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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a
13 Mauritius Charitable Trust,

14 Plaintiff,

15 v.

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

19 Defendant.

[Assigned for all purposes to:
Hon. Howard L. Halm Dep't 53]

Case No.: BC607494

**PLAINTIFF DCA'S CLOSING TRIAL
BRIEF**

[Request for Judicial Notice filed
concurrently herewith]

Date: March 26, 2018
Time: 8:30 a.m.
Dep't.: 53

1 **I. INTRODUCTION**

2 From February 28, 2018 through March 1, 2018 this Court held a bench trial regarding
3 whether Plaintiff DotConnectAfrica Trust (“DCA”) should be judicially estopped from
4 pursuing its claims before this Court based on statements DCA and its counsel made during
5 Defendant Internet Corporation for Assigned Names and Number’s (“ICANN”) Independent
6 Review Panel Process (“IRP”). The Court admitted over 50 exhibits into evidence and heard
7 the testimony from the CEO of DCA as well as the testimony of two high-level ICANN
8 employees. At the close of trial, the Court issued a tentative ruling declining to apply judicial
9 estoppel to DCA’s lawsuit on the basis that the Court has the discretion to deny the
10 application of judicial estoppel and that ICANN failed to prove the IRP was a quasi-judicial
11 proceeding – a required element of judicial estoppel.

12 ICANN did not meet its burden of proving all of the elements of judicial estoppel at
13 trial. Specifically, it is undisputed that the IRP was a non-binding proceeding that subjected
14 ICANN Board actions and inactions to accountability review by examining whether those
15 actions/inactions complied with ICANN’s Bylaws and Articles of Incorporation.
16 Accordingly, ICANN did not prove that the IRP was a quasi-judicial proceeding or that DCA
17 was successful in its position that the IRP was binding. DCA also introduced evidence at trial
18 that its statements at the IRP were made in the context of claims different from those at issue
19 in the instant lawsuit and therefore DCA’s positions in IRP and this lawsuit are not
20 completely inconsistent. Finally, DCA also presented evidence at trial that it was mistaken
21 with regard to the scope of ICANN’s litigation waiver and that it acted in good faith. For
22 these reasons and those described in more detail herein, DCA respectfully requests that the
23 Court adopt its tentative ruling as the final ruling and decline to apply judicial estoppel to the
24 instant matter. DCA Trust should not be judicially estopped from pursuing its law suit against
25 ICANN.

26 **II. ARGUMENT**

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

28 At trial, ICANN failed to meet its burden to prove *all* of the elements of judicial estoppel.
To establish judicial estoppel, the moving party must prove “(1) the same party has taken two

1 positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3)
2 the party was successful in asserting the first position (i.e., the tribunal adopted the position or
3 accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not
4 taken as a result of ignorance, fraud, or mistake.” *Jackson v. Cty. of L.A.*, 60 Cal. App. 4th 171,
5 183 (1997). “[E]ach case must be decided on its own facts and in light of equitable
6 considerations.” *Jogani v. Jogani* (2006) 141 Cal. App. 4th 158, 181. Here, ICANN failed to prove
7 the requisite elements.

8 ***1. The IRP Panel’s Decision Was Non-Binding So the IRP Was Not a***
9 ***Quasi Judicial Proceeding and DCA Was Not Successful in the IRP***

10 ***a) A “quasi-judicial proceeding” must at least be binding***

11 ICANN’s IRP is not a “judicial” or “quasi-judicial proceeding.” The *DCA v. ICANN IRP*
12 was not a binding arbitration or a binding adjudicative process. While there is no clear definition
13 of what qualifies as “quasi-judicial,” courts usually require that the proceeding have “the formal
14 hallmarks of a judicial proceeding. . . .” *Tri-Dam v. Schediwy*, No. 1:11-CV-01141-AWI, 2014
15 WL 897337, at *6 (E.D. Cal. Mar. 7, 2014). Furthermore, in determining whether to apply judicial
16 estoppel, “courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope
17 of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial
18 review of adverse rulings.” *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829 (1999); *see also*
19 *Sanderson v. Niemann*, 17 Cal. 2d 563, 573–575 (1941) (holding prior judgments not entitled to
20 collateral estoppel effect because of the informality of the proceedings and limited right to judicial
21 review).

