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14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
15 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

16 DOTCONNECTAFRICA TRUST,

17 Plaintiff,

18 v.

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

22 Defendants.

**CASE NO. BC607494**

Assigned for all purposes to Hon. Robert  
B. Broadbelt III

**ICANN'S TRIAL BRIEF (JUDICIAL  
ESTOPPEL BENCH TRIAL)**

*[Declaration of A. Pushinsky filed  
concurrently herewith]*

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## INTRODUCTION

DotConnectAfrica Trust (“DCA”) has filed the present lawsuit against Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) after *repeatedly and persuasively* representing to another tribunal that it did not have the right to file such a lawsuit. Such reversals of position are subject to the equitable doctrine of judicial estoppel to prohibit parties, like DCA, from gaining an advantage by taking one position and then seeking a second advantage by taking an inconsistent position.

DCA’s prior representations were made in a quasi-judicial proceeding that DCA initiated to challenge ICANN’s decision to halt the processing of DCA’s application for the .AFRICA generic top-level domain (“gTLD”). During the course of that lengthy proceeding, DCA *repeatedly and unequivocally* told the tribunal that *it was unable to sue ICANN in court because of the clear language of the parties’ binding litigation waiver*. DCA took this position in conjunction with *seven* different issues over the course of two years of the proceeding and, as a result, was successful in obtaining: (i) interim relief; (ii) additional briefing; (iii) additional document discovery; (iv) live witness testimony; (v) a decision from the tribunal that it stated was binding; (vi) application of a *de novo* standard of review; and (vii) an award of its costs. Each and every time, DCA argued that the tribunal should grant DCA’s requested relief because DCA could not file a lawsuit against ICANN; and each time the tribunal ruled in DCA’s favor. Following a two-day evidentiary hearing with live witness testimony and arguments from both parties, the tribunal issued a final ruling in DCA’s favor and recommended that ICANN resume the processing of DCA’s application for the .AFRICA gTLD. ICANN acted in accordance with the tribunal’s declaration, and returned DCA’s application to processing. DCA’s application later failed because DCA did not obtain the requisite support or non-objection from 60% of the relevant governments or public authorities of Africa, as required by ICANN’s Applicant Guidebook (“Guidebook”). Shortly thereafter, and in complete contradiction to its earlier position, DCA sued ICANN.

DCA’s decision to take different positions to seek unfair advantages is blatant, patently

1 unfair, and subject to the doctrine of judicial estoppel. The doctrine was created to *prohibit*  
2 litigants, like DCA, from manipulating the legal system by capriciously changing their positions,  
3 and the doctrine has been applied by California courts under analogous circumstances. As  
4 discussed in more detail below, the facts before the Court, which demonstrate DCA’s  
5 unquestionable misconduct, are quintessential for applying this doctrine. ICANN respectfully  
6 requests that this Court use its discretion to judicially estop DCA from continuing to pursue this  
7 lawsuit against ICANN and dismiss this litigation with prejudice.

## 8 **BACKGROUND**

### 9 **I. ICANN**

#### 10 **A. Background**

11 ICANN was formed in 1998. It is a California not-for-profit public benefit corporation.  
12 Pursuant to its Bylaws, its mission “is to coordinate, at the overall level, the global Internet’s  
13 system of unique identifiers, and in particular to ensure the stable and secure operation of the  
14 Internet’s unique identifier systems.” (Ex. A,<sup>1</sup> ICANN Bylaws at Art. I.)<sup>2</sup> Among these  
15 identifiers are the particular top-level domains used in the Internet’s domain name system  
16 (“DNS”). The DNS’s essential function is to convert easily-remembered domain names, such as  
17 “lacourt.org,” into numeric IP addresses understood by computers. The portion of a domain name  
18 to the right of the last dot (such as “.org,” or “.AFRICA”) is known as a gTLD.

19 ICANN is a global multistakeholder organization, made up of a number of different  
20 groups, each of which represents a different interest on the Internet. To ensure ICANN’s  
21 accountability to the global Internet community, ICANN has established accountability

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22 <sup>1</sup> All cited exhibits are attached hereto to the Declaration of Amanda Pushinsky In Support of  
23 ICANN’s Trial Brief (Judicial Estoppel Bench Trial). All cited materials will be provided to the  
24 Court at the Final Status Conference. For the purposes of this brief, ICANN attaches relevant  
25 excerpts of otherwise voluminous documents.

26 <sup>2</sup> For purposes of this bench trial, the operative Bylaws are ICANN’s Bylaws, as modified  
27 effective April 11, 2013. All references in this brief to the Bylaws are to this version of the  
28 Bylaws. Extensively revised ICANN Bylaws came into effect on October 1, 2016 but 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 2013 and 2016, there  
were no substantive modifications to the portions of ICANN’s Bylaws that are relevant to this  
trial.

1 mechanisms, such as Reconsideration Requests and the Independent Review Process (“IRP”).  
2 (ICANN Bylaws, Art. IV, §§ 2, 3.)

3 ICANN’s Board of Directors is made up of 20 members from around the world, 16 of  
4 whom have voting rights and four of whom are non-voting liaisons. In addition to its Board of  
5 Directors, ICANN has a number of supporting organizations that develop and make policy  
6 recommendations to the ICANN Board, and a number of advisory committees that provide advice  
7 to the ICANN Board.<sup>3</sup> One such advisory committee is the Governmental Advisory Committee  
8 (“GAC”). The GAC is composed of representatives and organizations from countries and unique  
9 economies around the world. Pursuant to ICANN’s Bylaws, the GAC is tasked with  
10 “consider[ing] and provid[ing] advice on the activities of ICANN as they relate to concerns of  
11 governments, particularly matters where there may be an interaction between ICANN’s policies  
12 and various laws and international agreements or where they may affect public policy issues.”  
13 (ICANN Bylaws, Art. XI, § 2.1.)

14 ***B. ICANN’s New gTLD Program, Applicant Guidebook, and Covenant Not to Sue***

15 In its early years, ICANN focused on increasing the number of companies (known as  
16 “registrars”) that could sell domain name registrations within the existing gTLDs. In 2012,  
17 ICANN launched the “New gTLD Program,” in which it invited interested parties to apply to be  
18 designated the registry operator of the gTLD(s) for which they applied. The registry operator  
19 would manage the assignment of names within the gTLD and maintain its database of names and  
20 IP addresses. Applicants must demonstrate, among other things, the technical and financial  
21 capability needed to operate a gTLD. ICANN prescribes the requirements for new gTLD  
22 applications through the Guidebook. (Ex. B, “Guidebook.”) The Guidebook dictates the  
23 requirements for new gTLD applications to be approved and the criteria by which they are  
24 evaluated.

25 The development of the Guidebook was an extensive process that spanned multiple years  
26 and involved comments and input from the Internet community as a whole. Starting in 2008,  
27

28 <sup>3</sup> For the Court’s reference, attached as Appendix A is ICANN’s Community Organizational Chart.

1 ICANN published multiple drafts of the Guidebook on ICANN’s website so that the public could  
2 provide feedback. (Ex. C, Dec. 1, 2016 Deposition of Sophia Bekele (“12/1/16 Bekele Dep.”) at  
3 23:3–24:2.) Sophia Bekele, DCA’s CEO, along with hundreds of members of the Internet  
4 community, provided feedback to ICANN on these drafts. (*Id.*) The final version of the  
5 Guidebook was published in June 2012.

6 One of the key supporting organizations in developing the New gTLD Program and the  
7 Guidebook was the Generic Names Supporting Organization (“GNSO”). The GNSO is a policy-  
8 development body that is responsible for developing and recommending to the ICANN Board  
9 substantive policies relating to gTLDs. As Ms. Bekele has testified, she served as a policy  
10 advisor on the GNSO starting in 2005 and actively participated in the development of the  
11 Guidebook. (12/1/16 Bekele Dep. at 19:4–17) (“I was active. I participated in all meetings and  
12 all phone calls.”) As an advisor, Ms. Bekele testified that she paid special attention to the  
13 development of the new gTLD Program and helped “formulat[e] the rules and requirements” for  
14 the New gTLD Program. (*Id.* at 17:3–20, 20:10–18; 23:2–24:2; Ex. D, Bekele IRP Witness  
15 Statement (“Bekele Witness Statement”) ¶ 13.)

16 Among the requirements set out by the Guidebook is that, in order to submit an  
17 application for a new gTLD, each applicant is required to agree to be bound by the terms and  
18 conditions set forth in the Guidebook:

19 By submitting this application through ICANN’s online interface  
20 for a generic Top Level Domain (gTLD) (this application),  
21 applicant (including all parent companies, subsidiaries, affiliates,  
22 agents, contractors, employees and any and all others acting on its  
23 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.

24 (Guidebook § 6.)

