP. (SUF ¶ 30.)

In its pre-hearing submissions to the IRP Panel, DCA emphasized that, under the Covenant, the IRP was DCA's only option to challenge ICANN's actions regarding DCA's application for .AFRICA. (SUF ¶ 41.) Specifically, DCA argued that Guidebook Module 6 effectively waives an applicant's right to a lawsuit "in exchange... for the right to challenge a final decision of ICANN through the accountability mechanisms set forth in ICANN's Bylaws, including IRP." (*Id.*) "As a result," DCA stated, "the IRP is the ***sole forum*** in which an applicant for a new gTLD can seek independent, third-party review of Board actions." (SUF ¶ 42) (emphasis added.)[3]

[3] DCA made this argument in order to try to persuade the IRP Panel that any decision it issued should be binding rather than non-binding; ICANN argued it was non-binding. (SUF ¶ 41, 44.) DCA was successful: based in part on its argument that the IRP was its sole remedy, the IRP (continued)

After a two year process during which ICANN produced hundreds of documents, drafted numerous responsive documents and supporting declarations, and put forth witnesses to testify under oath at the IRP hearing, on July 9, 2015, the three-member IRP Panel issued a Final Declaration (the "IRP Final Declaration"), finding in DCA's favor.[4] (SUF ¶ 31.) In acting on the IRP Declaration, the ICANN Board directed that DCA's application be returned to processing. (SUF ¶ 33.) (Atallah Decl. ¶ 12 & Ex. F (Board Resolutions 2015.07.16.01-05).) Thereafter, DCA was unable to obtain the requisite approval or non-objection of 60% of the governments from the continent of Africa, and therefore its application was not approved.[5] DCA could have initiated a second IRP, focused on ICANN's rejection of DCA's application (rather than ICANN's earlier acceptance of the GAC advice); instead, DCA opted to sue ICANN over the rejection of its application, in direct contravention of the Covenant. (SUF ¶ 34.)

D. DCA's Claims Against ICANN

DCA's FAC contains a total of ten causes of action against ICANN: breach of contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, and four claims for declaratory relief. (FAC ¶¶ 62-142.) DCA also

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Panel found that its decision was binding on the parties. (SUF ¶ 46.)

[4] The IRP Panel concluded that, rather than defer to the GAC's advice, ICANN should have "investigate[d] the matter further." (LeVee Decl. Ex. I ¶ 113). 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." (*Id.* ¶ 149.) DCA asked for various other relief, which the IRP Panel denied. (*Id.* ¶ 146.)

[5] As ICANN has detailed in prior filings, an applicant for a geographic top-level domain such as .AFRICA was required under the Guidebook to demonstrate that its application has the support or non-objection of 60% of local governments. In an attempt to meet this requirement, DCA had submitted with its application in 2012 two letters of support – a 2008 letter from the United Nations Economic Commission for Africa ("UNECA") and a 2009 letter from the African Union Commission ("AUC"). The Geographic Names Panel had not finished its review of DCA's support letters when the ICANN Board accepted the GAC consensus advice against DCA's application and halted the processing of DCA's application. When DCA prevailed at the IRP, and its application was returned to processing, the Geographic Names Panel analyzed DCA's 2008 and 2009 letters and found the letters did not conform to the Guidebook requirements. The Geographic Names Panel requested that DCA provide updated, conforming letters, but the AUC had withdrawn its endorsement of DCA in 2010, before DCA had even applied for .AFRICA, and UNECA made clear that it did not intend its 2008 letter to be an endorsement of DCA's application. DCA was therefore unable to obtain updated letters of support (indeed, DCA indicated that it did not even try), and its application accordingly did not proceed. For more detailed background information, see ICANN's Opposition to Motion for Preliminary Injunction, filed on January 9, 2017.

alleges intentional interference with a contract as to co-defendant ZACR.[6] (*Id.* ¶¶ 108-114.) The thrust of DCA's claims is that ICANN breached its contract with DCA – meaning, the Guidebook – by failing to review DCA's application for .AFRICA in accordance with ICANN's Articles of Incorporation, Bylaws, and the Guidebook, and by allegedly assisting a competing applicant for .AFRICA. (*Id.* ¶¶ 68-69.) DCA's intentional and negligent misrepresentation claims are based on its allegation that ICANN failed to review DCA's application in accordance with ICANN's Articles of Incorporation, Bylaws, and the Guidebook, and that ICANN failed to participate in good faith in the IRP. (*Id.* ¶¶ 74-77, 80-81.) DCA's claim for "fraud and conspiracy to commit fraud" alleges that ICANN conspired with third parties (the AUC and ZACR) to deny DCA's application. (*Id.* ¶¶ 84-93.) DCA also asserts claims for unfair competition and negligence arising out of the same operative facts. (*Id.* ¶¶ 96-107.)

