Ethan J. Brown (SBN 218814)
ethan@bnsklaw.com
Sara C. Colón (SBN 281514)
sara@bnsklaw.com
Rowennakete P. Barnes (SBN 302037)
kete@bnsklaw.com
BROWN NERI SMITH & KHAN LLP
11601 Wilshire Boulevard, Suite 2080
Los Angeles, California 90025
T: (310) 593-9890
F: (310) 593-9980

Attorneys for Plaintiff,
DOTCONNECTAFRICA TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – CENTRAL

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

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

Defendant.

Case No.: BC607494

[Assigned for all purposes to:
Hon. Robert B. Broadbelt Dep't 53]

PLAINTIFF DCA'S TRIAL BRIEF

Complaint Filed:	January 20, 2016
FSC (Phase 1):	January 25, 2019
Time:	8:30 a.m.
Trial (Phase 1):	February 6, 2019
Time:	10:00 a.m.
Dep't.:	53

I. INTRODUCTION

The background for this trial can be summarized concisely: DCA applied for the ".Africa" generic Top-Level Domain ("gTLD") (*e.g.* ".org" or ".gov") with ICANN. As part of that application, ICANN required DCA to accept a waiver of court remedies (the "Covenant Not to Sue" or the "Covenant"). As an alternative to the waiver, ICANN set up its own (illusory) redress procedure, an independent review process ("IRP"). DCA initiated an IRP, and during that IRP, DCA assumed that the Covenant Not to Sue was valid and, if so, that the IRP had to be a binding procedure to provide any redress. ICANN argued (and in this case continues to argue) that the IRP was non-binding then. The IRP agreed with DCA and said that adjudication had to be binding. The IRP did not rule on whether DCA could bring suit against ICANN in Court. Here, ICANN's judicial estoppel defense seeks to dismiss DCA's claims because DCA argued that the IRP must be binding *if* it was the only available redress. Neither ICANN, nor the courts are being taken advantage of because DCA seeks redress in this Court.

In August 2017, ICANN moved for summary judgment, contending that the Covenant - what DCA based its prior legal position on – barred this lawsuit. The Court disagreed as to DCA's fraud claims, leaving DCA's second, third, fourth, fifth, seventh, and tenth causes of action at issue. Judge Halm held that those causes of action, "relate to fraudulent actions or those causing willful injury." (Aug. 9, 2017 Order on MSJ at 5.) The Court has already ruled that DCA's current claims are outside the scope of the Covenant Not to Sue – or put otherwise, not subject to a bar on suing ICANN in Court. DCA's current claims were not at issue during the IRP as many of the facts on which DCA's current claims rest had not yet arisen. ICANN argued in its MSJ that "DCA successfully argued during the IRP that the Covenant bars new gTLD applications from challenging ICANN's actions in Court." (ICANN MSJ, May 26, 2017 at 20:14-16.) But ICANN takes DCA's statements during the IRP out of context. It is impossible that DCA's arguments about the Covenant during the IRP were made with regard to the current claims as they did not yet exist. Finally, DCA was not successful – as required for the application of judicial estoppel – because the IRP did not actually adjudicate the applicability or enforceability of the Covenant.

Rather, DCA successfully argued that in order to provide any redress, the adjudication process of the IRP must be binding. But ICANN never treated the IRP ruling as binding and there was no mechanism to force ICANN to do so. The ICANN Board *voted* on *whether* to accept the IRP ruling and added resolutions regarding the subsequent processing of DCA's application that were not part of the IRP's final declaration. ICANN's lawyers argued that the ICANN Board have the discretion to fashion its solution, which is exactly what happened.

After ICANN rejected DCA's application and DCA realized that ICANN would never agree to a binding IRP, DCA sought relief from this Court. ICANN cannot argue that in the IRP DCA misrepresented or concealed facts that DCA presents here. ICANN cannot argue that DCA adjudicated fraud claims in the IRP. Accordingly, ICANN cannot argue that the Covenant Not to Sue - the basis of DCA's purported inconsistent statements and the basis of this defense - applies to the remaining claims at issue.