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

- 1 • The IRP panel merely had the authority to “declare whether an action or inaction of the
2 Board was inconsistent with the [ICANN] Articles of Incorporation or [ICANN] Bylaws.”
3 [See Joint Exhibit No. 4 (April 2013 Bylaws Section 3.11); see Stipulated Fact No. 28].
- 4 • In its June 1, 2015 Letter to the Panel, ICANN stated: “...the Bylaws mandate that the
5 Board has responsibility of fashioning the appropriate remedy once the panel has
6 declared whether or not it thinks the Board’s conduct was inconsistent with ICANN’s
7 Articles of Incorporation or Bylaws. The Bylaws do not provide the Panel with the
8 authority to make any recommendations or declarations in this respect.” [Stipulated Fact
9 No. 32]. ICANN consistently argued during the IRP proceedings that the ICANN Board
10 was not bound to follow the rulings and recommendations of the IRP Panel, since the
11 Board could not outsource its decision making authority.
- 12 • There was no appeal to an IRP decision, nor could the parties confirm the final declaration
13 in court [Transcript of Christine Willet’s Trial Testimony at 115:8 – 116:5, RJN Ex. 2].
- 14 • ICANN argued that the IRP should be non-binding [Stipulated Fact No. 17].
- 15 • The IRP panel declared that its orders were binding on the parties. [Joint Exhibit 43 at
16 ¶23].
- 17 • After the IRP issued its final declaration on July 9, 2015, the ICANN Board voted on
18 whether or not to accept it: [Joint Exhibit 144].
- 19 • The ICANN Board never resolved to accept the panel’s finding that the IRP was a binding
20 proceeding. [Transcript of Christine Willet’s Trial Testimony at 111:13 – 111:21 (RJN
21 Ex. 2); Joint Exhibit 144]
- 22 • Some of the ICANN Board’s resolutions regarding the processing of DCA’s application
23 after the IRP were not adopted from the IRP Panel’s Final Declaration and were instead
24 independent directions by the ICANN Board as solutions fashioned by the ICANN Board:
25 [Transcript of Christine Willet’s Trial Testimony at 112:21 – 114:09 (RJN Ex. 2); Joint
26 Exhibit 144].
27
28

- 1 • IRP decisions were non-binding until approximately 9 months *after* DCA filed the instant
2 lawsuit, when ICANN changed its Bylaws make IRP declarations binding. [Transcript of
3 Akram Attalah’s Trial Testimony at 131:14 - 132:28 (RJN Ex. 2)].

4 In support of its argument in its trial brief that the IRP was a judicial proceeding, ICANN
5 cites to a number of federal cases – including a 5th circuit case and a bankruptcy case. ICANN
6 cites to two California state cases in support of its argument. All of the cases are inapposite,
7 however, because none of the cases find that a non-binding proceeding constitutes a quasi-judicial
8 proceeding. Furthermore, one of the cases does not analyze the doctrine of judicial estoppel at all.

9 In sum, the IRP was a non-binding and non-appealable procedure. The DCA v. ICANN
10 IRP was not a binding arbitration. It was a “corporate accountability mechanism” - as ICANN
11 referred to it --not a “quasi-judicial proceeding.”

12 ***b) DCA Did Not Succeed in its First Position because the IRP***

13 ***Decision Was Not Actually Binding on ICANN***

14 ICANN must also prove DCA “was successful in asserting [its] first position. . . .” “Absent
15 success in a prior proceeding, a party’s later inconsistent position introduces no ‘risk of
16 inconsistent court determinations’” *Jogani v. Jogani*, (2006) 141 Cal. App. 4th 158, 171 (internal
17 citations omitted). ICANN claims that this second element is met because the IRP Panel accepted
18 DCA’s position that the IRP was binding as true. However, as described in Section II.B.1.a, it
19 cannot be said that DCA *actually* succeeded in its position that the IRP should be binding because,
20 as seen in the claims and actions of ICANN following the conclusion of the DCA v. ICANN IRP
21 proceedings and its aftermath, the ICANN Board refused to treat IRP decisions as binding on it.
22 Instead, ICANN treated the IRP as an advisory opinion from an external review panel, which is
23 merely considered as input into ICANN’s decision-making process. The ICANN Board thought
24 that its decision should not be replaced by the IRP Panel’s decision. And, ICANN’s position was
25 that DCA could not have enforced the IRP decision or any subsequent ruling if entirely disregarded
26 by ICANN.

1 **2. DCA Presented Evidence At Trial Showing that Any Change in**
2 **Positions Were Made in Good Faith as the Result of Fraud or Mistake**

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

16 ICANN presented no evidence that DCA schemed to mislead or gain unfair advantage in
17 its positioning on the litigation waiver issue. Any change in DCA’s position resulted from
18 ICANN’s official positions during and after the IRP that the IRP Panel final ruling was in no way
19 binding on ICANN and in the fact that the claims before this Court are outside the scope of an
20 IRP. Because ICANN has failed to show any evidence of bad faith or fraudulent actions on the
21 part of DCA, and has in fact acknowledged DCA’s good faith actions during the IRP [Joint Exhibit
22 43 at ¶138.], this element is not satisfied, which is sufficient in itself to reject the application of
23 judicial estoppel.

