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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

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

Defendants.

CASE NO. BC607494

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

ICANN'S POST-TRIAL BRIEF (JUDICIAL ESTOPPEL BENCH TRIAL)

Complaint Filed: January 20, 2016
Bench Trial Date: February 6, 2019
Jury Trial Date: TBD

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INTRODUCTION

Following a three-day trial before this Court, there can be zero doubt that plaintiff DotConnectAfrica Trust ("DCA") unequivocally asserted it cannot sue defendant Internet Corporation for Assigned Names and Numbers ("ICANN") in court in any way related to DCA's application for .AFRICA. Further, DCA prevailed on that position multiple times throughout the Independent Review Process ("IRP") it instituted against ICANN, and then went on to win the entire proceeding on the merits. Nevertheless, months later, when DCA's application for .AFRICA ultimately did not succeed, DCA turned around and did exactly what it had repeatedly represented to the IRP Panel that it could not do—DCA sued ICANN. DCA has presented no evidence showing that its initial position was taken as a result of fraud, ignorance, or mistake; and there is strong evidence to the contrary. It is hard to imagine a situation more appropriate for invocation of the doctrine of judicial estoppel.

There truly is only one substantive issue that DCA continued to advance during the trial: DCA argued that, because ICANN did not view the IRP Panel's declaration as legally binding, and because the ICANN Board voted to implement the IRP Panel's award, the IRP is not a quasi-judicial proceeding. These matters, however, do not change the quasi-judicial nature of the IRP. DCA does not dispute that the IRP contained the hallmarks of a quasi-judicial proceeding—including representation by counsel, multiple rounds of briefing, document production, witness statements, a fiercely litigated nearly two-year proceeding, a live, two-day hearing in which all of the witnesses who submitted written statements testified under oath and were subject to cross-examination, and a neutral panel that had the ability to make decisions and concluded that its declarations in the IRP are final and binding. The fact that ICANN voted to adopt the IRP Panel's recommendations regarding ICANN's future action neither undermines the IRP's declaration on the merits nor the quasi-judicial nature of the IRP.

The evidence before the Court plainly shows that all five factors for applying judicial estoppel are met. DCA's attempts to misrepresent the facts and the applicable law should be rejected, and the Court should enter judgment in ICANN's favor.

ARGUMENT[1]

I. THE IRP IS A QUASI-JUDICIAL PROCEEDING (SECOND FACTOR).

A. The IRP Contained All the Hallmarks of a Quasi-Judicial Proceeding.

For judicial estoppel to apply, the "prior inconsistent assertion need not be made in a court of law," *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 102 Cal. App. 4th 181, 189 (2002), but can be made in any quasi-judicial proceeding. *See Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 568 F. Supp. 2d 1152, 1184 (C.D. Cal. 2008) ("[T]he truth is no less important to an [entity] acting in a quasi-judicial capacity than it is to a court of law."), *aff'd*, 692 F.3d 983, 998–99 (9th Cir. 2012).

When applying judicial estoppel and various other doctrines, courts consider a variety of factors, or "hallmarks," to determine whether a proceeding is quasi-judicial.[2] In weighing various combinations of hallmarks, "courts will pay proper respect to [] an association's quasi-judicial procedure." *Bray v. Int'l Molders & Allied Workers Union*, 155 Cal. App. 3d 608, 616 (1984). Courts frequently recognize that a private or non-profit organization's internal dispute resolution process is a quasi-judicial proceeding. *See, e.g., id.* (trade union's grievance procedure prescribed by the International Union's constitution and defendant's bylaws); *Gupta v. Stanford Univ.*, 124 Cal. App. 4th 407, 411 (2004) (private university disciplinary proceedings formed by the university's judicial charter); *Westlake*, 17 Cal. 3d at 471, 478, 483 (hospital's judicial review

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[1] Attached hereto as Appendix A is the timeline summarizing the relevant facts, similar to the timeline attached as Appendix B to ICANN's Pretrial Brief but now citing to stipulated facts, evidence, and testimony entered at trial.

[2] The inquiry is not rigid; courts consider various combinations of factors. *See Tri-Dam v. Schediwy*, No. 1:11-cv-01141-AWI, 2014 WL 897337, at *5–6 (E.D. Ca. Mar. 7, 2014) (holding that the first proceeding had the formal hallmarks of a judicial proceeding because parties had the ability to call witnesses, the witnesses swore an oath of truthfulness, and a neutral party presided over the hearing); *Nada Pac. Corp v. Power Eng'g & Mfg., Ltd.*, 73 F. Supp. 3d 1206, 1216–17 (N.D. Cal. 2014) (considering whether parties submitted briefs, cited to evidence, responded to the others' arguments, and whether the panel had the ability to make a decision); *see also Westlake Cmty. Hosp. v. Superior Court*, 17 Cal. 3d 465, 471, 478, 483 (1976) (recognizing a hospital procedure that provided an oral hearing before the hospital's judicial review committee, where the parties were represented by counsel, witnesses were called, documentary evidence was introduced, and the entire proceeding was transcribed by certified reporters was quasi-judicial; whereas, another hospital's procedure that relied solely on the hospital's internal investigation and did not provide a party a notice and a hearing was not).

committee hearing mandated by hospital bylaws and rules); *Drury v. Missouri Youth Soccer Ass'n, Inc*., 259 S.W.3d 558, 571 (Mo. Ct. App. 2008) (youth sports association committee hearing); *Singh v. Tong,* No. 06–64 AA, 2006 WL 3063495, at *3 (D. Or. Oct. 25, 2006) (law school honor code committee hearing).