ICANN can only argue that DCA took the (mistaken) assumption that the IRP was the only possible forum for redress of the injuries that ICANN caused. That is not subject to judicial estoppel. "[Judicial Estoppel] is intended to protect the integrity of the judicial process by preventing litigants from playing 'fast and loose' with the courts, and, as such, it should be invoked only in egregious cases. For these reasons, judicial estoppel is usually limited to cases where a party misrepresents or conceals material facts." *California Amplifier, Inc. v. RLI Ins. Co.* (2001) 94 Cal.App.4th 102, 118; *see also Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1484 ["An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing."]

For all of these reasons, ICANN's judicial estoppel defense fails, and the Court should rule in DCA's favor.

II. ARGUMENT

Judicial estoppel is an equitable doctrine and "an 'extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" *Jogani v. Jogani* ("*Jogani*") (2006) 141 Cal.App.4th 158, 169. "The doctrine is 'aimed at preventing fraud on the courts…and is invoked to prevent a party from changing its position over the course of

judicial proceedings when such positional changes have an adverse impact on the judicial process.'" *Id*. Ultimately, "given that 'judicial estoppel is an equitable doctrine…its application, even where all necessary elements are present, is discretionary. The doctrine should be applied with caution and limited to egregious circumstances." *Id*. at 171.

A. <u>The First Amended Complaint is not barred by judicial estoppel</u>

To establish judicial estoppel, the moving party must prove "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Jackson v. Cty. of L.A.* (1997) 60 Cal.App.4th 171, 183. "[E]ach case must be decided on its own facts and in light of equitable considerations." *Jogani, supra,* 141 Cal.App.4th 158, 181. Here, Defendant's attempts to establish judicial estoppel will fail because it cannot prove the requisite elements.

1. <u>DCA has not taken two positions</u>

DCA will show that it has not taken two inconsistent positions with respect to the Covenant. Its position in this lawsuit is an extension of the one it made at the IRP – not a separate position. At the IRP, DCA's position was that if the Covenant was enforceable, the IRP had to be binding; once DCA saw that ICANN refused to treat the IRP as binding, it was forced to bring this lawsuit and point out that the Covenant cannot be enforceable as that would render ICANN effectively judgment-proof. Therefore, DCA's position has remained that ICANN should be held accountable for its actions and should not be allowed to be a law unto itself or to act above the law under any circumstances.

2. <u>DCA's positions are not totally inconsistent</u>

The doctrine of judicial estoppel has a "limited purpose: to protect the integrity of the judicial process, primarily by precluding a party from taking inconsistent positions that pose a *risk of inconsistent court determinations*." *Jogani, supra,* 141 Cal.App.4th at 188 (emphasis added). To be "totally inconsistent," the party must have taken positions that are so irreconcilable that "one necessarily excludes the other," (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935,

962–963) - a "very high threshold" and a "rigorous standard." *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1387. If the litigant can explain how the positions are consistent, generally judicial estoppel does not apply. *Cleveland v. Policy Mgmt. Sys. Corp.* (1998) 526 U.S. 795, 798. ICANN cannot show that DCA's positions were so inconsistent to warrant judicial estoppel. Nor is there a risk of inconsistent adjudications here because none of the claims from either forum are the same. DCA's positions are not "totally inconsistent" because: 1) DCA's positions are not so irreconcilable that one necessarily excludes the other, and 2) DCA's initial position was made in a different context than the current litigation.

First, DCA's positions do not necessarily exclude one another. DCA *never* took the position that the waiver was valid or enforceable and the IRP never asked DCA if it was. The IRP only asked: "is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?" DCA responded that *if* the waiver was valid, as ICANN asserted it was, the IRP must "provide a final and binding resolution of disputes between ICANN and persons affected by its decisions." (05/26/2017 Declaration of Jeffrey LeVee ISO ICANN MSJ ("LeVee Decl."), Ex. G, ¶ 27) (quoting DCA's submission to the IRP). The IRP's final declaration reflects this by stating that "*assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." (IRP Final Declaration, ¶ 73 (emphasis added)). DCA's argument has always been that it is wrong for ICANN to be "effectively judgment-proof," (Levee's Decl., Ex. G, ¶ 26), and that DCA should be allowed to seek "final and binding" adjudication against ICANN. (*Id.*) As ICANN consistently maintained that the IRP proceedings were not binding (Levee's Decl., Ex. G, ¶ 28), DCA maintains that it is still entitled to binding remedies for the harms ICANN caused.