25 Module 6 of the Guidebook also contains the Release and Covenant Not to Sue  
26 (“Covenant”), which bars lawsuits against ICANN arising “in any way” out of ICANN’s  
27 evaluation of new gTLD applications:

28 Applicant hereby releases ICANN and the ICANN Affiliated



1 Parties from any and all claims by applicant that arise out of, are  
2 based upon, or are in any way related to, any action, or failure to  
3 act, by ICANN or any ICANN Affiliated Party in connection with  
4 ICANN's or an ICANN Affiliated Party's review of this  
5 application, investigation or verification, any characterization or  
6 description of applicant or the information in this application, any  
7 withdrawal of this application or the decision by ICANN to  
8 recommend, or not to recommend, the approval of applicant's  
9 gTLD application. APPLICANT AGREES NOT TO  
10 CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL  
11 FORA, ANY FINAL DECISION MADE BY ICANN WITH  
12 RESPECT TO THE APPLICATION, AND IRREVOCABLY  
13 WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR  
14 ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY  
15 OTHER LEGAL CLAIM AGAINST ICANN AND ICANN  
16 AFFILIATED PARTIES WITH RESPECT TO THE  
17 APPLICATION. . . .

18 (Guidebook § 6.6) (emphasis in the original.)

19 The Covenant specifically provides that, in lieu of legal action, applicants for gTLDs are  
20 entitled to utilize any accountability mechanism, set forth in ICANN's Bylaws, for purposes of  
21 challenging any final decision made by ICANN with respect to its application. (Guidebook § 6.)<sup>4</sup>

## 22 **II. DCA'S APPLICATION FOR .AFRICA**

### 23 **A. DCA's Application**

24 ICANN began accepting applications through the New gTLD Program in January 2012.  
25 In March 2012, DCA applied for .AFRICA. DCA understood that by applying for a gTLD, like  
26 all other applicants, it was agreeing to the Covenant contained in the Guidebook that barred  
27 lawsuits against ICANN related in any way to DCA's application. (12/1/16 Bekele Dep. at  
28 17:18–20, 24:3–7.)

DCA also understood that, under the Guidebook, applicants must meet specific  
requirements and pass various evaluation stages to become the registry operator of the applied-for  
gTLD. One of the evaluations is the "Geographic Names Review," which considers whether the  
applied-for gTLD constitutes a geographic name (in this case, the continent of Africa) and, if so,  
whether the applicant has the support or non-objection of 60% of the relevant governments or

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<sup>4</sup> In a recent decision, the Ninth Circuit upheld the enforceability of the Guidebook's Covenant and affirmed the district court's dismissal of an applicant's lawsuit against ICANN based on the Covenant and the party's ability to pursue its claims through an IRP. *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers*, 740 F. App'x 118 (9th Cir. 2018).

1 public authorities of the region that the gTLD purports to represent. This requirement ensures  
2 that appropriate consideration is given to the interests of the relevant governments or public  
3 authorities. (See Guidebook §§ 2.2.1.4, 2.2.1.4.2.) To meet this requirement, applicants for  
4 geographic gTLDs are required to submit letters of support or non-objection from the relevant  
5 governments or public authorities; the letters must meet criteria set forth in the Guidebook. (*Id.* at  
6 §§ 2.2.1.4.2, 2.2.1.4.3.) DCA submitted six letters of support with its .AFRICA application in an  
7 attempt to meet the Guidebook requirements.

8 In April 2013, while DCA’s application was in Geographic Names Review, the GAC  
9 issued “consensus advice” against DCA’s application. As discussed above, the GAC is one of  
10 ICANN’s advisory committees and consists of representatives from well over 150 international  
11 governments and organizations. It operates to provide advice to ICANN on issues relating to  
12 concerns of governments, including issues regarding individual gTLD applications. (Guidebook  
13 § 1.1.2.7.) The process for GAC advice on new gTLDs is intended to address applications that  
14 governments deem problematic, such as applications that potentially violate national law or raise  
15 other sensitivities. (*Id.* § 3.1.) If the GAC issues consensus advice regarding a particular  
16 application, it creates a strong presumption for the ICANN Board that the application should not  
17 be approved. (*Id.* § 1.1.2.7, 3.1.) After the GAC issued consensus advice that DCA’s application  
18 should not proceed, the ICANN Board adopted a resolution accepting that advice, which halted  
19 the processing of DCA’s application. DCA then initiated an IRP in October 2013 to challenge the  
20 ICANN Board’s decision to accept the GAC consensus advice.

21 ***B. The IRP***

22 Generally, an IRP allows an aggrieved applicant to ask an independent, three-member  
23 panel to determine whether an action or inaction of the ICANN Board was inconsistent with  
24 ICANN’s Articles of Incorporation, Bylaws, or the Guidebook. (Bylaws, Art. IV, § 3.) The  
25 Bylaws provide guidance regarding the standard of review and IRP procedures. (*Id.*) The IRP  
26 initiated by DCA was administered by the International Centre for Dispute Resolution (“ICDR”),  
27 which is the international arm of the American Arbitration Association. It was conducted in  
28

1 accordance with ICANN Bylaws, the ICDR’s International Arbitration Rules, and the  
2 Supplementary Procedures for ICANN’s IRP that the ICDR adopted. A neutral three-person  
3 panel presided over the IRP (the “Panel” or “IRP Panel”). DCA and ICANN each nominated one  
4 Panelist, and the ICDR appointed the third panelist. DCA nominated Dr. Catherine Kessedjian,  
5 the Deputy Director of the College of Paris and Professor of Law. Prior to joining the European  
6 College of Paris, Dr. Kessedjian was the Deputy Secretary General of the Hague Conference on  
7 Private International Law. ICANN nominated the Honorable Richard C. Neal, a retired  
8 California Court of Appeals justice. When Justice Neal passed away partway through the  
9 proceedings, ICANN nominated Judge Cahill, a retired California Superior Court judge. The  
10 ICDR appointed a Canadian lawyer named Babak Barin to chair the IRP Panel; Mr. Barin not  
11 only had extensive experience as a commercial litigator and arbitrator, but he was listed by  
12 Global Arbitration Review as being “highly regarded” among Canada’s top arbitration names.

13 The IRP lasted over two years and was a complex and adversarial process. It involved the  
14 production of thousands of pages of documents, numerous written submissions, and sworn  
15 witness declarations. The IRP culminated in a two-day live hearing, at which the parties gave  
16 opening statements, put on the testimony of live witnesses (DCA’s CEO, Ms. Bekele; an ICANN  
17 Board member; and the former chair of the GAC), each of whom was sworn in and subject to  
18 examination and questioning from the IRP Panel and opposing counsel. At the end of the  
19 hearing, counsel for the parties made closing arguments. (*See* Ex. E, 9/6/17 Bekele Dep. at 42:2–  
20 14, 87:22–89:6; *see generally* Ex. F, 5/22/15 IRP Hr’g Tr.; Ex. G, 5/23/15 IRP Hr’g Tr.)

21 ***C. DCA’s Statements to the IRP Panel***

22 To persuade the IRP Panel to issue various rulings in DCA’s favor throughout the IRP  
23 proceedings, DCA repeatedly argued that it was unable to sue ICANN in court and that the IRP  
24 would be DCA’s only opportunity to have all of its rights litigated. DCA won on the following  
25 ***seven substantive and critical issues:***

26 1. IRP Panel Grants DCA Interim Relief.

27 In its Request for Emergency Arbitrator and Interim Measures of Protection (“Interim  
28

1 Request”), DCA argued that the relief it requested was necessary to protect DCA’s procedural  
2 rights because “DCA has a right to be heard in a meaningful way in the *only proceeding*  
3 *available to review ICANN Board’s decision.*” (Ex. H, 3/28/14 DCA Request for Emergency  
4 Arbitrator and Interim Measures of Protection Request ¶ 29.) (emphasis added.)<sup>5</sup> The Panel  
5 granted DCA’s request for emergency relief. (Ex. I, 7/9/15 IRP Final Decl. (“Final Decl.”) ¶ 19.)

6 2. IRP Panel Grants DCA’s Request for Document Production.

7 DCA requested extensive document discovery from ICANN. In support of its request,  
8 DCA stated:

9 [T]he Panel should be guided by the cardinal principal set out in the  
10 ICDR Arbitration Rules that each party be given a full and fair  
11 opportunity to be heard; a principle that must also be viewed in the  
12 context of the fact that *these proceedings will be the first and last*  
*opportunity that DCA Trust will have to have its rights determined*  
*by an independent body.*

13 (Ex. J, 4/20/14 DCA Letter to the IRP Panel at 2.) (emphasis added). The IRP Panel ordered that  
14 the parties exchange document requests and produce documents. (Ex. K, 8/14/14 Decl. on the  
15 IRP Procedures (“Proc. Decl.”) ¶ 60.)

16 3. IRP Panel Grants DCA’s Request for Live Witness Testimony.