Here, the evidence before the Court demonstrates that the IRP had all the hallmarks of a quasi-judicial proceeding, which DCA has conceded, with the sole exception of the "binding" issue discussed below.[3] (2/6/19 Trial Tr. at 87:9–89:10; 90:9–91:3; 92:9–94:24; 115:9–18; 131:6–133:18.)[4] The IRP was conducted pursuant to the International Arbitration Rules of the International Center for Dispute Resolution ("ICDR") and was presided over by three neutral, independent, and distinguished decision–makers who had been selected by the parties and the ICDR. (2/6/19 Trial Tr. at 87:9–89:10; Stip. Fact ¶¶ 12, 13.) The proceeding was adversarial, as it was fiercely litigated over a nearly two-year period and culminated in a two-day live hearing transcribed by certified reporters. (2/6/19 Trial Tr. at 87:9–21; 90:9–91:3; Stip. Fact ¶¶ 14-16; *see generally* Ex. 35, 5/22/15 IRP Hr'g Tr., Ex. 36, 5/23/15 IRP Hr'g Tr.) The IRP Panel ordered document productions, sworn witness statements, witness lists, a prehearing conference, and written briefs on the merits, which cited to the evidence that had been developed. (Ex. 19, IRP Proc. Order 3; 2/6/19 Trial Tr. at 131:6–21.) At the two-day hearing, all three witnesses who provided sworn written statements testified under oath and were questioned by the IRP Panel and the lawyers. (2/6/19 Trial Tr. at 111:7–11; 132:19–133:14; Stip. Fact ¶¶ 16–17; *see generally* Ex. 35, 5/22/15 IRP Hr'g Tr., Ex. 36, 5/23/15 IRP Hr'g Tr.) DCA and ICANN were represented by counsel who gave opening and closing statements. (2/6/19 Trial Tr. at 89:11–21; 115:9–18,

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[3] As noted in ICANN's Pretrial Brief, DCA argued multiple times to the IRP Panel that the IRP was akin to an arbitration because it had all the characteristics courts consider to determine whether a proceeding is an arbitration. (ICANN Brief at 24, n.8; *see also* Ex. 15, DCA Sub. on Proc. Issues, at 4.) California courts have consistently held that arbitrations constitute quasi-judicial proceedings. *See, e.g.*, *Moore v. Conliffe*, 7 Cal. 4th 634, 644–45 (1994).

[4] Per the Court's order, on February 22, 2019, ICANN lodged all three volumes of the final transcripts containing trial testimony from February 6, 2019 (Vol. I), February 7, 2019 (Vol. II), and February 8, 2019 (Vol. III), which are respectively cited herein as "2/6/19 Trial Tr.," "2/7/19 Trial Tr.," or "2/8/19 Trial Tr." All exhibits cited were admitted into the record during trial. (*See generally* 2/6/19 Trial Tr.; 2/7/19 Trial Tr.; 2/8/19 Trial Tr.) All cites to "Stip. Fact" refer to the parties' January 17, 2019 Stipulation of Facts for Judicial Estoppel Trial.

133:15–18; Stip. Fact ¶ 17.) And, lastly, the IRP Panel determined, consistent with DCA's arguments to the IRP Panel, that its decisions were final and binding. (*Id.* at 92:9–94:24; Stip. Fact ¶ 34; *see also* Ex. 18, IRP Decl. on Proc., ¶ 131; Ex. 33, Final Decl., ¶ 23.)

Although DCA invoked *Nada* in its opening statement, ICANN cited *Nada* in its trial brief to, in fact, highlight the stark contrast between the IRP and the non-binding dispute process at issue in *Nada*. *See Nada*, 73 F. Supp. 3d at 1216–17. In *Nada*, the court concluded that the utility commission's dispute resolution board had many of the hallmarks of a quasi-judicial proceeding (i.e., adversarial proceedings, parties could submit briefs), *id.* at 1216, but the court noted that the proceedings lacked certain other important hallmarks (i.e., attorney representation was prohibited, parties could not examine each other), *id.* at 1211–12. Moreover, the utility commission's dispute resolution board "lacked the most important hallmark—the ability to make a decision." *Id.* at 1216–17. Specifically, the court concluded that the board had "no such power" to "make a decision" and "was limited to issuing a *nonbinding* (albeit written) recommendation that [the parties] could accept or reject," which could then be admissible in subsequent litigation or other dispute resolution proceedings. *Id.* at 1217 (emphasis added). As the court highlighted, the board's procedures recognized "that the [dispute] process might not result in a resolution of the dispute." *Id.* Essentially akin to a mediation, the dispute resolution process in *Nada* was nonbinding, and was meant only to supplement negotiations. Thus, the court concluded that the commission's proceedings were not quasi-judicial and did not justify invocation of judicial estoppel.

Here, by contrast, there was never any question that the IRP Panel could (and did) make a decision as to whether ICANN had acted inconsistently with its Bylaws, Articles of Incorporation, or the New gTLD Applicant Guidebook ("Guidebook"). (Ex. 4, Bylaws, at 15 (Art. IV, § 3.11(c)) ("The IRP Panel shall have the authority to . . . declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws[.]"); *id.* at 17 (Art. IV, § 3.21); Ex. 33, Final Decl., ¶ 148.) And the IRP Panel specifically held that its decisions were binding. (Ex. 18, IRP Decl. on Proc., ¶ 131; Stip. Fact ¶ 34; *see also id.* ¶ 20; Ex. 33, Final Decl., ¶ 23.)

B. The IRP Panel Issued a Decision and Concluded It Had the Power to Issue Binding Decisions.

DCA expressly (and repeatedly) argued to the IRP Panel that the Panel had the authority to issue "final and binding" decisions: "The governing instruments of the IRP—i.e., the Bylaws, the ICDR Rules, and the Supplementary Procedures—confirm that the IRP is final and binding. The powers of the IRP Panel, and the language used to describe its functions, demonstrate that it is meant to provide a final and binding decision resolving the dispute between the parties." (Ex. 15 ¶ 23 (emphasis added).)[5] Although ICANN argued against DCA's position,[6] the IRP Panel accepted DCA's position and ruled that "it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings." (Ex. 18, IRP Decl. on Proc., ¶ 129; *see also id.* ¶ 20.) And the IRP Panel concluded the same as to the merits: "As ICANN's Bylaws explicitly put it, an IRP Panel is '*charged with* comparing contested actions of the Board [. . .], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. [']" (Ex. 32, Third Panel Decl. of IRP Proc, ¶ 14 (emphasis in original) (citing Bylaws Article IV, Section 3); *see also* Ex. 18 ¶ 131; Ex. 33, Final Decl.; Ex. 4, Bylaws, Article IV, § 11.c, 21 (ICANN's Bylaws state: "The IRP Panel shall have the authority to . . . declare whether an action or inaction of the Board was inconsistent with the Articles of

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[5] One of DCA's primary arguments in the IRP was that the Panel's decision must be binding because DCA could not sue ICANN. (*See, e.g.*, Ex. 15, DCA Sub. on Proc. Issues, ¶ 22 ("ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to . . . waiver of all of its rights to challenge ICANN's decision on DCA's application in court. . . . IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions."); Ex. 16, DCA Resp. to the IRP Panel's Questions on Proc. Issues,¶ 7 ("Where California courts have considered and upheld broad litigation waivers, the alternative to court litigation provided by the parties' contract is inevitably a binding dispute resolution mechanism. *Little v. Auto Stiegler, Inc*., 63 P.3d 979, 987 (Cal. 2003) [] Thus, in order for this IRP not to be unconscionable, it must be binding.") (additional citations omitted).)