Second, even if the Court were to find that DCA's position with regard to the Covenant at the IRP and in this lawsuit are wholly inconsistent, judicial estoppel would not apply because DCA's statements concerning waiver were not made within the current context of a lawsuit for fraud and willful injury. Generally, litigants are not judicially estopped from changing their positions when the circumstances surrounding the litigation have also changed. For instance, litigants have been allowed to change prior statements not addressing the current scenario of the

litigation. *Miller v. Bank of Am.* (2013) 213 Cal.App.4th 1, 10. The IRP panel focused entirely on whether the ICANN *Board* followed its own Bylaws as to one contractual issue. *The IRP panel did not analyze or rule whether the Covenant was enforceable.* This lawsuit focuses on whether ICANN is liable for fraud and intentional misconduct for actions by a number of ICANN staff, ICANN committees, panels, and board members. These claims were never adjudicated by the IRP. This is demonstrated by the fact that DCA's claims are based on a lot of conduct by ICANN that took place *after* the IRP Panel issued its final declaration. Therefore, like in *Miller*, DCA should not be held to a position taken with respect to an entirely different set of claims.

In the context of a proceeding ICANN claimed at the time was the only available mechanism, it was reasonable and appropriate for DCA to rely on ICANN's position, presumed commitment to accountability, and reputation that the IRP would be a trusted and authoritative adjudicative process. DCA brought suit when it became clear: (1) how limited the IRP was (to Board action and further consideration); (2) that ICANN could refuse to follow the IRP ruling without judicial consequence; (3) there was no way to confirm the award if ICANN did not allow it; and (4) ICANN – the wrongdoer – had unfettered discretion as to how or whether to implement the IRP ruling.

3. <u>DCA did not succeed in its first position</u>

ICANN must also prove DCA "was successful in asserting [its] first position. . .." "Absent success in a prior proceeding, a party's later inconsistent position introduces no 'risk of inconsistent court determinations.'" *Jogani, supra,* 141 Cal.App.4th at 171 (internal citations omitted). In its motion for summary judgment, Defendant claims that this second element is met because "the IRP Panel accepted DCA's position [that the IRP was binding] as true and adopted it in finding in DCA's favor." (Def. Mot. Summ. J., 21, ¶¶ 13-14).

But that is not the position ICANN is seeking to judicially estop. ICANN seeks to judicially estop DCA from taking the position that this Court is a proper forum for its present claims. Again, DCA did not take a position with regard to the proper forum for its present claims at the IRP because its present claims did not yet exist. But even if DCA had taken that position, the parties did not brief or argue the issue of the applicability of the Covenant and the IRP did not rule on the

applicability of the Covenant.[1] *See The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 845 ["The third [judicial estoppel factor requires that the party to be estopped was successful in asserting the first position…[which] means not just that the party prevailed in the earlier action, but that 'the tribunal adopted the position or accepted it as true.'"]

The IRP did not adopt or accept that the Covenant was enforceable and precluded Court actions. The IRP panel merely stated "[t]hus, *assuming* the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate "accountability" remedy for applicants is the IRP." (See August 14, 2014 Decl. ¶ 40 and Final Declaration ¶ 73 [emphasis added]). Therefore, the panel's position on the waiver was an assumption not a ruling as to its applicability to the IRP claims or the claims at issue here.

Furthermore, even after the IRP's ruling, ICANN's position remained that the IRP panel's declaration was not binding. (*See* Levee's Decl., Ex. D, ¶ 9). ICANN stated that "the question of whether the Panels declaration was or was not legally binding *became a moot issue* once ICANN's Board *elected* to adopt all of the DCA Panel's recommendations. . .." (Levee's Decl., Ex. D, ¶ 10 (emphasis added)). DCA did not *actually* succeed in its position because - as seen in the claims and actions of ICANN through the conclusion of the IRP proceedings and after - ICANN refuses to treat IRP decisions as binding on it. Instead, ICANN treats the IRP as an advisory opinion, and considers it as input into ICANN's decision-making process. ICANN's position was also that DCA could not have enforced the IRP or any subsequent ruling if entirely disregarded by ICANN.