17 The IRP Panel asked the parties various questions regarding the appropriate procedures  
18 for an IRP. ICANN and DCA each submitted responses to the IRP Panel on May 5, 2014. DCA  
19 requested that the IRP Panel allow examination of live witnesses at the proceedings, even though  
20 ICANN’s Bylaws expressly forbid this. (Ex. L, DCA’s Submission on Procedural Issues (“DCA  
21 Submission”), May 5, 2014 ¶¶ 64–66.) In support of its arguments, DCA asserted:

22 It is also critical to understand that ICANN *created the IRP as an*  
23 *alternative to allowing disputes to be resolved by courts.* By  
24 submitting its application for a gTLD, DCA agreed to eight pages  
25 of terms and conditions, including a nearly page-long string of  
26 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.*

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27 <sup>5</sup> The specific request DCA made of the IRP Panel is not relevant; however, for context, DCA  
28 asked that an emergency IRP Panel be convened in order for DCA to seek a stay of the  
assignment of .AFRICA during the pendency of the IRP.

1 (*Id.* at ¶ 22.) (emphasis added). The IRP Panel ordered the parties to have witnesses appear for  
2 testimony at the IRP hearing. (Proc. Decl. ¶130.)

3 4. IRP Panel Grants DCA’s Request for Extended Briefing.

4 DCA also requested that the IRP Panel allow additional briefing prior to the live hearing.  
5 (DCA Submission ¶¶ 60–62.) As with its request for live testimony, DCA again justified this  
6 request by arguing that DCA had waived all of its rights to challenge ICANN in court. (*Id.* at ¶  
7 22.) The IRP Panel agreed, and ordered the parties to submit additional briefing. (Proc. Decl. ¶  
8 71.)

9 5. IRP Panel Agrees with DCA That IRP Decision Is Binding.

10 On multiple occasions, DCA argued to the Panel that the IRP was an arbitration under  
11 California law in all but name—“[t]he IRP has all the characteristics of an arbitration under  
12 California law and widely accepted international arbitral practice and procedure”—and therefore,  
13 should have certain features, including a binding resolution. (DCA Submission ¶¶ 1, 4, 22.) On  
14 May 12, 2014, the IRP Panel narrowed its procedural questions to a few remaining points of  
15 contention, which it asked the parties to brief. (Proc. Decl. ¶ 15–18.) Among these was this  
16 question: “[i]s the Panel’s decision concerning the IRP Procedure and its future Declaration on  
17 the Merits in this proceeding binding?” (Proc. Decl. ¶ 19.) Both parties submitted responses on  
18 May 20, 2014. ICANN took the position that the IRP declaration should not be binding. (Proc.  
19 Decl. ¶ 97.) DCA took the position that any decision by the IRP Panel must be binding because,  
20 due to the Covenant, DCA was unable to sue ICANN and therefore the IRP was DCA’s sole  
21 means of disputing a decision by ICANN:

22  
23 Module 6 of the Guidebook contains eight pages of terms and  
24 conditions that an applicant “agrees to . . . without modification” by  
25 submitting an application for a gTLD, including significant waivers  
26 of rights . . . . In exchange for waiving these significant legal  
27 rights, Section 6 of Module 6 grants applicants the right to  
28 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. . . .*

(Ex. M, 5/20/214 DCA’s Response to the Panel’s Questions on Procedural Issues (“DCA’s

1 Response”) ¶¶ 5–6) (emphasis added.) On this basis, DCA argued that the IRP Panel’s decision  
2 must be binding in order to both justify the Covenant and remain consistent with California law.  
3 (*Id.* ¶ 5–7.) Specifically, DCA argued that “[i]t is fundamentally inconsistent with California law,  
4 U.S. federal law, and principles of international law for ICANN to require applicants to waive all  
5 rights to challenge ICANN in court or any other forum and not provide a substitute accountability  
6 mechanism capable of producing a binding remedy. . . . Thus, in order for this IRP not to be  
7 unconscionable, it must be binding.” (*Id.* ¶ 7.)

8 DCA further added, “as a condition of applying for a gTLD, DCA *unilaterally*  
9 *surrendered all of its rights to challenge ICANN in court or any other forum outside of the*  
10 *accountability mechanisms in ICANN’s Bylaws.* As a result, the IRP is the *sole forum* in which  
11 DCA can seek independent, third-party review of the actions of ICANN’s Board of Directors.”  
12 (Ex. N, 5/29/14 DCA Letter to the IRP Panel at 2–3.) (emphasis in original.) DCA concluded by  
13 stating, “[i]f the panel were to determine that this IRP was non-binding, DCA *would effectively*  
14 *be deprived of any remedy.*” (*Id.* at 3.) (emphasis added.)

15 The IRP Panel agreed with DCA’s position, finding that because of the Covenant, “[t]he  
16 avenues of accountability for applicants that have disputes with ICANN do *not* include resort to  
17 the courts,” and that “the ultimate ‘accountability’ remedy for applicants is the IRP.” (Proc. Decl.  
18 ¶¶ 39, 40) (emphasis in original.) Thus, the IRP Panel held that its decision would be binding on  
19 the parties. (*Id.* at ¶ 131) (“Based on the foregoing and the language and the content of the IRP  
20 Procedure, the Panel concludes that this declaration and its future Declaration on the Merits of  
21 this case is binding on the parties.”)

22 6. IRP Panel Applies *De Novo* Review.

23 DCA argued that the IRP Panel should apply an objective standard, or “*de novo*” standard  
24 of review, because, according to DCA, “[t]his is *the only opportunity that a claimant has for*  
25 *independent and impartial review of ICANN’s conduct, the only opportunity.* And within that  
26 context of that only opportunity, really, there should [not] be a deferential standard [of] review,  
27 deference to the regulator, whose very conduct is being questioned. I think that is wrong.”  
28

1 (5/22/15 IRP Hr’g Tr. at 22:16–23:3) (also noting that the Covenant provided ICANN “with a  
2 protection from the public courts”) *id.*, at 23:11-17; *see also* (5/23/15 IRP Hr’g Tr. at 490:13–  
3 491:3) (stating that “at the end of the day, the only people that ICANN is accountable to are the  
4 three of you . . . the Independent Review Panels.”) Similarly, DCA later made statements  
5 directed at ICANN during the IRP hearing: “*We cannot take you to Court. We cannot take you*  
6 *to arbitration. We can’t take you anywhere. We can’t sue you for anything.*” (5/23/15 IRP  
7 Hr’g Tr. at 507:24–508:5.) The Panel agreed with DCA and held that it would apply a *de novo*  
8 standard of review. (Final Decl. ¶ 76.)

9  
10 7. IRP Panel Awarded DCA Its Costs.

11 Lastly, in its Submission on Costs, DCA argued that ICANN should pay DCA’s full costs  
12 if DCA were to prevail based on ICANN’s conduct during the IRP, “which is the only  
13 independent accountability mechanism available [to] parties such as DCA.” (Ex. O, 7/1/2015  
14 DCA Submission on Costs at 3.)

15 On July 9, 2015, the IRP Panel issued a Final Declaration, finding in DCA’s favor. (Final  
16 Decl. ¶ 150.) The IRP Panel recommended that ICANN should “continue to refrain from  
17 delegating the .AFRICA gTLD and permit [DCA’s] application to proceed through the remainder  
18 of the new gTLD application process.” (*Id.* ¶ 149.) Additionally, and in accordance with DCA’s  
19 argument in its Submission on Costs, the IRP Panel recommended that ICANN pay DCA’s IRP  
20 costs. Just a few days later, ICANN’s Board adopted a resolution determining that ICANN “shall  
21 continue to refrain from delegating the .AFRICA gTLD”; “shall permit DCA’s application to  
22 proceed through the remainder of the new gTLD application process”; and “shall reimburse DCA  
23 for the costs of the IRP as set forth in paragraph 150 of the [IRP Final] Declaration.”<sup>6</sup>

24 **III. DCA’S LAWSUIT AGAINST ICANN**

25 ICANN placed DCA’s application back into processing in the exact place the application  
26 had been when the Board initially adopted the resolution accepting the GAC advice—Geographic  
27 Names Review. InterConnect Communications (“InterConnect”), the independent third-party

28 <sup>6</sup> *See* Ex. P, “ICANN Board Resolution,” *also available at*  
<https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a>.

1 expert panel retained to perform the Geographic Names Review, resumed its evaluation of  
2 DCA's .AFRICA application. InterConnect evaluated DCA's six letters of support and  
3 concluded that they did not meet the criteria in the Guidebook. InterConnect, through ICANN,  
4 offered DCA two opportunities to re-submit conforming letters that demonstrated the support or  
5 non-objection of 60% of the relevant governments or public authorities, as required by the  
6 Guidebook. DCA refused to do so. Instead, DCA filed this lawsuit, completely contradicting its  
7 explicit statements to the IRP Panel that it could not file a lawsuit against ICANN related "in any  
8 way" to its application for .AFRICA.