[6] ICANN's position on the issue, however, is irrelevant for purposes of judicial estoppel. ICANN opposed each of DCA's requests to the IRP, just as one would expect in an adversary proceeding. The judicial estoppel doctrine is "directed against those who would attempt to manipulate the court system[.]" *Nat'l Bldg. Maint. Specialists, Inc. v. Hayes*, 653 S.E. 2d 772, 774 (Ga. Ct. App. 2007) (citation omitted). "A fortiori, whether to apply the doctrine of judicial estoppel depends *entirely* on the actions of the [party to be judicially estopped]." *Id*. (emphasis added). Whether a proceeding is quasi-judicial is properly determined by looking at the hallmarks of the proceeding, not the positions taken by the parties as to how the proceeding should be conducted.

Incorporation and Bylaws" and that "declarations of the IRP Panel . . . are final and have precedential value.").) Thus, the IRP Panel concluded it had binding authority on matters of both procedure and merits: "[T]he Panel concludes that this Declaration [on the IRP Procedure] and its future Declaration on the Merits of this case are binding on the parties." (Ex. 18, IRP Decl. on Proc., ¶ 131.)

The IRP Panel first exercised that authority by issuing rulings in DCA's favor on discovery, additional briefing, and live witnesses. (Ex. 18, IRP Decl. on Proc., ¶¶ 129–130; 2/6/19 Trial Tr. at 114:24–115:1.) Each party proceeded strictly in accordance with these IRP Panel rulings on discovery (ICANN and DCA exchanged document requests, and the IRP involved the production of thousands of pages) (2/6/19 Trial Tr. at 131:6–21), briefing, and live witness testimony (DCA produced its witness and ICANN produced its two witnesses at the IRP hearing, all of whom testified live and were subject to cross examination) (*id.* at 111:7–11; 132:19–133:14; *see generally* Ex. 35, 5/22/15 IRP Hr'g Tr., Ex. 36, 5/23/15 IRP Hr'g Tr.; Stip. Fact ¶¶ 14-17).

Before the IRP Panel issued a final declaration, DCA submitted a request that if the Panel declared that ICANN was in violation of its Bylaws and/or its Articles of Incorporation, then the IRP Panel also recommend a course of action for the ICANN Board. (Ex 33 ¶ 59 (DCA's form of requested relief was a declaration regarding the Board's action, a declaration regarding the prevailing party, and as a result of the Board's violation, *recommendations* as to a course of action for the Board); Ex. 29, DCA Final Req. for Relief.) The IRP Panel found that it did have the "power to **recommend** a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook." (Ex. 33, Final Decl., ¶ 126) (emphasis added).) Thereafter, the IRP Panel exercised its authority by making a decision on the merits regarding the ICANN Board's actions: "[T]he Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN." (Ex. 33, Final Decl., ¶ 148.) ICANN did not challenge that decision. (*See generally* Ex. 41, Resolution.)

In addition to the IRP Panel's decision about the Board's conduct, the Panel made several recommendations—all of which DCA had requested—advising ICANN to: (1) continue to refrain from delegating while DCA's application is being processed; (2) place DCA's application into processing "through the remainder of the new gTLD application process"; and (3) pay DCA's IRP costs in the amount of $198,046.04. (Ex. 33, Final Decl., ¶¶ 149–150; Stip. Fact ¶ 39.) One week after the IRP Panel issued its final award, ICANN adopted these Panel recommendations in full: (1) ICANN did not delegate .AFRICA while DCA's application was being processed following the IRP (2/6/19 Trial Tr. at 105:21–26 (testifying that ICANN did not delegate .AFRICA until after this Court [Judge Halm] denied DCA's application for a preliminary injunction)); (2) ICANN returned DCA's application to the exact place it had been when the Board accepted the Governmental Advisory Committee ("GAC") advice to stop processing DCA's application—Geographic Names Review (2/8/19 Trial Tr. at 331:7–332:28)—in order to allow the application to continue through the remainder of the gTLD application process;[7] and (3) ICANN paid DCA's IRP costs in the amount of $198,046.04 (2/6/19 Trial Tr. at 130:12–131:5). (*See also* 2/8/19 Trial Tr. at 320:18–323:26; Ex. 41, Resolution.) ICANN abided by the IRP Panel's decision and recommendations in every respect. (*See* Ex. 33, Final Decl., ¶¶ 59, 60; 2/8/19 Trial Tr. at 324:4–6, 383:26–28.)

C. ICANN's Board Vote on the IRP Panel's Recommendations Does Not Undermine the Quasi-Judicial Nature of the IRP.

DCA argues that, because the ICANN Board had to vote on the IRP Panel's recommendations, the IRP was not a quasi-judicial proceeding. DCA is wrong. ICANN has always acknowledged that the ICANN Board would have to consider how to fashion an

[7] DCA implies that if ICANN had truly followed the IRP Panel's decision, DCA's application would have ultimately passed. (2/7/19 Trial Tr. at 209:4–210:7, 220:13–221:14.) But DCA knew, when its application for .AFRICA was halted in 2013 as a result of the GAC advice, the Geographic Names Review panel, InterConnect Communications ("InterConnect" or "ICC"), had not yet completed its evaluation of DCA's application. (Ex. 52, DCA App.; 2/7/19 Trial Tr. at 301:1–4.) Following the IRP, ICC resumed its evaluation of DCA's application. (2/8/19 Trial Tr. at 333:1–4.) ICC determined that DCA's letters did not conform to the Guidebook requirements and DCA was given an opportunity to obtain new or updated letters. DCA refused. (2/6/19 Trial Tr. at 164:19–166:11 (DCA never submitted new letters of support in response to ICC's clarifying questions, and therefore did not pass Geographic Names Review); 2/8/19 Trial Tr. at 333:1–335:22.)

appropriate remedy following a decision by the IRP Panel that the Board violated its Bylaws or the Articles of Incorporation. (Ex. 132, ICANN Ltr., at 2–3 (ICANN's letter addressing DCA's request that the Panel make recommendations as to ICANN's course of action following a declaration on the merits); *see also* Ex. 33, Final Decl., ¶ 48; *see also* Ex. 41, Resolution.)