DCA's four claims for declaratory relief ask the Court: (1) to "confirm" the IRP Panel's Declaration (*id.* ¶¶ 118); (2) to require ICANN to "follow the IRP Declaration and allow [DCA's] application to proceed through the delegation phase of the application process (*id.* ¶ 124)[7]; (3) to declare "that the registry agreement between ZACR and ICANN [is] null and void and that ZACR's application does not meet ICANN standards" (*id.* ¶ 132); and (4) to declare that the Covenant is unenforceable (*id.* ¶ 142).

DCA filed two motions for preliminary injunction with this Court seeking to halt the delegation of .AFRICA to ZACR. DCA's first motion was based on its Ninth cause of action for declaratory relief. (Declaration of Jeffrey A. LeVee ("LeVee Decl.") ¶ 14.) The Court denied that motion based on "the reasoning expressed in the oral and written arguments of defense

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[6] ZACR, or ZA Central Registry, also applied for .AFRICA in 2012. ZACR's application met all Guidebook requirements, including demonstrating that it had the support or non-objection of 60% of relevant governments. As the only successful applicant, ZACR obtained the rights to operate .AFRICA in 2013. However, because of the IRP proceedings and this lawsuit, the delegation of .AFRICA to ZACR was on hold until DCA's third motion for preliminary injunction was denied by this Court on February 3, 2017. For further background information regarding ZACR and its application for .AFRICA, see ICANN's Opposition to Motion for Preliminary Injunction, filed on January 9, 2017.

[7] In deposition, DCA subsequently agreed that the IRP declaration did not (as DCA alleged) require that ICANN allow DCA to skip the Geographic Names Review. (SUF ¶ 38.)

counsel," which included ICANN's argument that DCA's claim was barred by the Covenant. (LeVee Decl. ¶ 14, 15, Ex. J.) DCA's second motion for preliminary injunction was based on its second cause of action for intentional misrepresentation and its fifth cause of action for violation of California's Unfair Competition law. (LeVee Decl. ¶ 16.) On February 3, 2017 the Court denied the second motion as well, holding in part:

> For the reasons set forth in the Ruby Glen order, it appears that the Covenant is enforceable. If the Covenant is enforceable, DCA's claims against ICANN for fraud and unfair business practices are likely to be barred. As a result, DCA cannot establish that it is likely to succeed on the merits.

(LeVee Decl. Ex. K.)

ICANN agrees with the Court's previous orders denying DCA's motions for preliminary injunction, and brings this motion requesting that the Court enforce the Covenant and dismiss this lawsuit.

LEGAL STANDARD

A defendant is entitled to summary judgment where a cause of action has no merit. Cal. Civ. Proc. Code § 437c(f)(1). A defendant meets its burden of showing that a cause of action has no merit if it negates one or more elements of the cause of action, or establishes that there is a complete defense to that cause of action. *Id.*; *City of Emeryville v. Superior Court*, 2 Cal. App. 4th 21, 25 (1991). A defendant's motion for summary judgment shall be granted where, from the evidence presented, there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. Cal. Code Civ. Proc. § 437c(c).

Once the defendant has carried its initial burden, the burden shifts to the plaintiff to produce evidence sufficient to support a verdict in its favor. *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 849 (2001). The plaintiff must make an independent showing with competent evidence that a triable issue of material fact exists which bars summary judgment by putting forth substantial evidence to meet this burden. *Id.* "An issue of fact . . . is not created by speculation, conjecture, imagination or guess work . . . conclusory assertions, or mere possibilities" or by allegations in the complaint. *Lyons v. Sec. Pac. Nat'l Bank*, 40 Cal. App. 4th 1001, 1014 (1995) (internal quotation marks and citations omitted). When the record, taken as a whole, could not

lead a rational trier of fact to find for the plaintiff, there is no genuine issue for trial and summary judgment must be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

A court may also grant a defendant's summary judgment motion based on a finding that the plaintiff's action is barred by the doctrine of judicial estoppel. *RSL Funding, LLC v. Alford*, 239 Cal. App. 4th 741, 748 (2015). "Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. Courts apply the doctrine to prevent internal inconsistency, preclude litigants from playing 'fast and loose' with the courts, and prohibit parties from deliberately changing positions according to exigencies of the moment." *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 102 Cal. App. 4th 181, 189 (2002) (internal citations omitted); *Jackson v. Cty. of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997) ("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") (citations omitted); *Thomas v. Gordon*, 85 Cal. App. 4th 113, 118 (2000) ("The 'essential function and justification of judicial estoppel is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.'") (citation omitted).