9 The First Amended Complaint initially included ten causes of action against ICANN,  
10 including breach of contract claims and claims for declaratory relief. (*See* DCA's First Amended  
11 Complaint ("FAC"), filed February 26, 2016.) Each of the claims relates to ICANN's processing  
12 of DCA's application for .AFRICA. On May 26, 2017, ICANN moved for summary judgment  
13 on the grounds that DCA's lawsuit was barred both by the Covenant and by the doctrine of  
14 judicial estoppel due to DCA's contradictory positions on whether it was permitted to sue ICANN  
15 in court. The Court granted ICANN's motion in part, finding that the Covenant barred DCA's  
16 non-fraud claims, but denied ICANN's motion as to DCA's fraud-based claims. (8/9/2017 Order  
17 Re: ICANN's Mot. for Summ. J.) The Court then set a bench trial on the issue of whether DCA's  
18 lawsuit was barred by the doctrine of judicial estoppel so that the parties would have an  
19 opportunity to present evidence prior to the Court ruling. (*Id.*)<sup>7</sup> For the Court's convenience,  
20 ICANN attaches a timeline summarizing the relevant above-mentioned facts in Appendix B.

### 21 **LEGAL STANDARD**

22 Judicial estoppel is an equitable doctrine designed to maintain the integrity of the judicial  
23 system and to protect the parties from unfair strategies and manipulation. *See, e.g., Owens v. Cty.*  
24 *of Los Angeles*, 220 Cal. App. 4th 107, 121 (2013); *Blix Street Records, Inc. v. Cassidy*, 191 Cal.  
25

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26 <sup>7</sup> From February 28 to March 1, 2018, the parties conducted a bench trial on the affirmative  
27 defense of judicial estoppel before Judge Halm. The Court later declared a mistrial due to Judge  
28 Halm's retirement. Relevant portions of that trial testimony are attached as Exhibit Q (February  
28, 2018) and Exhibit R (March 1, 2018) and are respectively cited herein as "2/28/18 Trial Tr."  
or "3/1/18 Trial Tr."



1 App. 4th 39, 47 (2010) (“[S]ometimes called the doctrine of ‘preclusion of inconsistent  
2 positions.”) (citations omitted). In fact, “the equitable doctrine of judicial estoppel targets not  
3 only unfairness between individual parties, but also abuse of the judicial system itself.” *MW*  
4 *Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.*, 36 Cal. 4th 412, 424 (2005). It  
5 “precludes a party from gaining an advantage by taking one position, and then seeking a second  
6 advantage by taking an incompatible position.” *People ex rel. Sneddon v. Torch Energy Servs.,*  
7 *Inc.*, 102 Cal. App. 4th 181, 189 (2002), as modified (Oct. 4, 2002).

8 The doctrine of judicial estoppel is centered on “the principle that litigation is not a war  
9 game unmoored from conceptions of ethics, truth, and injustice.” *Ferraro v. Camarlinghi*, 161  
10 Cal. App. 4th 509, 558 (2008). “Our adversarial system limits the affirmative duties owed by an  
11 advocate to his adversary, but that does not mean it frees him to deceive courts, argue out of both  
12 sides of his mouth, fabricate facts and rules of law, or seek affirmatively to obscure the relevant  
13 issues and considerations behind a smokescreen of self-contradictions and opportunistic flip-  
14 flops.” *Id.* These principles are applied to positions taken by both a party or a party’s legal  
15 counsel. *Blix*, 191 Cal. App. 4th at 48.

16 Essentially, “[c]ourts apply the doctrine to prevent internal inconsistency, preclude  
17 litigants from playing ‘fast and loose’ with the courts, and prohibit ‘parties from deliberately  
18 changing positions according to exigencies of the moment.’” *People ex rel. Sneddon*, 102 Cal.  
19 App. 4th at 189 (citation omitted); *Thomas v. Gordon*, 85 Cal. App. 4th 113, 118 (2000) (“The  
20 essential function and justification of judicial estoppel is to prevent the use of intentional self-  
21 contradiction as a means of obtaining unfair advantage in a forum provided for suitors seeking  
22 justice.”) (citations omitted). Courts reason that “[i]t seems patently wrong to allow a person to  
23 abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to  
24 assert the opposite.” *Jackson v. Cty. of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997) (citation  
25 omitted). In determining whether to apply judicial estoppel, courts consider the following five  
26 factors set out by the court in *Jackson*: (1) the same party has taken two positions; (2) the  
27 positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was  
28

1 successful in asserting the first position (*i.e.*, the tribunal adopted the position or accepted it as  
2 true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a  
3 result of ignorance, fraud, or mistake. *Jackson*, 60 Cal. App. 4th at 183. Generally, there are no  
4 “inflexible prerequisites or an exhaustive formula for determining the applicability of judicial  
5 estoppel.” *New Hampshire v. Maine*, 532 U.S 742, 751 (2001).

## 6 ARGUMENT

### 7 **I. COURTS APPLY JUDICIAL ESTOPPEL TO PREVENT THE EXACT** 8 **CONDUCT DCA HAS EXHIBITED.**

9 DCA’s repeated—and successful—arguments to the IRP Panel that DCA could not sue  
10 ICANN, followed by DCA’s lawsuit against ICANN, is exactly the type of conduct the doctrine  
11 of judicial estoppel is intended to prevent. Prior to addressing why DCA’s conduct gives rise to  
12 the judicial estoppel doctrine under the *Jackson* factors, it is important to clarify how the doctrine  
13 is generally applied. Because judicial estoppel allows courts to target “unfairness between  
14 individual parties,” such as when one party attempts to gain advantage by changing its positions,  
15 courts have the discretion to apply the doctrine when it is necessary to protect the integrity of the  
16 judicial process. *MW Erectors*, 36 Cal. 4th at 424. In fact, in invoking judicial estoppel, courts  
17 have found that the application of the doctrine is not dependent on the potential merits of a claim  
18 and can be used, for example, to bind a party to what would otherwise be an unenforceable  
19 contract. *See, e.g., Blix*, 191 Cal. App. 4th at 49–50. The goal of the judicial estoppel doctrine is  
20 to prevent gamesmanship and the intentional assertions of inconsistent statements, even if it may  
21 result in harsh consequences. *Id.* The following instances of courts applying the doctrine to  
22 prevent parties from changing their positions in circumstances similar to, and even much less  
23 egregious than, DCA’s repudiation of its prior position are instructive.

24 In *Blix*, after the trial court dismissed the case based on the parties’ representations that  
25 they had reached an enforceable settlement, a party’s new counsel claimed the settlement was  
26 unenforceable. *Blix*, 191 Cal. App. 4th at 49–51. The appellate court held that, even if the  
27 settlement agreement had not been binding, appellants were judicially estopped from denying its  
28 enforceability because they represented to the trial court that the case had settled, resulting in the

1 trial court dismissing the case. *Id.* (“In sum, there is no justifiable reason why a party cannot be  
2 judicially estopped from denying the enforceability of an agreement that might otherwise be  
3 unenforceable.”).

4 Similarly, in *Bucur v. Ahmad*, 244 Cal. App. 4th 175 (2016), an appellant plaintiffs’  
5 lawsuit for fraud and breach of contract was barred on the basis of judicial estoppel. In an earlier  
6 action, plaintiffs agreed to arbitrate their claims against defendants. After the arbitrator granted  
7 defendants’ motion to dismiss, plaintiffs refiled the same claims in court. *Id.* at 187. The  
8 appellate court held that plaintiffs were judicially estopped from taking two inconsistent  
9 positions, stipulating to arbitration and then refileing “virtually the same case for litigation.” *Id.*  
10 (holding that all requirements for application of judicial estoppel were met, barring the  
11 subsequent litigation of the case in court).

12 In *Owens*, a taxpayer was precluded from “chang[ing] his tune” and bringing an action  
13 challenging an election measure after he had previously, as a class member in a different action,  
14 championed the election measure’s “priceless” benefits during the class settlement approval  
15 proceeding. 220 Cal. App. 4th at 121–23. The appellate court affirmed the application of judicial  
16 estoppel stating, “This is not a difficult decision. [The taxpayer’s] attempt to revive his action  
17 against the County is exactly the kind of litigation conduct judicial estoppel is meant to prevent.”  
18 *Id.* at 122.

## 19 **II. THE DOCTRINE OF JUDICIAL ESTOPPEL BARS DCA’S LAWSUIT.**

20 DCA’s reversal of its position easily meets all five *Jackson* factors. The undisputed facts  
21 show that DCA repeatedly argued—in support of *seven* different contested issues before the IRP  
22 Panel—that the Covenant prevented DCA from suing ICANN in court, and that DCA succeeded  
23 on every single issue. The IRP ultimately ruled in DCA’s favor on the merits and provided relief,  
24 which the ICANN Board granted in full. Then, when DCA’s application for .AFRICA later did  
25 not pass Geographic Names Review, rather than filing a second IRP, DCA filed this lawsuit—  
26 thereby repudiating its prior and contrary position that DCA could not sue ICANN in court. Such  
27 inequitable conduct undermines the integrity of the legal system and should be prohibited. *See*  
28

1 Owens, 220 Cal. App. 4th at 121 (“The doctrine prohibits a party from asserting a position in a  
2 legal proceeding that is contrary to a position he or she successfully asserted in the same or some  
3 earlier proceeding.”).