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

- 26 • Sophia Bekele, the CEO of DCA is not a lawyer. [Transcript of 2/28/18 Sophia Bekele
27 Trial Testimony at 78:4 – 5 (RJN Ex. 1); Transcript of 3/1/2018 Sophia Bekele Trial
28 Testimony at 19: 10 – 13 (RJN Ex. 2)].

- 1 • The litigation waiver relevant to the judicial estoppel trial was drafted by ICANN.
2 [Transcript of 3/1/18 Trial Testimony of Christine Willet at 59:18 – 21 (RJN Ex. 2)].
- 3 • DCA did not ask its attorneys to opine on the binding nature of the waiver pursuant to
4 California law because the focus of the IRP was ICANN’s new generic Top Level Domains
5 (gTLD) Applicant Guidebook, ICANN’s Bylaws, and Articles of Incorporation.
6 [Transcript of Sophia Bekele’s 2/28/18 Trial Testimony at 54:12 – 20, 67:1 – 24, 68:6 – 17
7 (RJN Ex. 1)]
- 8 • At the time of the IRP, DCA was unaware of any court ruling as to the scope of ICANN’s
9 litigation waiver, nor has ICANN ever pointed to any. As a matter of fact, the DCA v.
10 ICANN IRP was the first IRP proceeding under ICANN’s new gTLD program. [See Joint
11 Exhibit 43 at ¶143].
- 12 • This Court subsequently ruled, while denying in part ICANN’s Motion for Summary
13 Judgment, that the claims now pending in the instant lawsuit are outside the scope of the
14 litigation waiver. [RJN Ex. 3 Court’s Order on ICANN’s Motion for Summary Judgment].
- 15 • At the time of the IRP, DCA was mistaken as to the scope of the litigation waiver.
16 [Transcript of Sophia Bekele’s 3/1/18 Trial Testimony at 51:15 – 21 (RJN Ex. 2)].
- 17 • ICANN speciously presented the IRP as an alternative to court litigation but never intended
18 to be bound by an IRP ruling, because in truth ICANN believes that its IRP procedures are
19 not a binding arbitral mechanism. [See Joint Exhibit No. 2 at Module 6 (“Applicant agrees
20 not to challenge, in court or in any other judicial for a, any final decision made by ICANN
21 with respect to the application...provided that applicant may utilize an accountability
22 mechanism set forth in ICANN’s bylaws for purposes of challenging any final decision
23 made by ICANN with respect to the application”); see Section II.B.1.a].

24 DCA did not act with bad faith, did not take inconsistent positions, and, contrary to
25 ICANN’s arguments during the MSJ, was not attempting to play ‘fast and loose’ with the judicial
26 system. See *Kelsey v. Waste Management of Alameda County*, 76 C.A.4th 590, 598, 90 C.R.2d
27 510 (1999) (rejecting judicial estoppel, despite inconsistency, because defendant failed to show
28

1 that plaintiff's failure to list claim was intentional and not result of ignorance); *Cloud v. Northrop*
2 *Grumman Corp.*, 67 Cal. App. 4th 995, 1018 (1998) (rejecting judicial estoppel, despite
3 inconsistency, because defendant "did not act with the intent to play fast and loose with the courts
4 that is required for application of the judicial estoppel doctrine") (internal citations omitted).

5 Because DCA did not act in bad faith and DCA presented evidence that it was mistaken in
6 taking its position with regard to the litigation waiver, and also mistaken on the binding
7 nature/applicability of the final IRP outcome since ICANN did not accept the final IRP decision
8 as binding on it, ICANN has failed to prove this prong of judicial estoppel. Accordingly, the Court
9 should not apply the doctrine of judicial estoppel to DCA's case.

10 **3. DCA's positions are not totally inconsistent**

11 The doctrine of judicial estoppel has a "limited purpose: to protect the integrity of the
12 judicial process, primarily by precluding a party from taking inconsistent positions that pose a *risk*
13 *of inconsistent court determinations.*" *Jogani v. Jogani* (2006) 141 Cal. App. 4th 158, 188
14 (emphasis added). Judicial estoppel is applied only against a party that has taken positions or made
15 statements that are "totally inconsistent." *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171,
16 183 (1997). Put another way, the party must have taken positions that are so irreconcilable that
17 "one necessarily excludes the other." *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935,
18 962–963 (1997). Ultimately, this element is a "very high threshold" and a "rigorous standard."
19 *Bell v. Wells Fargo Bank, N.A.*, 62 Cal. App. 4th 1382, 1387 (1998). Furthermore, if the litigant
20 can explain how the positions are consistent, generally the court will not apply judicial estoppel.
21 *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 798 (1998). ICANN did not show
22 that DCA's positions were so inconsistent as to warrant judicial estoppel. There is no risk of
23 inconsistent judicial determinations here because the IRP Panel only made determinations
24 regarding the binding nature of the IRP and whether the ICANN Board followed its Bylaws, and
25 Articles of Incorporation with respect to the ICANN Board deliberation and consideration of the
26 ICANN GAC decision against DCA's new gTLD application. DCA's remaining causes of action
27 in the lawsuit do not require the Court to rule on either of those issues. Furthermore, the IRP
28 panel's ruling was not binding. See *Minish v. Hanuman Fellowship*, 214 Cal. App. 4th 437, 454

1 (finding that there was no risk of inconsistent judicial determinations when one of the
2 determinations was not binding).