Just like most court orders, as Ms. Christine Willett testified at trial, IRP Declarations are not self-implementing. (2/8/19 Trial Tr. at 320:16–17.) If ICANN is to take any action in response to an IRP Declaration, its Board is required under ICANN's Bylaws to consider the IRP's Final Declaration. (*Id*. at 318:21–28, 319:27–320:17.) This is not unusual. As DCA is surely aware (given that its CEO worked for and with multiple large organizations), it is common for any organization with a board of directors to have to vote on actions that the organization takes. (2/6/19 Trial Tr. at 74:6–75:6; *see also* Ex. 29, DCA Final Req. for Relief (DCA characterizing IRP Panel's guidance on ICANN's actions following a declaration on the merits as "recommendations" thus implicitly recognizing that the ICANN Board would need to take action thereon); Ex 33, Final Decl., ¶ 59.) Thus, the fact that a vote may be required to effectuate organizational action does not undermine the quasi-judicial nature of the proceeding that led to that vote. *See, e.g.*, *Bray*, 155 Cal. App. 3d at 612 (trade union's grievance procedure was quasi-judicial notwithstanding that the union's membership subsequently voted to approve the recommended sanction); *Risam v. Cty. of Los Angeles*, 99 Cal. App. 4th 412, 418 (2002) (proceeding before Civil Service Commission hearing officer was quasi-judicial notwithstanding that the Commission subsequently approved the findings of the hearing officer); *Power v. Northside Indep. Sch. Dist.*, Case No. A-14-CA-1004-SS, 2016 WL 8788185 (W.D. Tex. Jan. 27, 2016) (proceeding before the Texas Education Agency was a quasi-judicial procedure notwithstanding that Board of Education subsequently adopted findings of the agency and voted to terminate employees).[8]

[8] DCA's attempt to further impose nefarious motives onto ICANN by arguing that ICANN disregarded the IRP by posting a redacted version of the Final Declaration to "cover up" "bad things" (2/6/19 Trial Tr. at 56:6–8, 134:15–135:13) is disingenuous. The redacted information was information submitted to the parties under a confidentiality agreement, which all parties were required to redact pursuant to a protective order issued by the IRP Panel. (Ex. 21, Proc. Order 4, at 2 ("The parties themselves will ensure that any confidential information or document referred

D. Inclusion of "Additional Language" in the ICANN Board's Resolution Likewise Does Not Undermine the Quasi-Judicial Nature of the IRP.

DCA also argues that, because the July 2015 ICANN Board Resolution ("Resolution") contained additional resolutions about actions other than the recommendations specifically set out in the IRP Panel's Final Declaration, the ICANN Board did not treat the Final Declaration as binding. The additional paragraphs, however, had nothing to do with the nature of the IRP or the IRP Panel's specific recommendations; rather it had everything to do with what ICANN's Bylaws required ICANN to do.

Specifically, DCA takes issue with the Board's resolutions concerning the GAC. (Ex. 41, Resolution, at 2–3 (Resolutions 2015.07.16.02, 2015.07.16.04–2015.07.16.05.))[9] DCA argues that the Board's resolution "actually instructs" ICANN to take into account the very GAC advice that the IRP Panel found ICANN wrongfully accepted and that ICANN was "not just going to accept the final declaration as the only guidance on how to continue processing DCA's application." (2/6/19 Trial Tr. at 63:18–24; 2/7/19 Trial Tr. at 209:4–210:7.) But ICANN's Bylaws, witness testimony, and the Resolution itself specifically address why these additional resolutions were included. Under its Bylaws, if ICANN plans to take any action that goes against GAC consensus advice, it must follow specific procedures. (Ex. 4, Bylaws, at 57 (Art. XI, § 2.1(j), (k); 2/8/19 Trial Tr. at 324:20–328:13, 381:22–383:5.) Accordingly, ICANN added specific provisions to the Resolution that communicated to the GAC that, if DCA's application

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to or cited by the IRP Panel in its determinations and declarations are appropriately redacted where necessary.").) During the trial, Ms. Sophia Bekele acknowledged that she posted a non-redacted version of the Final Declaration on her website, in direct contravention of the confidentiality agreement DCA entered into with ICANN. (2/6/19 Trial Tr. at 136:12–20, 138:16–141:9.)

[9] The ICANN Board resolved in resolution 2015.07.16.01 to "permit DCA's application to proceed through the remainder of the new gTLD application process as set out below." (Ex. 41, Resolution, at 2 (emphasis added).) As Ms. Willett explained during trial, the language "as set out below" relates to resolution 2015.07.16.03, where the Board explains how ICANN is to resume processing DCA's application: "the Board directs the President and CEO, or his designee(s), to take all steps necessary to resume the evaluation of DCA's application for .AFRICA and to ensure that such evaluation proceeds in accordance with the established process(es) as quickly as possible." (Ex. 41, Resolution, at 2; 2/8/19 Trial Tr. at 321:23–323:3.) Because the ICANN Board had directed ICANN staff in June 2013 to halt processing DCA's application, ICANN staff needed direction from the ICANN Board to resume processing the application in July 2015. (2/8/19 Trial Tr. at 323:4–12.)

was subsequently deemed to have passed the entire application process and possibly prevail in contention resolution (which would have contradicted the Board-accepted GAC's 2013 consensus advice), ICANN would follow the Bylaws procedures that require consultation with the GAC. (Ex. 41, Resolution, at 1–5; 2/8/19 Trial Tr. at 381:22–383:22.) Indeed, the Board's actions in this circumstance were consistent with ICANN's commitment to accountability and transparency—"when the Board issues resolutions, they are actually talking to more than just the IRP Panel. They are talking to all of their constituents, including the GAC in this instance." (2/8/19 Trial Tr. at 381:26–382:1.) Thus, the "additional language" in ICANN's Resolution was not in any way inconsistent with the IRP Panel's Final Declaration, nor did ICANN resolve to do anything less than what the Panel directed. (*Id.* at 331:3–6, 384:1–4.)[10]

Viewed objectively, the IRP exhibited all of the hallmarks of a quasi-judicial proceeding. Nothing in ICANN's subsequent conduct altered that fact.

II. THERE IS NO EVIDENCE DCA ACTED AS A RESULT OF IGNORANCE, FRAUD, OR MISTAKE (FIFTH FACTOR).

There is literally no evidence that DCA took its first position (that it could not sue ICANN in court) as a result of ignorance, fraud, or mistake. *See Jackson v. Cty. of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997); *Blix Street Records, Inc. v. Cassidy*, 191 Cal. App. 4th 39, 51 (2010); *Bucur v. Ahmad*, 244 Cal. App. 4th 175, 188 (2016) (applying judicial estoppel because "[a]ppellants made no showing that their stipulation to arbitrate, with the knowledge and consent of their former attorney, was the result of fraud, ignorance, or mistake").