Judicial estoppel most appropriately applies where: "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*, 60 Cal. App. 4th at 183; *Thomas*, 85 Cal. App. 4th at 118.

ARGUMENT

I. DCA'S ENTIRE FAC IS BARRED BY THE COVENANT.

A. The Covenant Bars Each And Every Claim.

A written release generally extinguishes any claim covered by its terms. *Skrbina v.*

Fleming Cos., 45 Cal. App. 4th 1353, 1366–67 (1996). The Covenant, which DCA acknowledged and accepted, bars ***all*** of the claims set forth in the FAC because they "arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN" in connection with ICANN's review, investigation, or verification, of, or its decision not to approve or recommend, DCA's application. (SUF ¶ 5.)

In *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Nos.*, No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS 163710, at *10–11 (C.D. Cal. Nov. 28, 2016), a United States District Court dismissed another lawsuit filed by a gTLD applicant against ICANN on the sole ground that the Covenant bars all "claims related to ICANN's processing and consideration of a gTLD application." *See also Commercial Connect v. Internet Corp. for Assigned Names & Nos.*, No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550, at *9–10 (W.D. Ky. Jan. 26, 2016) (holding that the Covenant is enforceable, "clear and comprehensive.").

Here, as in *Ruby Glen,* each of DCA's claims, no matter how styled, boils down to allegations regarding ICANN's review and processing of DCA's application, including its decision not to approve the application. Specifically:

- DCA's first claim against ICANN, for breach of contract, is based on DCA's allegation that ICANN failed to "review Plaintiff's .AFRICA application in accordance with ICANN's Bylaws, Articles of Incorporation, and the new gTLD rules [and procedures]. . . ." (SUF ¶ 8.)

- DCA's second and third claims, for intentional and negligent misrepresentation, are based on DCA's allegation that "ICANN represented to Plaintiff that Plaintiff's application for .AFRICA would be reviewed in accordance with ICANN's [Bylaws], Articles of Incorporation, and the new gTLD [rules and procedures]." (SUF ¶ 9.)

- DCA's fourth claim, for fraud and conspiracy to commit fraud, is based on the allegation that, in lieu of properly reviewing DCA's application, ICANN conspired to "improperly deny[] Plaintiff's application" and accepted a competing application for .AFRICA. (SUF ¶ 10.) (*Id.* ¶¶ 84-85.)

- DCA's fifth claim, for unfair competition, is based on the same allegations underlying its first four claims. (SUF ¶ 11.)

- DCA's sixth claim, for negligence, is based on ICANN's alleged "duty to act with proper care in processing Plaintiff's application," including an alleged duty to investigate the GAC's advice concerning DCA's application and an alleged duty

not to consider or move forward with the competing application for .AFRICA. (SUF ¶ 12.)

- Three of DCA's claims for declaratory relief relate to DCA's application and ICANN's processing thereof. DCA asks the Court: (1) to "confirm" the IRP Declaration (which dealt with the processing of DCA's application); (2) to require ICANN to "follow the IRP Declaration and allow [DCA's] application to proceed through the delegation phase of the application process"[8]; and (3) to declare "that the registry agreement between ZACR and ICANN [is] null and void and that ZACR's application does not meet ICANN standards." The fourth request for declaratory relief relates to the Covenant at issue in this motion. (SUF ¶13-16.)

By their express terms, each of these claims arises out of "ICANN's processing and consideration of" DCA's application for .AFRICA. *Ruby Glen,* 2016 U.S. Dist. LEXIS 163710 at *10–11. Thus, as in *Ruby Glen*, each and every one of DCA's claims is barred by the Covenant.