4 **A. DCA Has Taken Two Positions & Was Successful in Asserting Its First Position.**

5 1. DCA Was Successful in Arguing It Could Not Sue ICANN on Seven  
6 Different Issues.

7 The first and third factors of the judicial estoppel inquiry are met here—DCA has initiated  
8 the present lawsuit against ICANN whereas, previously, DCA had unequivocally argued to the  
9 IRP Panel that it could not sue ICANN and was successful in making the argument each time. As  
10 explained above, DCA argued that it could not file a lawsuit against ICANN on *seven* different  
11 issues in order to persuade the IRP Panel to issue critical and substantive rulings in its favor. *See*  
12 *People ex rel. Sneddon*, 102 Cal. App. 4th at 189 (“The party invoking judicial estoppel must  
13 show that . . . the position was adopted by the first tribunal in some manner such as by rendering a  
14 favorable judgment.”). DCA’s pleas to grant relief on the basis that the IRP was its “first and  
15 last” opportunity to “have its rights determined by an independent body” (4/20/14 DCA’s Letter  
16 to the IRP Panel at 2) were “adopted” and “accepted . . . as true” by the IRP Panel, *see Jackson*,  
17 60 Cal. App. 4th at 183.

18 DCA made strategic decisions and greatly benefited from its statements in the IRP.  
19 Below is a chart summarizing DCA’s IRP statements, their purpose, and the Panel’s rulings  
20 granting the relief requested, all of which are supported by the IRP record and none of which  
21 DCA can refute:

Issue	DCA’s Statement	Purpose	Panel’s Ruling
23 24 25 26 27 28 <b>1</b>	“DCA has a right to be heard in a meaningful way in the <b>only proceeding available to review the ICANN Board’s decisions.</b> ”  <i>Request for Emergency Arbitrator and Interim Measures of Protection ¶ 29 (Ex. H)</i>	To obtain requested emergency relief (precluding ICANN from delegating .AFRICA during IRP).	The Panel granted DCA’s request for emergency relief.  <i>Final Declaration ¶ 19 (Ex. I)</i>

Issue	DCA's Statement	Purpose	Panel's Ruling
2	<p>“[T]he Panel should be guided by the cardinal principal set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that <b>these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body.</b>”</p> <p><i>April 20, 2014 Letter to the IRP Panel (Ex. J at p. 3)</i></p>	To obtain extensive document discovery from ICANN.	<p>The Panel ordered that the parties would exchange document requests and produce documents in response.</p> <p><i>14 August 2014 Declaration on Procedure ¶ 60 (Ex. K)</i></p>
3	<p>“It is also critical to understand that <b>ICANN created the IRP as an alternative to allowing disputes to be resolved by courts.</b> 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. <b>For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available.</b>”</p> <p><i>May 5, 2014 Submission on Procedures ¶ 22 (Ex. L)</i></p>	To have the IRP include live witness testimony at the IRP hearing.	<p>The Panel ordered the parties to have witnesses appear for testimony at the IRP hearing.</p> <p><i>14 August 2014 Declaration on Procedure ¶ 130 (Ex. K)</i></p>
4	<p>“It is also critical to understand that <b>ICANN created the IRP as an alternative to allowing disputes to be resolved by courts.</b> 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. <b>For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available.</b>”</p> <p><i>May 5, 2014 Submission on Procedures ¶ 22 (Ex. L)</i></p>	To have the IRP include additional and extended briefing.	<p>The Panel ordered the parties to submit additional briefing.</p> <p><i>14 August 2014 Declaration on Procedure ¶¶ 71 (Ex. K)</i></p>
5	<p>“...[A]s a condition of applying for a gTLD, <b>DCA unilaterally surrendered all of its rights to challenge ICANN in court</b> or any other forum outside of the accountability mechanisms in ICANN's Bylaws. As a result, the <b>IRP is the sole forum</b> in which DCA can seek independent, third-party review of the actions of ICANN's Board of Directors.”</p> <p><i>May 29, 2014 Letter to IRP Panel (Ex. N at 2–3)</i></p>	To have the IRP Panel rule that its decision would be binding on the parties.	<p>The Panel held that its decision would be binding on the parties.</p> <p><i>14 August 2014 Declaration on Procedure ¶ 131 (Ex. K)</i></p>

Issue	DCA's Statement	Purpose	Panel's Ruling
6	<p>“This is the <b>only opportunity that a claimant has for independent and impartial review of ICANN’s conduct, the only opportunity.</b>”</p> <p><i>22 May 2015 IRP Hr’g Tr. at 22:16–23:3 (Ex. F)</i></p> <p>“<b>We cannot take you to Court. We cannot take you to arbitration. We can’t take you anywhere. We can’t sue you for anything.</b>”</p> <p><i>23 May 2015 IRP Hr’g Tr. at 507:24–508:5 (Ex. G)</i></p>	To have the IRP Panel apply a <i>de novo</i> standard of review.	<p>The Panel held that it would apply a <i>de novo</i> standard of review.</p> <p><i>Final Declaration ¶ 76 (Ex. I)</i></p>
7	<p>The IRP is “the only independent accountability mechanism available to parties such as DCA.”</p> <p><i>1 July 2015 Submission on Costs (Ex. O at 2)</i></p>	To have the IRP Panel rule that ICANN should pay the entirety of DCA’s IRP costs.	<p>The Panel declared that ICANN should pay the entirety of DCA’s IRP costs.</p> <p><i>Final Declaration ¶ 150 (Ex. I)</i></p>

2. DCA’s Success Before the IRP Is Not Undermined by the Fact That ICANN Did Not Award DCA the Right to Operate .AFRICA.

DCA previously intimated that the success factor is not met because DCA did not ultimately succeed in securing the right to operate the .AFRICA gTLD and therefore it did not “win.” (2/28/18 Trial Tr. at 31:8-9 (“[DCA] won the IRP, but it didn’t really get the relief that it wanted.”).) This completely misconstrues the issue at hand. The IRP Panel never ruled that DCA should be granted the rights to .AFRICA, as that issue was not before the Panel. That DCA ultimately, after the IRP, could not garner the required support or non-objection from the relevant governments or public authorities is irrelevant to the judicial estoppel inquiry. DCA was successful on each of the seven issues for which it argued that it could not sue ICANN—for purposes of judicial estoppel, *that is the relevant inquiry. See People ex rel. Sneddon*, 102 Cal. App. 4th at 189 (“At its heart, [judicial estoppel] prevents chameleonic litigants from ‘shifting positions to suit the exigencies of the moment’ . . . , engaging in ‘cynical gamesmanship’ . . . or ‘hoodwinking’ a court.”) (citations omitted.)

**B. DCA’S First Position Was Taken in a “Quasi-Judicial Administrative Proceeding.”**

The second factor of judicial estoppel is also met because the IRP is a “quasi-judicial

1 administrative proceeding.” To qualify for judicial estoppel, a party’s statements need not be  
2 made in a court of law but can be made in a “quasi-judicial administrative proceeding.” *Jackson*,  
3 60 Cal. App. 4th at 183; *see also People ex rel. Sneddon*, 102 Cal. App. 4th at 189 (“The prior  
4 inconsistent assertion need not be made to a court of law.”). “Statements to administrative  
5 agencies may also give rise to judicial estoppel.” *People ex rel. Sneddon*, 102 Cal. App. 4th at  
6 189 (*citing Mitchell v. Washingtonville Cent. School Dist.*, 190 F.3d 1, 6 (2d Cir. 1999)). Courts  
7 are clear that “[t]hough called *judicial* estoppel, the doctrine has been applied, rightly in our view,  
8 to proceedings in which a party to an administrative proceeding obtains a favorable order that he  
9 seeks to repudiate in a subsequent judicial proceeding.” *People ex rel. Sneddon*, 102 Cal. App.  
10 4th at 189 (*quoting Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993)).

11 As the Ninth Circuit has articulated, “many cases have applied the doctrine where the  
12 prior statement was made in an administrative proceeding, and we are not aware of any case  
13 refusing to apply the doctrine because the prior proceeding was administrative rather than  
14 judicial.” *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996) (“We  
15 hold that the doctrine of judicial estoppel is not rendered inapplicable in this case by the fact that  
16 plaintiff’s prior position was taken in a workers’ compensation proceeding rather than in a  
17 court.”). This rule has been justified on the ground that “[t]he truth is no less important to an  
18 administrative body acting in a quasi-judicial capacity than it is to a court of law.” *Id.* (*quoting*  
19 *Muellner*, 714 F. Supp. at 357).