DCA argues that ICANN has the burden to show that DCA acted fraudulently or in bad faith in order for judicial estoppel to apply. (2/9/18 Phase I DCA Trial Brief ("DCA Trial Brief") at 9.) DCA cites no authority that supports this argument (*see id.*), and the law is just the opposite: "Regardless of whether the motive was pure or the effects of the falsehood inconsequential, we must expect honesty and frankness in all judicial and administrative proceedings from parties that choose to bring lawsuits in our courts." *Int'l Engine Parts, Inc. v.*

[10] DCA's implication that ICANN was somehow influenced by communications with ZACR is both false and legally irrelevant. Communications with ZACR following the IRP Panel's ruling on the merits in favor of DCA are irrelevant to the doctrine of judicial estoppel; and the unrefuted testimony demonstrated that ICANN rejected ZACR's advice. (2/8/19 Trial Tr. at 383:23–28.)

Feddersen & Co., 64 Cal. App. 4th 345, 354 (1998); *Jackson*, 60 Cal. App. 4th at 183 (judicial estoppel should apply when there is no indication on the record that the first position was based on ignorance, fraud, or mistake).[11]

More importantly, the evidence confirmed that DCA fully understood the New gTLD Applicant Guidebook's Covenant Not to Sue ("Covenant") before it submitted its application for .AFRICA to ICANN, including the possibility that the Covenant was not enforceable. DCA's CEO, Ms. Bekele—a highly educated professional in the field of technology and the Internet—was an active member of the ICANN community and was acting as a policy advisor to the ICANN supporting organization (the GNSO) that developed the policy recommendations behind the New gTLD Program. (2/6/19 Trial Tr. at 73:12–75:6; 75:17–77:18.) Ms. Bekele was also an active participant in the development of the Guidebook, and part of her job as policy advisor was to review and respond to feedback ICANN received on various drafts of the Guidebook. (*Id*. at 78:3–15; 2/7/19 Trial Tr. at 196:25–197:10.) She herself commented on multiple drafts of the Guidebook. (2/6/19 Trial Tr. at 78:3–15.) And she admitted that DCA understood that it was agreeing to be bound by the terms of the Guidebook, including the Covenant, when it submitted its application for .AFRICA, and that it was commonly understood that the Covenant prevented applicants from filing lawsuits against ICANN. (*Id.* at 78:16–80:10.)

During her re-direct examination, Ms. Bekele directly implied that DCA did not fully comprehend the Covenant (and therefore was mistaken about its enforceability) when it took its first position during the IRP (that it could not sue ICANN) because the Covenant was a late addition to the Guidebook. Ms. Bekele testified that the Covenant was sprung on applicants, herself included, at the last minute, as a result of ICANN trying to protect itself from an unexpected avalanche of new gTLD applications: "I think it came towards the last version of the ICANN Guidebook [in June 2012]. I suppose it's ICANN . . . trying to protect itself from any lawsuits. . . . [W]hen they reached about 1,900 or so . . . ICANN came up with a way to protect

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[11] The case DCA cites in support of its argument (DCA Trial Brief at 9), *Lee v. W. Kern Water Dist.*, 5 Cal. App. 5th 606 (2016), is, as ICANN explains in its Pretrial Brief, entirely distinguishable and did not set a new standard, raise any party's burden, or indicate that fraudulent conduct must be proven for this factor to be met. (1/17/19 ICANN Brief at 28, n.12.)

itself, and this was sort of submitted at the last minute." (2/7/19 Trial Tr. at 197:14–198:1.) But Ms. Bekele's testimony was 100% false. As Ms. Bekele admitted on re-cross, the Covenant Module 6 was present in the very first draft of the Guidebook published for public comment in October 2008—*four years* before DCA submitted its .AFRICA application (or any applications were submitted). (2/7/19 Trial Tr. at 245:27–247:3; *see also* Ex. 61, 2008 Guidebook.) Indeed, Ms. Bekele submitted a public comment from DCA's email address to ICANN on Module 6 in 2009—three years before DCA's application was submitted—in which she noted that the Covenant might be unenforceable: "In many legal jurisdictions forgoing the right to sue or challenge another party (in this case ICANN on application issues) is illegal in itself . . . Not sure if enforceable." (Ex. 60, DCA Cmt Mod. 6; *see also* 2/7/19 Trial Tr. at 236:28–238:10; 238:26–244:24.) Although Ms. Bekele tried to distance herself from this document by claiming she made the comment on behalf of a group she represented, she acknowledged that she wrote the comment, and that the subject line of the comment—"DotConnectAfrica Module 6"—confirmed that the comment came from DCA. (2/7/19 Trial Tr. at 236:28–238:10; 238:26–244:24.)[12]

DCA also argues that DCA's first position was taken as a result of ignorance or mistake because DCA was not aware that Judge Halm would later find that the Covenant did not bar fraud claims. Whether DCA was unaware that a subsequent court might find the Covenant unenforceable as to certain types of claims is irrelevant to judicial estoppel, as *Blix* makes clear. *See Blix*, 191 Cal. App. 4th at 49–51. In *Blix*, the parties represented to the court that they had reached a settlement, and based on that representation, the court dismissed the case. *Id*. One of

[12] Ms. Bekele also testified that the GAC was "very upset" with the first draft of the Covenant and that "there was a consensus that it […] was unconscionable is the right term, and should not proceed." (2/7/19 Trial Tr. at 198:19–24.) Although the GAC's position is not relevant to the judicial estoppel inquiry, again, Ms. Bekele's testimony is false. The GAC provided comments on over 80 issues regarding the New gTLD Program and the Guidebook. (*See generally* Ex. 62, ICANN Scorecard; 2/8/19 Trial Tr. at 385:11–386:11.) While the GAC raised some concerns about whether the Covenant would cause legal conflicts and requested that ICANN provide an appropriate mechanism for any complaints to be heard, the GAC neither deemed the Covenant "unconscionable" nor issued any "consensus" that it was. (Ex. 62, ICANN Scorecard, at 31; 2/8/19 Trial Tr. at 389:5–392:16.) To the contrary: in response to the GAC's comments, ICANN agreed to clarify in the Guidebook that ICANN's internal accountability mechanisms would be available to applicants. (2/8/19 Trial Tr. at 389:5–392:16.) The GAC "welcomed" and "appreciated" ICANN's response to its concerns. (Ex. 62, ICANN Scorecard, at 31; *see also* Ex. 63, 2011 Guidebook, at 4–5; 2/8/19 Trial Tr. at 394:26-396:6.)

the parties thereafter retained new counsel, who claimed the settlement was unenforceable. *Id*. The court of appeal held that, even though the settlement was possibly unenforceable as a matter of law, the party was judicially estopped from denying the settlement's enforceability because the party had represented to the trial court that the case had settled, resulting in the trial court dismissing the case. *Id.* at 51. Thus, DCA did not need to be correct that the Covenant barred lawsuits against ICANN in order for it to be estopped from taking an opposite position at a later date.