3 Second, even if the Court were to find that DCA’s position with regard to the Covenant at
4 the IRP and in this lawsuit are wholly inconsistent, DCA’s statements concerning waiver do not
5 establish judicial estoppel because they were not made within the current context of a lawsuit for
6 fraud and willful injury. [Transcript of 2/28/18 Trial Testimony of Sophia Bekele 152:8 – 157:19,
7 160:5 – 17 (RJN Ex. 1)]. Generally, litigants are not judicially estopped from changing their
8 positions when the circumstances surrounding the litigation have also changed. For instance,
9 litigants have been allowed to change prior statements not addressing the current scenario of the
10 litigation. *Miller v. Bank of Am.*, 213 Cal. App. 4th 1, 10 (2013). The IRP panel focused entirely
11 on whether the ICANN *Board* followed its own Bylaws and Articles of Incorporation *and the IRP*
12 *Panel did not analyze whether the Covenant was enforceable*; this litigation focuses on whether
13 ICANN is liable for actions by a number of actors in addition to the ICANN Board (including
14 staff, ICANN Board Committees, the ICANN Geographic Names Panel, and individual board
15 members, ICANN community affiliates/partners/collaborators) - under multiple theories including
16 fraud, not excluding intentional misconduct - in handling DCA’s application (and including
17 possible collusion by parties with a vested interest to deny DCA’s application) and issues related
18 thereto.

19 The current president of the Global Domains Division at ICANN admitted at trial that the
20 decisions made during the evaluation process by Interconnect Communications (“ICC”) at issue
21 in the instant litigation could not be the subject of an IRP. [Transcript of Akram Attalah’s Trial
22 Testimony at 129:10 – 130:19 (RJN Ex. 2)]. ICANN’s liability for fraud, the other causes of action
23 at issue in this litigation, and the enforceability of the Covenant, were never adjudicated by the
24 IRP. [See Joint Exhibit 43 at ¶¶112 – 117; Transcript of 2/28/18 Trial Testimony of Sophia Bekele
25 at 177:21 – 181:27; 189:14 - 21(RJN Ex. 1)]. Moreover, much of the harmful and injurious
26 conduct committed by ICANN against DCA that forms the basis for DCA’s claims in the instant
27 lawsuit took place *after* the IRP Panel issued its final declaration [Transcript of Sophia Bekele
28 3/1/18 Trial Testimony at 6:17 – 7:25 (RJN Ex. 2); Joint Exhibit 49]. Therefore, like in *Miller*,
DCA should not be held to a position taken with respect to an entirely different set of claims.

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

9 **B. Whether to Apply Judicial Estoppel is Within the Court’s Discretion**

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

16 In the instant litigation DCA alleges that ICANN committed fraud against it. DCA
17 believes that it is entitled to justice and that its case should be heard by a competent court, the
18 place of justice. It would be inequitable to prevent DCA from bringing its claims in court when
19 DCA could not have brought the same claims before the DCA v. ICANN IRP Panel and, even if
20 the IRP would have adjudicated those claims, the IRP Panel’s decision would not have been
21 binding on ICANN. It would be inequitable to prevent DCA from bringing its claims in court
22 when DCA was mistaken as to the scope of ICANN’s litigation waiver. DCA was also mistaken
23 in its belief that ICANN would accept the IRP Panel’s Declaration as binding. It would be
24 inequitable to prevent DCA from bringing its claims in court when facts giving rise to DCA’s
25 current claims had not even arisen at the time of the IRP.

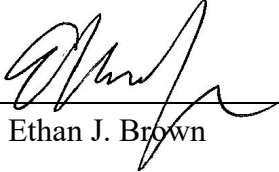
26 In its tentative ruling this Court indicated that, using its discretion, it would not apply
27 judicial estoppel. DCA respectfully requests that the Court adopt its tentative ruling as final. For
28 the reasons indicated at trial and herein, DCA should not be judicially estopped from bringing
the instant litigation.

1 **III. CONCLUSION**

2 Accordingly, the Court should adopt its tentative ruling and find that judicial estoppel does
3 not apply to the instant lawsuit.

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5
6 Dated: March 19, 2018

BROWN NERI SMITH & KHAN, LLP

7
8 By:  _____
9 Ethan J. Brown

10 *Attorneys for Plaintiff,*
11 DotConnectAfrica Trust

12 4818-8620-6558, v. 3