20 In order to determine what proceedings qualify as a “quasi-judicial administrative  
21 proceeding,” courts look to whether the “formal hallmarks of a judicial proceeding” are present.  
22 *See Nada Pac. Corp. v. Power Eng’g & Mfg., Ltd.*, 73 F. Supp. 3d 1206 (N.D. Cal. 2014); *Tri-*  
23 *Dam v. Schediwy*, No. 1:11-CV-01141-AWI, 2014 WL 897337, at \*5–6 (E.D. Cal. Mar. 7, 2014).  
24 The IRP constitutes a “quasi-judicial administrative proceeding” because it was conducted in a  
25 manner in which courts have found to indicate the “formal hallmarks of a judicial proceeding”: it  
26 was adversarial; the parties swore an oath of truthfulness; submitted briefs; made arguments; cited  
27 to evidence; and called witnesses, all while a neutral party presided over the hearing. *See id.*  
28

1 Specifically, the IRP was a fiercely litigated proceeding, governed by the International  
2 Arbitration Rules and presided over by a distinguished independent three-member panel. The  
3 Panel issued orders setting deadlines and requirements for document requests, objections,  
4 document production, pleadings, witness lists, and witness statements, in addition to scheduling  
5 dates for a prehearing conference and the two-day live hearing. (*See, e.g.*, Ex. S, Procedural  
6 Order No. 3.) In the course of the two-year IRP, ICANN and DCA each produced documents  
7 responsive to its adversary’s requests (in ICANN’s case, producing thousands of pages). Along  
8 with their original briefs on the merits, both sides provided the IRP Panel with witness statements,  
9 which were required to contain an affirmation of the truth of the statement. (Procedural Order  
10 No. 3 ¶ 6(x)(c)). During the IRP final hearing, the parties gave opening and closing statements,  
11 and all three of the witnesses who submitted witness statements (Ms. Bekele, a member of  
12 ICANN’s Board, and the former chair of the GAC) were sworn in by the IRP Panel before giving  
13 live testimony, and underwent questioning by DCA’s counsel, ICANN’s counsel, and the IRP  
14 Panel. (*See generally* 5/22/15 IRP Hr’g Tr.; 5/23/15 IRP Hr’g Tr.)

15 DCA has admitted each of these facts during the course of this litigation. (9/6/17 Bekele  
16 Dep. at 54:16–55:5 (confirming that during the course of the IRP proceedings and the IRP  
17 hearing, the parties exchanged documents, filed pleadings, and witnesses testified at the hearing  
18 (including Ms. Bekele herself); 9/6/17 Bekele Dep. at 53:21–54:15 (confirming that three  
19 witnesses testified live at the IRP hearing).) DCA has further testified that the IRP Panel  
20 constituted a neutral third-party decision-maker selected by the parties that afforded both parties  
21 an opportunity to be heard. (9/6/17 Bekele Dep. 16:17–17:13.) And DCA also confirmed that the  
22 IRP Panel ruled that its Final Declaration would be binding on the parties. (9/6/17 Bekele Dep. at  
23 53:13–16 (confirming DCA’s memory that the IRP Panel concluded that its declaration would be  
24 binding on the parties).) Indeed, during the course of the IRP, DCA repeatedly called, and  
25 likened, the proceeding to an arbitration,<sup>8</sup> which California courts have held constitute “quasi-  
26

27 <sup>8</sup> DCA argued at multiple points during the IRP that those proceedings were equivalent to an  
28 arbitration. (*See* DCA Submission ¶ 1.) DCA further emphasized: “Under California law and  
applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that



1 judicial administrative proceedings.”<sup>9</sup> In short, DCA has essentially acknowledged this factor of  
2 judicial estoppel.

3  
4 **C. DCA’s Lawsuit Against ICANN Is Wholly Inconsistent with Its Position  
Before the IRP.**

5 The fourth factor of judicial estoppel is met as DCA’s lawsuit against ICANN is  
6 inconsistent with the position DCA took during the IRP. Despite repeatedly representing to the  
7 IRP Panel that DCA was unable to sue ICANN in court, DCA then “changed its tune” and sued  
8 ICANN in court. (*See* FAC.) DCA’s prior position before the IRP is totally and logically  
9 inconsistent with its subsequent action/position of bringing suit against ICANN before this Court.  
10 *See Jackson*, 60 Cal. App. 4th at 182; *see also MW Erectors*, 36 Cal. 4th at 422 (a party must  
11 show that the two positions taken are “totally inconsistent”); *Browne v. Turner Const. Co.*, 127  
12 Cal. App. 4th 1334, 1349 (2005) (defining standard as “logically inconsistent”). DCA cannot  
13 both be precluded from suing ICANN *and* allowed to sue ICANN. These positions are truly  
14 irreconcilable and are necessarily mutually exclusive. *See e.g., AP-Colton LLC v. Ohaeri*, 240  
15 Cal. App. 4th 500 (2015) (judicially estopping party from arguing that the case is “limited” after  
16 the party checked the “unlimited” box on the Case Management Statement, and designated the  
17 cross-complaint and the notice of appeal as “unlimited”).

18 DCA’s representations to the IRP Panel were unequivocal: the IRP proceeding was  
19 DCA’s only opportunity to have *all* of its rights litigated. (4/20/14 DCA Letter to the IRP Panel  
20 at. 2, (“[T]hese proceedings will be *the first and last opportunity* that DCA Trust will have to

21 California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-  
22 party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring  
23 the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a  
24 binding decision.” (DCA Submission ¶ 4; *see also* 9/6/17 Bekele Dep. at 15:19–16:13  
(confirming that DCA compared the IRP to an arbitration); 9/6/17 Bekele Dep. at 24:18–24  
(confirming DCA’s lawyers took the position that the IRP was an arbitration in all but name).)

25 <sup>9</sup> California courts have held that arbitrations constitute “quasi-judicial administrative  
26 proceedings.” *See, e.g., Moore v. Conliffe*, 7 Cal. 4th 634, 644–45 (1994); *Accito v. Matmor*  
27 *Canning Co.*, 128 Cal. App. 2d 631, 633 (1954) (extending litigation privilege to arbitrations and  
28 finding that the object of arbitration statutes is to “provide a means of obtaining speedy and final  
disposition of disputes . . . by arbitrators of parties’ own choice in a quasi judicial manner as a  
substitute for the formalized and oftentimes expensive court proceeding”); *see also Portland Gen.*  
*Elec. Co. v. U.S. Bank Trust Nat’l Ass’n*, 218 F.3d 1085, 1090 (9th Cir. 2000) (“Arbitration  
agreements permit arbitrators to resolve pending disputes generally through adversary hearings at  
which evidence is admitted and the arbitrator plays a quasi-judicial role.”).

1 have its rights determined by an independent body.”); DCA Submission ¶22, (“For DCA and  
2 other gTLD applicants, *the IRP is their only recourse*; no other legal remedy is available.”);  
3 5/29/14 DCA Letter, at p. 2–3 (“DCA unilaterally *surrendered all of its rights* to challenge  
4 ICANN in court . . . *the IRP is the sole forum . . .*”); 5/22/15 IRP Hr’g Tr. at 22:16–23:3 (“This is  
5 the *only opportunity* that a claimant has for independent and impartial review of ICANN’s  
6 conduct, *the only opportunity.*”).)

7 DCA never qualified any of its statements to the IRP Panel. Yet, in an effort to avoid  
8 being judicially estopped, DCA has now attempted to retract its previous statements with pretext.  
9 DCA has previously argued in this Court that it did not really change positions by filing the  
10 present lawsuit because the IRP was about ICANN following its Bylaws, while this lawsuit is  
11 about fraud. Alternatively, DCA has argued that its position at the IRP was actually that *if the*  
12 *Covenant was enforceable, then the IRP must be binding.*

13 These attempts to excuse its prior statements to the IRP Panel are without merit. First,  
14 during the IRP, DCA stated that it was unable to sue ICANN in court with 100% certitude,  
15 affirmatively, and ***without qualification***. See, e.g., *Padron v. Watchtower Bible & Tract Soc’y of*  
16 *New York, Inc.*, 16 Cal. App. 5th 1246, 1263 (2017) (affirming the application of judicial estoppel  
17 when the party’s first position was not made with a qualification that would otherwise make the  
18 second position consistent). DCA did not represent that it was prevented from suing ICANN  
19 *except for certain claims, or except in the event of fraud.*<sup>10</sup> In fact, DCA brought both fraud *and*  
20 non-fraud claims in this lawsuit. What is more, DCA’s current fraud claims include many of the  
21 *exact same allegations* underlying its claims during the IRP.<sup>11</sup> Indeed, as DCA admits, at the

22  
23 <sup>10</sup> DCA took this same position in a letter to Congress, asking for oversight of the New gTLD  
24 Program. DCA wrote that “[t]he program has been designed in such a way that an applicant  
25 (participating in the program) cannot sue ICANN on the basis of its application or matters relating  
26 to the New gTLD program, thus constricting any possible avenues of legal redress for any  
27 aggrieved application.” (Ex. T, February 21, 2013 Letter from DCA to Congress at 2–3.)