Finally, that Ms. Bekele is not an attorney or that her IRP attorneys were the ones who made the statements to the IRP Panel does not equate to ignorance or mistake. Judicial estoppel applies to positions taken by both "a party or a party's legal counsel." *Blix*, 191 Cal. App. 4th at 48. Additionally, ICANN does not need to, as DCA implies, proffer evidence that "DCA was an expert on the waiver" or that "DCA asked California counsel to opine on the applicability of the waiver to future claims." (2/6/19 Trial Tr. at 68:22–69:3.) DCA was represented at the IRP by accomplished attorneys from a national firm (Weil, Gotshal & Manges), and the statements of DCA's attorneys bind DCA. (*Id*. at 89:11–21; 2/7/19 Trial Tr. at 195:4–16.) Positions taken at the advice of counsel and ignorance of the law are not "mistakes" for purposes of judicial estoppel. *See Galin v. IRS*, 563 F. Supp. 2d 332, 341 (D. Conn. 2008) (stating that "[t]he law is clear that legal advice and ignorance of the law are not defenses to judicial estoppel"); *Carr v. Beverly Health Care & Rehab. Servs., Inc.*, No. C-12-2980 EMC, 2013 WL 5946364, at *6 (N.D. Cal. Nov. 5, 2013) (for purposes of judicial estoppel "'ignorance of the law is no excuse,' particularly where, as here, [the declarant] was represented by counsel") (citation omitted).

III. DCA SUCCESSFULLY ASSERTED THAT IT COULD NOT SUE ICANN DURING THE IRP AND THEN TOOK A WHOLLY INCONSISTENT POSITION (FIRST, THIRD, AND FOURTH FACTORS).

During the trial, DCA made little effort to deny that the first, third, and fourth factors of the judicial estoppel inquiry had been met. The evidence unmistakably showed that DCA repeatedly and unequivocally asserted that it could not sue ICANN in court in order to obtain multiple advantages during the IRP. The evidence further showed that the IRP Panel accepted as

true DCA's position that it could not sue ICANN, and that the IRP Panel ruled in favor of DCA each time, including ultimate success on the merits. Despite repeatedly, and successfully, arguing before the IRP Panel that DCA cannot sue ICANN in court, DCA did sue ICANN in complete contradiction to its earlier position.

A. DCA Repeatedly Asserted that the Covenant Prevented Lawsuits Against ICANN (First Factor).

DCA made unambiguous, unequivocal statements to the IRP Panel that, because of the Covenant, it could not sue ICANN in court. For example, to support its argument that the IRP should allow extensive document discovery, DCA stated that "these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body." (Ex. 39, DCA Ltr., at 2; 2/6/19 Trial Tr. at 114:5–19; Stip. Fact ¶ 29.) Similarly, DCA requested extended briefing and a live hearing with witness testimony because "[f]or DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available." (Ex. 15, DCA Sub. on Proc. Issues, ¶ 22; 2/6/19 Trial Tr. at 95:23–96:10; Stip. Fact ¶ 24.) Again, when requesting that the Panel apply *de novo* review, DCA stated :"We cannot take you to Court. We cannot take you to arbitration. We can't take you anywhere. <u>We can't sue you for anything</u>." (Ex. 36, 5/23/15 IRP Hr'g Tr. at 29:24–30:5 (emphasis added); *see also* Ex. 35, 5/22/15 IRP Hr'g Tr., at 22:16–23:3.) DCA made the same representations when seeking interim relief (Ex. 11, DCA Req. for Emergency Arbitrator and Interim Measures of Protection), when requesting a declaration that the IRP is binding (Ex. 17, DCA's Ltr. Brief), and when petitioning that ICANN pay DCA's IRP costs (Ex. 31, DCA Sub. on Costs).[13]

Not once did DCA qualify the statements it made to the IRP Panel regarding its lack of an ability to sue ICANN; not once did DCA state that it could not sue ICANN *unless* the Covenant was unenforceable, or *except* in the case of fraud. (*See, e.g.*, 2/6/19 Trial Tr. at 95:23–96:10 (Ms. Bekele confirming that DCA did not mention the enforceability of the Covenant in its statements to the Panel).)

[13] A complete list of DCA's statements and the IRP Panel's rulings is summarized in ICANN's Pretrial Brief. (1/17/19 ICANN Trial Brief at 21–22; *see also* 2/6/19 Trial Tr. at 92:9–131:18; *see also* Stip. Fact ¶¶ 21-30; 35.)

B. DCA Succeeded in Asserting Its Position Before the IRP Panel (Third Factor).

As a result of DCA's repeated and unqualified assertions that it could not sue ICANN, the IRP Panel ruled in DCA's favor on seven different issues: (1) interim relief; (2) discovery; (3) live witness testimony; (4) extended briefing; (5) a decision that the IRP is binding on the parties; (6) a *de novo* standard of review; and (7) costs. (Ex. 18, IRP Decl. on Proc., ¶ 130; Ex. 32, Third Panel Decl. of IRP Proc, ¶¶ 37–38; Ex. 33, Final Decl., ¶¶ 19, 150–151; 2/6/19 Trial Tr. at 108:22–25, 109:18–110:16.) The evidence overwhelmingly demonstrated that, in ruling on these issues, the IRP Panel repeatedly relied on and adopted DCA's position that it could not sue ICANN. *See Jackson*, 60 Cal. App. 4th at 183 (holding that success factor is met if "the tribunal adopted the position or accepted it as true").

For example, in ruling that it had the power to interpret and determine IRP procedure, the Panel indicated "the avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts: [quoting Covenant]." (Ex. 18, IRP Decl. on Proc., ¶ 39; *id.* ¶¶ 129, 130, 131) (deciding that IRP declarations on procedure and the merits should be binding on the parties, and ordering document exchange and extended briefing). The IRP Panel again repeated the same language when ordering the parties to have witnesses appear for testimony at the IRP hearing. (Ex. 32, Third Panel Decl. of IRP Proc, ¶ 15.)