B. The Covenant Is Enforceable.

Fully aware that the Covenant bars its claims, DCA argues that the Covenant is unenforceable. Specifically, DCA claims that the Covenant is void pursuant to California Civil Code section 1668 ("Section 1668"), that the Covenant is unconscionable, and that the Covenant was procured by fraud. (FAC ¶¶ 136-138.) As this Court previously has found, none of these allegations has merit.

1. Section 1668 Does Not Apply To The Covenant.

Section 1668 invalidates clauses that seek to "exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another." Cal. Civ. Code § 1668. Thus, Section 1668 is relevant only to contractual provisions "which have for their object, directly or indirectly, to *exempt* any one from responsibility" for fraud or willful injuries. Cal. Civ. Code § 1668 (emphasis added). The California Supreme Court has invalidated provisions waiving judicial remedies under Section 1668 only upon concluding that "the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.'" *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 163 (2005) (quoting Section 1668), *overruled on other grounds*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333

[8] DCA has previously acknowledged that the IRP Panel's recommendations did ***not*** include allowing DCA's application to proceed to the delegation phase of the application process. (SUF ¶ 38.)

(2011).

DCA's FAC specifically notes that the Covenant explicitly provides for the use of alternative dispute resolution mechanisms, referred to as accountability mechanisms in ICANN's Bylaws and Guidebook: "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." (SUF ¶ 17.) Thus, the Covenant does not exempt ICANN from responsibility; any applicant may invoke the various accountability mechanisms provided for in ICANN's Bylaws. (SUF ¶ 18.) DCA utilized two of those third-party accountability mechanisms, and, in fact, *won* its IRP. (SUF ¶ 31.) As a result of DCA's success in the IRP that it initiated, ICANN returned DCA's application to processing despite the consensus GAC advice that had caused ICANN to stop processing the application. Nevertheless, once ICANN resumed processing DCA's application, the application failed because DCA did not have the requisite support or non-objection of the countries of Africa (and the IRP Panel did not exempt DCA from having to obtain that support). (SUF ¶ 33, 38.) Even then, DCA still had an alternative resolution remedy available to it: it could have pursued a second IRP related to the determination that DCA had failed the Geographic Names Review. (SUF ¶ 24.) Instead, DCA filed this lawsuit.

Courts have interpreted Section 1668's phrase "willful injury to the person or property of another" to mean more than merely intentional conduct, but instead "intentional wrongs." *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th 35, 43 (2011) ("Ordinarily, the statute invalidates contracts that purport to exempt an individual or entity from liability for future *intentional wrongs and gross negligence*.") (emphasis added) (citations omitted). In *Food Safety Net Services v. Eco Safe Systems USA, Inc.*, 209 Cal. App. 4th 1118 (2012), the cross-complainant alleged that the cross-defendant food safety equipment tester employed "slovenly procedures which seemed to be slanted towards a preconceived conclusion." *Id.* at 1125. Despite these allegations, the court held that a limitation of liability clause was enforceable and barred not only the cross-complainant's claim for breach of contract but also cross-complainant's "bad faith" claim. *Id.* at 1125–27.

Similarly, DCA's claims of a "pretext[ual]" outcome for DCA's application, or its allegation that ICANN "allowed" ZACR and the AUC to violate ICANN's rules and procedures – even if true (which they are not) – do not assert a "willful injury" within the meaning of Section 1668. *See Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 729 (1998) ("While the word 'willful' implies an intent, the intention must relate to the misconduct and not merely to the fact that some act was intentionally done.") (citations omitted), *disapproved of on other grounds, Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826 (2001).

As the court in *Ruby Glen* stated: "[b]ecause the [C]ovenant not to sue only applies to claims related to ICANN's processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which . . . section *1668* applies." *Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *9–11. Just as in *Ruby Glen*, the conduct alleged in DCA's FAC does not amount to "fraud, or willful injury to the person or property of another." Instead, DCA challenges only ICANN's "processing and consideration of a gTLD application." That is neither fraud nor "willful injury." Accordingly, Section 1668 does not invalidate the Covenant.

2. The Covenant Is Not Unconscionable.

To establish that the Covenant is unconscionable, DCA bears the burden of showing that the Covenant is both procedurally and substantively unconscionable. *See McCaffrey Grp., Inc. v. Superior Court*, 224 Cal. App. 4th 1330, 1348 (2014); *see also Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *15–16. The procedural unconscionability analysis "addresses the circumstances of contract negotiation and formation, focusing on oppression and surprise due to unequal bargaining power." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347 (2015). The sophistication of the contracting party weighs heavily against a finding that any oppression took place. *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 26–27 (1989).