28 <sup>11</sup> See, e.g., FAC ¶ 29 (claiming that ICANN conspired with the AUC on how to defeat any  
applications for .AFRICA other than the AUC’s), and Ex. U, Amended Notice of IRP ¶ 20, 45  
(same), Bekele IRP Witness Statement ¶¶ 63–64 (same), Ex. V, DCA’s IRP Memorial on the  
Merits ¶ 13 (same); FAC ¶ 44 (claiming ICANN allowed the GAC to be used as a vehicle for the  
issuance of advice against DCA’s application by the AUC), and Amended Notice of IRP at ¶¶  
26–28 (same), Bekele IRP Witness Statement ¶ 65 (same), 5/22/15 IRP Hr’g Tr. at pp. 33:1–

1 time of the IRP *DCA believed ICANN had committed fraud.* (9/6/17 Bekele Dep. at 44:5–12,  
2 44:22–45:9, 45:11–46:15, 47:6–48:21, 65:9–66:3.) And when DCA was repeatedly arguing to  
3 the IRP Panel that it was unable to sue ICANN because of the Covenant, DCA’s IRP claims  
4 already included allegations of fraud against ICANN. Thus, at the time DCA represented to the  
5 IRP Panel that it could not, *under any circumstances*, file a lawsuit against ICANN related to  
6 ICANN’s processing of DCA’s application for .AFRICA, DCA was referencing *all* of its  
7 operative claims, including fraud.

8 Second, in the instances where DCA raised the issue of enforceability of the Covenant, it  
9 was to reinforce that position, but never qualify it. (*See* DCA’s Response to the Panel’s  
10 Questions on Procedural Issues, Res. ¶ 7 (stating that under California, federal, and international  
11 law and principles “in order for this IRP not to be unconscionable, it must be binding”).) DCA  
12 did not state that the Covenant might be unenforceable or that, depending on the enforceability of  
13 the Covenant, DCA might have the right to sue ICANN in the future.

14 There simply is no way to characterize DCA’s two positions as anything other than  
15 inconsistent and mutually exclusive.

16 ***D. DCA’s Position Before the IRP Was Not a Result of Ignorance, Fraud, or***  
17 ***Mistake.***

18 Finally, the fifth factor of judicial estoppel is met because there is no evidence indicating  
19 that DCA took its prior position as a result of ignorance, fraud, or mistake. *See, e.g., Jackson*, 60  
20 Cal. App. 4th at 183 (judicial estoppel should apply only when the first position was not the result  
21 of ignorance, fraud, or mistake); *Blix*, 191 Cal. App. 4th at 51 (finding that there is no indication  
22 on the record that the first position was based on ignorance, fraud, or mistake); *Padron*, 16 Cal.  
23 App. 5th at 1264 (same). In fact, courts have placed the burden of proving this factor on the party  
24 attempting to evade estoppel. *Bucur*, 244 Cal. App. 4th at 188 (applying judicial estoppel

25  
26 42:20 (same); FAC ¶¶ 44–45 (claiming that the GAC advice was not “consensus” because  
27 Kenya’s true representative was absent), and DCA’s Memorial on the Merits ¶¶ 19–22 (same),  
28 5/22/15 IRP Hr’g Tr. at 42:16–48:3 (same); FAC ¶ 76 (claiming that ICANN never intended to  
treat the applicants the same, but rather chose applicants based on its own wishes and in exchange  
for political favors), and Bekele IRP Witness Statement ¶¶ 90–91 (same), 5/22/17 IRP Hr’g Tr. at  
17:1–11, 21–24 (same); and so on.<sup>11</sup>

1 because “[a]ppellants made no showing that their stipulation to arbitrate, with the knowledge and  
2 consent of their former attorney, was the result of fraud, ignorance, or mistake”).

3 DCA has attempted to misrepresent the standard by arguing that the “law places the  
4 burden of proof on the Defendant to establish evidence that DCA has acted fraudulently.” (2/9/18  
5 Phase I DCA Trial Brief (“DCA Trial Brief”), at 9.)<sup>12</sup> It does not. In weighing this factor, courts  
6 consider whether there was any *indication in the record* that the first position was based on  
7 ignorance, fraud, or mistake; if there was not, this factor should weigh in favor of the application  
8 of the doctrine. *Blix*, 191 Cal. App. 4th at 51; *Padron*, 16 Cal. App. 5th 1246, 1264 (2017)  
9 (same). The standard does not place on the party seeking to invoke estoppel a burden of  
10 affirmatively proving fraud or bad faith.

11 DCA also has argued that its prior statements were a result of DCA’s ignorance and  
12 mistake as to whether or not it could sue ICANN. This argument is illogical and it fails under  
13 California law. DCA’s argument is that Sophia Bekele, the CEO of DCA, is not a lawyer.  
14 (2/28/18 Trial Tr. at 23:25–28, 3/1/18 Trial Tr. at 19:10–21.) Whether Ms. Bekele is an attorney  
15 is irrelevant to the judicial estoppel inquiry; courts are clear that judicial estoppel applies to  
16 positions taken by both “a party or a party’s legal counsel.” *Blix*, 191 Cal. App. 4th at 48.  
17 Indeed, Ms. Bekele is also not an “ignorant plaintiff.” She has a bachelor’s degree in business  
18 analysis and information systems, and a master’s in business administration and management and  
19 information systems. (2/28/18 Trial Tr. at 42:1–7.) As Ms. Bekele testified, she has been  
20 actively involved in the ICANN community since 2005, including serving as an advisor to  
21

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22 <sup>12</sup> The single case DCA cites for its argument, *Lee v. W. Kern Water Dist.*, 5 Cal. App. 5th 606  
23 (2016), is completely distinguishable. (See DCA Trial Brief, at 9.) In *Lee*, the defendants argued  
24 that because the plaintiff stipulated in the workers’ compensation proceedings that her injury  
25 arose from her employment, she should have been barred by judicial estoppel from asserting  
26 before the trial court that it did not. *Lee*, 5 Cal. App. 5th at 630–31. The appellate court affirmed  
27 that judicial estoppel did not apply due to defendants’ forfeiture of the argument and indicated,  
28 even if forfeiture was not applied, the facts in the case did not indicate any wrongdoing for the  
purposes of judicial estoppel based on the record before it—the employee testified that she filled  
out a form brought to her home by her employer, urging her to seek medical treatment. *Id.* The  
paperwork contained a boilerplate stipulation that her injury arose out of and in the course of her  
employment, which the court found “hardly show she intended to deceive the court, take unfair  
advantage of her opponents.” *Id.* This is wholly distinguishable from DCA’s *deliberate and*  
*repeated* statements at issue here. Moreover, the court in *Lee* did not set a new standard, raise  
any party’s burden, or indicate that fraudulent conduct must be proven to meet this factor.

1 ICANN’s Generic Names Supporting Organization (the organization that developed the policy  
2 recommendations behind the New gTLD Program). (2/28/18 Trial Tr. at 43:1–22; 3/1/18 Trial  
3 Tr. at 56:18–22.) And perhaps most importantly, she was an active participant in the  
4 development of the Guidebook, which contains the Covenant (2/28/18 Trial Tr. at 44:23–26).

5 DCA further claims ignorance because “the litigation waiver relevant to the judicial  
6 estoppel trial was drafted by ICANN.” (DCA Post-Trial Brief, at 6.) Courts have rejected such  
7 assertions of ignorance that would otherwise permit a party to avoid the impact of being bound by  
8 a legal document. *See Thomas*, 85 Cal. App. 4th at 121 (holding that a physicians’ allegation that  
9 she did not read bankruptcy petitions or schedules before signing them and that she relied on  
10 advice of professionals is an insufficient basis for rejecting application of judicial estoppel)  
11 (citing *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333, 339 (1985) (“It is well  
12 established, in the absence of fraud, overreaching or excusable neglect, that one who signs an  
13 instrument may not avoid the impact of its terms on the ground that he failed to read the  
14 instrument before signing it.”)). And as indicated above, Ms. Bekele was also an active  
15 participant in the development of the Guidebook that contains the Covenant—any ignorance she  
16 may claim regarding the Covenant is not excusable.