C. DCA Has Taken a Wholly Inconsistent Position by Filing this Lawsuit (Fourth Factor).

After repeatedly and successfully asserting it could not sue ICANN, DCA went on to win the IRP. (Ex. 33, Final Decl., ¶ 150 ("[T]he Panel declares DCA Trust to be the prevailing party in this IRP.").) As a result, ICANN permitted DCA's application to proceed through the remainder of the new gTLD application process. (2/6/19 Trial Tr. at 164:19–23; 2/8/19 Trial Tr. at 331:7–26.) Then, six months later, DCA's application was rejected after the third-party vendor reviewing DCA's application for .AFRICA determined that DCA had failed to demonstrate the support or non-objection of 60% of African governmental authorities (as required by the

Guidebook). (2/6/19 Trial Tr. at 164:19-166:11; 2/8/19 Trial Tr. at 333:1–335:22.) Unhappy with this outcome, DCA abandoned the position it had argued so strenuously to the IRP Panel and filed this lawsuit. *See, e.g.*, *Cal. Coastal Com. v. Tahmassebi*, 69 Cal. App. 4th 255, 259 (1998) (applying judicial estoppel to preclude landowner who first waived his right to litigate the applicability of exclusion for a development permit and agreed to comply with a Coastal Commission's order from later asserting in litigation that exclusion applied and that the landowner had no obligation to obey the Commission's orders).

DCA's lawsuit against ICANN is totally and logically inconsistent with DCA's first position that it could not sue ICANN. *See generally Browne v. Turner Const. Co.*, 127 Cal. App. 4th 1334, 1349 (2005) (rejecting judicial estoppel argument because second statement was not "logically inconsistent with" earlier statement). DCA's repeated arguments that it cannot sue ICANN in any way related to its application, followed by DCA's lawsuit against ICANN specifically related to its application, are two positions that are irreconcilable and mutually exclusive.

IV. DCA MISAPPREHENDS THE DOCTRINE OF JUDICIAL ESTOPPEL.

A. <u>The Legally Enforceable Scope of the Covenant Is Irrelevant to Judicial Estoppel.</u>

DCA argues that ICANN's judicial estoppel defense is an attempt to revive the issue of whether the Covenant is enforceable with regard to DCA's fraud claims. To the contrary, the legally enforceable scope of the Covenant (on which Judge Halm has ruled) is irrelevant to whether judicial estoppel (which Judge Halm bifurcated as a separate bench trial) bars DCA's claims here. As discussed in Section II above, judicial estoppel is not dependent on the merits of a claim but on the way in which the claim is raised. *Blix,* 191 Cal. App. 4th at 49–50. The court in *Blix* concluded that "[e]stoppel—whether judicial, equitable or promissory—can, however, be used to bind a party to what would otherwise be an unenforceable contract." 191 Cal. App. 4th at 49–50; *see also id.* at 50 ("[E]stoppel can preclude a party from denying the existence, validity, or enforceability of what otherwise would not constitute an enforceable contract."); *id*. at 51 ("In sum, there is no justifiable reason why a party cannot be judicially estopped from denying the enforceability of an agreement that might otherwise be unenforceable.").

The doctrine of judicial estoppel requires consideration of the positions DCA took in the prior proceeding; it does not consider the merits or legal accuracy of the positions DCA took (i.e., whether the Covenant is enforceable). The only relevant inquiry is whether DCA took one position before the IRP, succeeded on it, and is now taking a totally inconsistent position before this Court. *Blix*, 191 Cal. App. 4th at 47 (judicial estoppel is "sometimes called the doctrine of 'preclusion of inconsistent positions'") (citation omitted).

B. "Context" Is Irrelevant to the Application of Judicial Estoppel.

DCA's argument that judicial estoppel does not apply because DCA's statements to the IRP Panel were made in relation to different claims, or in a different "context," misrepresents the law. (2/6/19 Trial Tr. at 66:2–25.) In essence, DCA is attempting to create a new factor for the judicial estoppel inquiry by asking this Court to look at the "context" in which DCA's statements were made. Courts, however, have rejected arguments that judicial estoppel was inapplicable because issues raised in one lawsuit are entirely different, factually or legally, from those where the first position was taken. *Conrad v. Bank of Am.*, 45 Cal. App. 4th 133, 147 (1996) (citing *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419–420 (3d Cir. 1988)) (holding that judicial estoppel precluded plaintiff from pursuing lawsuit for fraud because plaintiff did not disclose the lawsuit as a potential claim in prior bankruptcy proceedings). For example, judicial estoppel has precluded a party from claiming a decedent was domiciled in California to take advantage of California's right of publicity law in federal court when the party previously claimed in an earlier lawsuit that the same decedent was domiciled in New York, even though that earlier lawsuit related to *a different claim* (avoiding California estate taxes) and in *a different proceeding* (probate court). *See Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, 692 F.3d 983, 998–99 (9th Cir. 2012).

Indeed, judicial estoppel has regularly been applied to claims based on statements made in relation to completely different claims in different proceedings. *See, e.g.*, *Furia v. Helm*, 111 Cal. App. 4th 945 (2003) (judicial estoppel precluded plaintiff from taking a position in a legal malpractice and fraudulent misrepresentation/concealment lawsuit after previously taking an inconsistent position in disciplinary proceedings before the Contractors State License Board);

Thomas v. Gordon, 85 Cal. App. 4th 113, 116–17 (2000) (judicial estoppel precluded plaintiff's claim for negligence, fraud, and misrepresentation against accountant because claim was predicated on plaintiff having an interest in two companies, when in her bankruptcy, plaintiff denied any interest in those companies); *Drain v. Betz Labs., Inc*., 69 Cal. App. 4th 950 (1999) (judicial estoppel barred plaintiff's wrongful termination claim based on racial discrimination after plaintiff stated that he could not perform any of his job-related duties in an application for disability benefits and a workers' compensation claim).