Neither "oppression" nor "surprise" took place here. DCA is unquestionably a sophisticated entity, one that claims to possess the significant technical and financial wherewithal required to operate a gTLD registry on behalf of an entire continent. (SUF ¶ 19.) DCA's CEO

has been "active in the DNS" industry, has an MBA, and has worked for banks and auditors. (SUF ¶ 19.) DCA cannot claim to have been "oppressed" into agreeing to a contract provision it had ample sophistication to comprehend. *See Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322 (2005) (rejecting unconscionability claim because it is reasonable to expect a merchant to "carefully read, understand, and consider" its agreements).

Nor can DCA claim it was "surprised" by the Covenant. To the contrary, DCA admits it was aware of the Covenant when it applied for .AFRICA. (SUF ¶ 23.) The Covenant was highlighted through capitalization and formatting, and the Guidebook was adopted after numerous versions containing the Covenant were posted for public comment. (SUF ¶¶ 20, 22.) According to DCA, DCA's CEO even helped to formulat[e] the rules and requirements for the New gTLD Program," including the Guidebook. (SUF ¶ 17.) Moreover, DCA's argument to the IRP Panel that the IRP Panel's decision should be binding on the parties precisely because the Covenant prevented DCA from filing a lawsuit makes clear that DCA was not only aware of the Covenant when it applied for .AFRICA, but fully appreciated its meaning and impact, and utilized it to DCA's own advantage. (*See* SUF ¶ 41.)

Given DCA's sophistication and its awareness of the Covenant, there is no basis to conclude that the Covenant is procedurally unconscionable, and the *Ruby Glen* court agreed. *See Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *13 ("the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook '. . . has been revised extensively via public comment . . .' militates against a conclusion that the covenant not to sue is procedurally unconscionable") (citation omitted).

Nor is the Covenant substantively unconscionable. Substantive unconscionability exists only where the terms are so one-sided as to "shock the conscience." *Morris*, 128 Cal. App. 4th at 1323 (citation omitted). Here, DCA claims that the Covenant is substantively unconscionable because it is one-sided, and because it allows ICANN to "absolve itself of wrongdoing while affording no remedy to applicants." (FAC ¶ 137.) First, this is demonstrably untrue. As discussed above, the Covenant specifically allows gTLD applicants to utilize various alternative

resolution mechanisms in the event of any dispute or grievance – mechanisms DCA itself utilized by initiating the IRP. (SUF ¶¶ 25, 29, 30.) ICANN actively participated in the IRP proceedings, including producing documents, drafting responsive documents and supporting declarations, and participating at the IRP hearing. (SUF ¶ 31.) DCA prevailed in the IRP, and ICANN's Board returned DCA's application to processing in accordance with the IRP Panel's declaration. (SUF ¶¶ 31, 33.) Thus, any claim that the Covenant "absolve[s] [ICANN] of wrongdoing while affording no remedy to applicants" is proven false by DCA's own experience.

Further, "[u]nconscionability turns *not only* on a 'one-sided' result, but also on an absence of 'justification' for it." *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647 (2010) (citations omitted); *see also Kurashige v. Indian Dunes, Inc.*, 200 Cal. App. 3d 606, 614 (1988). Here, the Covenant has a well-founded justification: absent a broad litigation waiver for the New gTLD Program, the applicants for the over 1,900 applications could initiate frivolous and costly legal actions to challenge legitimate ICANN decisions, which could have placed the successful implementation of the New gTLD Program in jeopardy. The Covenant was deemed appropriate in light of these considerations. (SUF ¶ 36.) The court in *Ruby Glen* confirmed this reasoning: "Without the covenant not to sue, any frustrated applicant could . . . derail the entire system developed by ICANN . . . ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue." *Ruby Glen, LLC*, 2016 U.S. Dist. LEXIS 163710, at *15. Moreover, it is not true that the Covenant benefits only ICANN. The Covenant achieves finality and reduces delays and uncertainties, which benefits new gTLD applicants generally and hastens the delivery of the benefits of new gTLDs for the advantage of the Internet community.