17 DCA also has argued that its reversal of position should be excused because DCA was not  
18 aware during the IRP that ICANN would not view the IRP as binding. (*See* 2/28/18 Trial Tr. at  
19 148:28–149:5.) But the evidence proves this argument to be false. Prior to the IRP, ICANN had  
20 participated in only one IRP, and that panel had ruled that its declaration was *not* binding.  
21 (5/29/14 DCA Letter to the IRP Panel, at 3.) In fact, the claimant’s attorney in that IRP also  
22 represented DCA in its IRP proceeding. (2/28/18 Trial Tr. at 54:12–20; 3/1/18 Trial Tr. at 90:18–  
23 21.) Further, DCA was put on notice *at least* by early 2014 that ICANN did not view this  
24 particular IRP as binding, yet DCA continued to tell the IRP Panel (including with emphatic  
25 statements at the May 2015 hearing) that it was unable to sue ICANN, without caveat. At no time  
26 did DCA qualify its statement to say, “DCA cannot sue ICANN in court unless ICANN fails to  
27 follow the IRP Panel’s decision,” or “DCA cannot sue ICANN unless ICANN does not treat the  
28

1 IRP Panel’s decision as binding.” And, to be clear, ICANN followed the IRP Panel’s Final  
2 Declaration in full.

3 DCA also has argued that it was not aware during the IRP that this Court (Judge Halm)  
4 would allow DCA’s fraud claims to proceed. This argument also fails. First, as previously noted,  
5 DCA brought both fraud and non-fraud claims in this lawsuit. Second, the fact that DCA did not  
6 know that a subsequent court might find the Covenant unenforceable does not undermine the  
7 application of judicial estoppel. The court in *Blix* made clear that judicial estoppel is not  
8 dependent on the potential merits of a claim. *Blix*, 191 Cal. App. 4th at 49–50. There, a party  
9 was estopped from changing its position that a settlement agreement was enforceable, even in  
10 part, to a position that it was unenforceable, *even if it was legally unenforceable*. *Id.* at 50–51;  
11 *see also Galin v. IRS*, 563 F. Supp. 2d 332, 341 (D. Conn. 2008) (stating that “[t]he law is clear  
12 that legal advice and ignorance of the law are not defenses to judicial estoppel”); *Carr v. Beverly*  
13 *Health Care & Rehab. Servs., Inc.*, No. C-12-2980 EMC, 2013 WL 5946364, at \*6 (N.D. Cal.  
14 Nov. 5, 2013) (for the purposes of judicial estoppel “‘ignorance of the law is no excuse,’  
15 particularly where, as here, [the declarant] was represented by counsel”) (citation omitted).  
16 Third, in all the times that DCA argued to the IRP Panel that DCA could never sue ICANN, DCA  
17 never once qualified its statements by referencing the potential unenforceability of the Covenant,  
18 nor did DCA ever indicate that it intended to challenge the enforceability of the Covenant.  
19 Fourth, and most importantly, this Court’s ruling would only excuse DCA’s about-face if DCA  
20 had reversed its position as a result of the Court’s ruling. But it did not. DCA reversed its  
21 position before the Court’s ruling, based on nothing more than its own desire to obtain the rights  
22 to operate .AFRICA. DCA cannot attempt to use this Court’s ruling to excuse its behavior.

23 **IV. ICANN’S CONDUCT IS NOT RELEVANT TO THE JUDICIAL ESTOPPEL**  
24 **INQUIRY.**

25 In an effort to avoid being judicially estopped, DCA previously has tried to redirect the  
26 Court’s focus to ICANN’s conduct—*i.e.*, ICANN’s positions before the IRP and actions  
27 thereafter. Specifically, DCA has argued that, because ICANN did not view the IRP Declaration  
28

1 as binding or because ICANN allegedly failed to implement the Declaration after the IRP  
2 concluded, the IRP is not a “quasi-judicial” proceeding and DCA did not actually succeed in its  
3 first position before the IRP Panel. (See 2/28/18 Trial Tr. at 28:24-29:9.) DCA’s arguments  
4 ignore the judicial estoppel factors.

5 First, while it is true that ICANN argued during the IRP that the IRP’s ruling should not  
6 be binding, ICANN’s position has no bearing on whether DCA’s conduct supports the application  
7 of judicial estoppel. One of the fundamental tenets of the doctrine of judicial estoppel is to  
8 maintain the integrity of the courts and prevent parties, like DCA, from gaining unfair advantage  
9 by taking inconsistent positions. Thus, judicial estoppel is “primarily concerned with the  
10 connection between a party and the judicial system, not the relationship between the parties.”  
11 *Jogani v. Jogani*, 141 Cal. App. 4th 158, 170 (2006).

12 Second, DCA *prevailed* in convincing the IRP panel that its decision should be final and  
13 binding, which was in part based on DCA’s argument that it has “surrendered all of its rights to  
14 challenge ICANN in court.” (See 5/29/14 DCA Letter to IRP Panel; Proc. Decl. ¶¶ 39, 40 (IRP  
15 holding that IRP decision would be binding as “[t]he avenues of accountability for applicants that  
16 have disputes with ICANN do *not* include resort to the courts,” and that “the ultimate  
17 ‘accountability’ remedy for applicants is the IRP”).) As outlined above, the Panel’s ruling on this  
18 issue is one of several examples that undercut DCA’s argument that it did not succeed on its prior  
19 position.

20 Third, whether ICANN deemed the Final Declaration to be binding is irrelevant to the  
21 question of whether the IRP was a quasi-judicial administrative proceeding. As outlined in  
22 Section II.B above, the IRP is a quasi-judicial administrative proceeding because it possesses all  
23 of the “hallmarks” of such proceedings. DCA has not pointed to any authority to support its  
24 argument to the contrary. Nevertheless, the fact that the IRP Panel ruled that the Final  
25 Declaration is binding supports DCA’s own prior arguments that a binding resolution is a  
26 “hallmark” of a quasi-judicial proceeding.

27 Finally, while it is true that ICANN continued to disagree with whether that Final  
28

1 Declaration was binding, the ICANN Board issued a resolution adopting the IRP Final  
 2 Declaration *in every respect* (as reflected in the chart provided below):  
 3

IRP Panel’s Declaration (Ex. I, ¶¶ 149-150)	ICANN Board Resolution (Ex. P)	ICANN’s Action
ICANN should continue to refrain from delegating .AFRICA to ZA Central Registry (“ZACR”) <sup>13</sup> while DCA’s application is being processed.	To continue to refrain from delegating .AFRICA to ZACR while DCA’s application is being processed.	ICANN continued to refrain from delegating .AFRICA to ZACR while DCA’s application was being processed.
ICANN should place DCA’s application back into processing.	To place DCA’s application back into processing.	ICANN placed DCA’s application back into processing (Geographic Names Review) – the exact place the application had been before the IRP.
ICANN should pay DCA’s IRP costs.	To pay DCA’s IRP costs.	ICANN paid DCA’s IRP costs.

11 Notably, DCA has actually admitted that ICANN followed each aspect of the IRP Panel’s  
 12 ruling: (i) it is undisputed that ICANN did not delegate .AFRICA to ZACR while DCA’s  
 13 application was being processed following the IRP; (ii) DCA admits that its application had not  
 14 completed Geographic Names Review at the time the GAC advice was accepted and admits that,  
 15 following the IRP, ICANN placed DCA’s application back into Geographic Names Review for  
 16 evaluation (2/28/18 Trial Tr. at 49:12–28; 3/1/18 Trial Tr. at 11:7–10); and (iii) DCA admits that  
 17 ICANN paid DCA’s IRP costs. (2/28/18 Trial Tr. 104:20–25.)

18 **CONCLUSION**

19 For the foregoing reasons, ICANN respectfully requests that the Court apply the doctrine  
 20 of judicial estoppel to prevent DCA from proceeding with the lawsuit. Each *Jackson* factor is  
 21 satisfied here: DCA repeatedly represented in a quasi-judicial proceeding that DCA could not sue  
 22 ICANN; DCA succeeded on each of those arguments; and there is no evidence that DCA’s first  
 23 position was a result of ignorance, fraud, or mistake. By filing this lawsuit, DCA has taken a  
 24 totally inconsistent position and should be judicially estopped from doing so.

25 Ultimately, this lawsuit is about DCA taking a second bite at the apple because “it didn’t

26 <sup>13</sup> ZACR is an entity that had separately applied for the .AFRICA gTLD through the New gTLD  
 27 Program. Ultimately, .AFRICA was delegated to ZACR only after this Court (in February 2017)  
 28 denied DCA’s attempt to obtain a preliminary injunction preventing ICANN from delegating the  
 gTLD to ZACR. (See 2/3/17 Order re Plaintiff’s Motion for Preliminary Injunction.) ZACR is  
 an intervener in this action.

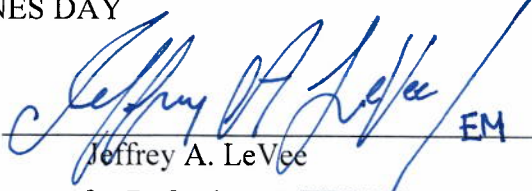


1 really get the relief it wanted”—the right to operate .AFRICA. (2/28/18 Trial Tr. at 31:8–9.)  
2 Such relief was not available at the IRP, and the IRP Panel never ruled that DCA should be  
3 granted the right to operate .AFRICA. ICANN provided DCA every opportunity to submit  
4 sufficient documentation to proceed with its application; DCA did not comply and instead sued  
5 ICANN, which DCA had persistently told the IRP Panel it could never do. DCA should be  
6 judicially estopped from proceeding with this lawsuit.  
7

8 Dated: January 17, 2019

JONES DAY

9  
10 By:

  
Jeffrey A. LeVee EM

11 Attorneys for Defendant INTERNET CORP.  
12 FOR ASSIGNED NAMES AND NUMBERS  
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