In short, "context" does not matter. The linchpin of judicial estoppel is to preclude parties from deceiving courts and arguing out of both sides of their mouths. *See, e.g.*, *Ferraro v. Camarlinghi*, 161 Cal. App. 4th 509, 558 (2008).[14]

C. Judicial Estoppel Does Not Require that First Position Taken Be Adjudicated.

DCA argued in its trial brief (DCA Trial Brief at 4–5) that it was not "successful" because the IRP Panel did not rule that DCA cannot sue ICANN. DCA is confusing judicial estoppel with the doctrines of collateral estoppel or *res judicata*. Judicial estoppel does not require that the claims/position in the first proceeding were adjudicated. In the seminal case on judicial estoppel, the court in *Jackson* stated: "The distinction between collateral estoppel and judicial estoppel is fairly easy to make; accordingly, courts seldom confuse these two doctrines. Collateral estoppel . . . deals with the finality of judgment on factual matters that were fully considered and decided. Judicial estoppel, on the other hand, prevents inconsistent positions whether or not they have been

[14] Without any analysis, DCA relies on *Miller v. Bank of Am.*, 213 Cal. App. 4th 1 (2013) for the proposition that "litigants have been allowed to change prior statements not addressing the current scenario of the litigation." (DCA Trial Brief at 4–5.) DCA misconstrues *Miller*. There, the court declined to apply judicial estoppel against a bank where its counsel provided answers to the courts' similar hypothetical questions on an issue that was tangential to the case, and which were arguably inconsistent with a position the bank took in a later proceeding. 213 Cal. App. at 9–10. In so concluding, the court found that "[a]t that point in the litigation the Bank had no dog in any fight over" the answers its counsel provided: "Viewed in context, the statements on which Miller hangs his hat cannot fairly be said to represent the Bank's 'position.'" *Id.* at 10. In addition, the Bank's victory in the case had nothing to do with the statements at issue: "[N]either we nor the Supreme Court adopted counsel's misstatement or accepted it as true; indeed, [the statements at issue were] irrelevant to both courts' limited determinations as to the validity of *one*-account setoffs." *Id.* Thus, *Miller* is distinguishable from the evidence before this Court. Here, DCA's first position that it could not sue ICANN in court because the IRP was DCA's "sole forum" (and secured relief from the IRP Panel on that basis) is, in fact, directly "addressing the current scenario" where DCA now is taking the exact opposite position.

the subject of a final judgment." 60 Cal. App. 4th at 182; *see also AFN, Inc. v. Schlott, Inc*., 798 F. Supp. 219, 223 (D.N.J. 1992) (stating that judicial estoppel is "distinct from other forms of estoppel" such as "*res judicata* and collateral estoppel [that] focus on the effect of a final judgment") (citations omitted) (cited by *Blix*, 191 Cal. App. 4th at 48). In other words, the IRP Panel did not need to rule whether the IRP was the sole forum; the Panel simply needed to rely on or accept as true DCA's representations that the IRP was the sole forum when it granted DCA's requested relief on seven separate issues.

V. JUDICIAL ESTOPPEL HAS BEEN INVOKED TO BAR LITIGATION BASED ON EXACTLY THE TYPE OF CONDUCT DCA HAS DISPLAYED.

Judicial estoppel is "a powerful tool to encourage litigants to be mindful of the need to employ the full and complete truth regardless of transitory needs of a particular proceeding." *Int'l Engine Parts*., 64 Cal. App. 4th at 354. But courts regularly use that tool because "[i]t seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." *Jackson*, 60 Cal. App. 4th at 181. Indeed, California courts apply the doctrine in far less egregious circumstances than here in order to prevent gamesmanship and the intentional assertions of inconsistent statements, even if the result is a bar to a plaintiff's claims. *See Blix*, 191 Cal. App. 4th at 49–50 (without regard to the legal merits of plaintiff's argument, judicial estoppel applied to bar plaintiff's claim that a settlement was unenforceable when the plaintiff had previously argued it was enforceable); *Bucur*, 244 Cal. App. 4th at 175 (plaintiffs' lawsuit for fraud and breach of contract was barred because plaintiffs had previously agreed to arbitrate the same claims); *Owens v. Cty. of Los Angeles*, 220 Cal. App. 4th 107, 122 (2013) (plaintiff's lawsuit challenging an election measure barred after plaintiff had previously argued for the "priceless" benefits of that election in a previous lawsuit); *Jackson*, 60 Cal. App. 4th at 190–91 (officer judicially estopped from bringing a disability discrimination claim under the Americans with Disability Act because of a position he took in a workers' compensation proceeding).

Although not required for judicial estoppel to apply, the fact is DCA had another remedy. After its application for .AFRICA failed to pass evaluation following further processing in 2015,

DCA could have asked the ICANN Board for reconsideration. (2/8/19 Trial Tr. at 335:23–26, 379:28–380:12.) The Board would then have voted on whether accept or deny DCA's request. (*Id.* at 336:6–19, 380:13–15.) Had ICANN's Board denied DCA's request for reconsideration, DCA could have instituted a second IRP to challenge the decision regarding the action taken by ICANN's staff and vendors. (*Id.* at 336:6–19, 380:16–381:7) Indeed, multiple IRPs have focused on decisions by the ICANN Board denying reconsideration arising conduct by ICANN staff and vendors. (*Id.* at 335:23–336:27; 379:28–381:7.) Instead, DCA chose to reverse a position it had asserted continuously throughout the IRP, and file this lawsuit against ICANN.

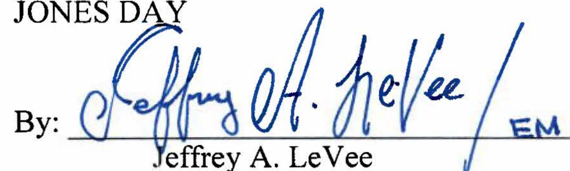
CONCLUSION

The evidence shows that DCA's conduct meets each factor for the application of judicial estoppel. DCA repeatedly, unequivocally, and successfully argued in a quasi-judicial proceeding that it cannot sue ICANN in court, and there is no evidence that DCA's first position was a result of ignorance, fraud, or mistake. DCA has taken a totally inconsistent position by suing ICANN, and the doctrine of judicial estoppel should be applied to preclude DCA from doing so.

In addition, the inequity of DCA's conduct supports this result. DCA's reversal of position was self-serving and unfair to ICANN, the IRP Panel, and this Court. ICANN respectfully requests that the Court use its equitable powers to apply judicial estoppel and dismiss this case.[15]

Dated: March 1, 2019

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendant INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS

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[15] If the Court is inclined to deny judicial estoppel, ICANN requests the opportunity to present alternative relief —within the Court's equitable powers, *see, e.g.*, *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1552 (1998) —to at least bar DCA from re-litigating in this Court the same claims it raised in the IRP.