3. DCA's Allegation That The Covenant Was Procured By Fraud Is Directly Contradicted By Its Own Admission.

The FAC alleges that the Covenant was procured by fraud because, although ICANN's Bylaws and the Guidebook promise a "real and effective" dispute resolution mechanism, according to DCA ICANN did not abide by the IRP Declaration when ICANN returned DCA's application back to the Geographic Names Review for processing. (FAC ¶ 139.) However, DCA

subsequently contradicted its own argument: DCA admitted in discovery that nothing in the IRP Declaration permitted DCA's application to skip the Geographic Names Review (which DCA's application had not completed at the time the Board accepted the GAC's consensus advice and halted the processing of DCA's application), and that ICANN therefore acted in conformance with the IRP Declaration by placing DCA's application back into the Geographic Names Review. (SUF ¶ 38.) Thus, the only stated basis for DCA's assertion that the Covenant was procured by fraud – that ICANN had no intention of, and failed to, abide by the results of the IRP – is negated by DCA's own admission, rendering DCA's argument that the Covenant was procured by fraud meritless.

Because DCA's entire lawsuit is barred by the Covenant, and because the Covenant is enforceable against DCA, summary judgment should be granted as to DCA's entire FAC.

II. DCA'S ENTIRE FAC ALSO IS BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL.

The FAC should also be dismissed pursuant to the doctrine of judicial estoppel. As described above, DCA successfully argued during the IRP that the Covenant bars new gTLD applicants from challenging ICANN's actions in court. (SUF ¶¶ 41-46.) Then, when DCA's application for .AFRICA was later denied because of its inability to meet Guidebook requirements, DCA filed this lawsuit. (SUF ¶ 49.) This reversal of position meets all requirements for the doctrine of judicial estoppel.

A. DCA Has Taken Two Clearly Inconsistent Positions.

"[F]or the doctrine [of judicial estoppel] to apply, the seemingly conflicting positions 'must be clearly inconsistent so that one necessarily excludes the other." *Jackson*, 60 Cal. App. 4th at 182 (citation omitted). DCA's position in the IRP was that the IRP was its "sole forum" to seek independent, third party review of ICANN's actions. Yet, in this Court, DCA argues that the IRP was not the sole forum to seek independent, third party review of ICANN's actions. These positions are absolutely inconsistent.

B. DCA Was Successful in Asserting Its First Position.

DCA was successful in asserting its first position before the IRP Panel that the Covenant

did not permit DCA to file a lawsuit against ICANN. After DCA initiated the IRP proceedings, the IRP Panel issued lists of questions for the parties to brief regarding IRP procedures. (SUF ¶ 39.) Among these was this question: "[i]s the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?" (SUF ¶ 40.) In response, DCA argued that the IRP was DCA's *sole forum* to challenge ICANN's actions because new gTLD applicants waive any right to seek redress through the judicial system. (SUF ¶ 41.) On this basis, DCA argued that the IRP Panel's decision must be binding in order to both justify the waiver and remain consistent with California law. (SUF ¶ 43.) The IRP Panel accepted DCA's statement as true, finding that under the Covenant, "[t]he avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts," and that under the Covenant, "the ultimate 'accountability' remedy for applicants is the IRP." (SUF ¶ 45.) Based in part on this determination, the IRP Panel held that its decisions must therefore be binding. (SUF ¶ 46.)

Thus, the IRP Panel accepted DCA's position as true and adopted it in finding in DCA's favor. *Jackson*, 60 Cal. App. 4th at 183 (application of judicial estoppel requires that the party was successful in asserting the first position, "i.e., [that] the tribunal adopted the position or, accepted it as true[.]"); *People ex rel. Sneddon*, 102 Cal. App. 4th at 189 ("The party invoking judicial estoppel must show that ... the position was adopted by the first tribunal in some manner such as by rendering a favorable judgment.").

C. DCA's First Position Was Taken In A "Quasi-Judicial Administrative Proceeding."

To qualify for judicial estoppel, a party's statements need not be made in a court of law, but can be made in a "quasi-judicial administrative proceeding." *Jackson*, 60 Cal. App. 4th at 183. What constitutes a "quasi-judicial administrative proceeding" is not strictly defined under California law, in keeping with the notion that judicial estoppel is an equitable, and therefore inherently flexible, doctrine. *See, e.g.*, *Thomas*, 85 Cal. App. 4th at 118 (noting that because judicial estoppel is an equitable doctrine, courts could not rule out the possibility that circumstances may warrant application of the doctrine even if one of the *Jackson* factors were not met).

The Ninth Circuit (in addition to other circuits) has found that certain proceedings, such as arbitrations, can constitute "quasi-judicial administrative proceedings" for purposes of judicial estoppel where they bear the "formal hallmarks of a judicial proceeding": the swearing of an oath of truthfulness by the parties, the calling of witnesses, and a neutral party presiding over the hearing. *Tri-Dam v. Schediwy*, No. 1:11-CV-01141-AWI, 2014 WL 897337, at *6 (E.D. Cal. Mar. 7, 2014); *see also Keshish v. Allstate Ins. Co.*, 959 F. Supp. 2d 1226, 1242 (C.D. Cal. 2013) (citing *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062 (5th Cir. 1990), for the proposition that unlike some other proceedings, "an arbitration is a quasi-judicial proceeding"); *In re Siller*, 427 B.R. 872, 886 (Bankr. E.D. Cal. 2010) (stating that "[t]here is no persuasive reason why an arbitration adjudicatory in nature should be viewed differently than the quasi-judicial administrative proceeding on which an estoppel can be based"), *overruled on other grounds*, *Cotchett, Pitre & McCarthy v. Siller*, Nos. CIV S–10–0779 KJM, CIV S–10–0780 KJM, 2012 WL 1657620 (E.D.Cal. May 10, 2012).

This IRP proceeding between ICANN and DCA bore the "formal hallmarks" of a judicial proceeding: it was a structured proceeding in which the parties submitted briefs and exchanged discovery; witnesses testified under oath;[9] a neutral panel, which found that its final decision should be binding on the parties, presided over the proceedings; and following its issuance, both parties acted in accordance with that panel's declaration. (SUF ¶ 47.) Indeed, DCA itself argued that the IRP was an arbitration:

> [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.

(SUF ¶ 48). By DCA's own words, the IRP qualifies as a "quasi-judicial administrative proceeding," and DCA's statements made therein are properly the subject of judicial estoppel.

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[9] Although ICANN disputed DCA's ability under ICANN's Bylaws to call witnesses during the hearing, the IRP Panel rejected ICANN's argument and required three witnesses to testify. (LeVee Decl. ¶ 10.)

D. DCA's Reversal Was Not The Product Of Ignorance Or Mistake.

DCA has never claimed that the positions that it took in the IRP were borne of ignorance or mistake, and it freely admits it knew (and argued that) the Covenant barred lawsuits against ICANN. (SUF ¶ 41.) When DCA wanted the IRP Panel to issue a final and binding declaration, DCA argued that the IRP was its only forum to challenge ICANN's actions, and that it had no ability to use the judicial system to address its claims. When its IRP victory did not ultimately result in DCA obtaining the contractual rights to operate .AFRICA (because it could not meet other Guidebook requirements), DCA reversed its position and filed this lawsuit. There is no evidence that either of these positions were taken as a result of ignorance or mistake.

DCA's gamesmanship comes at a great cost to the named parties, this Court, and most of all to the people of Africa, who waited for years for the benefits the .AFRICA gTLD could bring. This is precisely the sort of conduct that the equitable doctrine of judicial estoppel was intended to prevent.

CONCLUSION

DCA knew when it applied for .AFRICA that its application might not succeed. Every applicant runs that risk, and DCA knew its risk was particularly significant because at the time it applied, DCA knew that it did not have the support or non-objection from 60% of the local governments – a critical Guidebook requirement for an application for a "geographic" name. (FAC ¶¶ 24, 30.) DCA applied anyway, and in so doing, DCA agreed to be bound by the Covenant, just as the other 1,930 new gTLD applicants agreed.

DCA and Ruby Glen breached their agreement not to file a lawsuit against ICANN arising out of their applications, as set forth in the Covenant. The district court in *Ruby Glen* dismissed Ruby Glen's complaint at the Federal Rule of Civil Procedure 12(b)(6) stage because of the Covenant. Likewise, because DCA's claims all pertain to the "processing and consideration of" a new gTLD application, DCA's lawsuit is barred under the Covenant. In addition, because DCA itself relied on the applicability of the Covenant in the IRP, DCA is judicially estopped from filing this lawsuit.

ICANN respectfully requests that this Court grant ICANN's motion for summary judgment as to the entirety of DCA's FAC.

Dated: May 26, 2016

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS

NAI-1502648126

PROOF OF SERVICE

I, Diane Sanchez, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On May 26, 2017, I served a copy of the within document(s):

ICANN'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery.

☒ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 26, 2017, at Los Angeles, California.

Diane Sanchez

Diane Sanchez

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