4. <u>ICANN does not actually recognize the IRP as a true "quasi-judicial proceeding"</u>

ICANN's IRP is not a "judicial" or "quasi-judicial proceeding." While there is no clear definition of what qualifies as "quasi-judicial," courts usually require that the proceeding have the "the formal hallmarks of a judicial proceeding. . .." *Tri-Dam v. Schediwy* (E.D. Cal. Mar. 7, 2014), No. 1:11-CV-01141-AWI, 2014 WL 897337, at *6. In determining whether to apply estoppel, "courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its

[1] ICANN likely would have argued that any validity of the Covenant was outside the scope of the IRP, which under the Bylaws, must focus on "a. did the Board act without conflict of interest in taking its decision; b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company." (Bylaws, Art. IV, § 3, ¶ 4a-c.)

jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings." *Vandenberg v. Sup. Ct.* (1999) 21 Cal.4th 815, 829; *see also Sanderson v. Niemann* (1941) 17 Cal.2d 563, 573–575 (holding prior judgments not entitled to collateral estoppel effect because of the informality of the proceedings and limited right to judicial review).

DCA will show that at the time DCA's IRP case was pending, there was no opportunity for judicial review or appeal, or even a second IRP that ICANN claims DCA could have filed. The July 22, 2017 amended version of the ICANN Bylaws include the following rules and procedures which were non-existent at the time of DCA's IRP:

- an "IRP Implementation Oversight Team shall be established...to develop clear published rules for the IRP that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties." July 22, 2017 Bylaws Section 4.3(n)(i).
- Those rules "shall at a minimum address the following elements: (G) The standards and rules governing appeals from IRP Panel decisions, including which IRP Panel decisions may be appealed." July 22, 2017 Bylaws Section 4.3 (n)(iv)(G).
- "Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within sixty (60) days of issuance of such decision." Section 4.3(w).

ICANN's view of its own IRP is that it lacks several of the indicia of a judicial proceeding, including the scope of its jurisdiction, the authority of the Panelists, the established procedural rules, and the ability to issue binding decisions on the parties:

> [This] proceeding is not an arbitration. Rather, an IRP is a truly unique 'Independent Review' process established in ICANN's Bylaws with the specific purpose of providing for 'independent third-party review of Board actions alleged by an affected party to be inconsistent with the Article of Incorporation or Bylaws'. . .. Indeed, the word 'arbitration' does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels […] ICANN's Board had the authority to, and did, adopt Bylaws, establishing internal accountability mechanism and defining the scope and form of those mechanisms.

(Levee's Decl., Ex. G, ¶ 28). The IRP panel did not have the authority[2] to fashion whatever relief it deemed appropriate. The panel merely had the authority to "declare whether an action or

[2] In ICANN Counsel's letter to the DCA v ICANN IRP Panel, Mr. Jeffrey LeVee wrote: "ICANN objects to the appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws." *See* ICANN Counsel's letter to Members of the IRP Panel dated June 1, 2015

inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." (*See* April 2013 Bylaws Section 3.11.)

Furthermore, ICANN presented a letter to the IRP Panel dated June 1, 2015 arguing that: "Because the Panel's authority is **limited** to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. …. In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation of Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect." (June 1, 2015 letter from Jones Day to IRP Panel (emphasis added)).

ICANN treated the IRP Panel as lacking authority to make binding rulings. ICANN treated the Panel's ruling with total derision and elected to fashion a solution of its own contrivance. ICANN disregarded the ruling of a Panel that it thought should be enfeebled (by a direct challenge to the Panel's authority), and when the Panel asserted its authority to make a binding ruling, ICANN ignored the Panel's ruling. Thus, the IRP was not a judicial or even quasi-judicial proceeding.

ICANN also tried to limit the scope of the IRP numerous times. ICANN took the position that "The Panel has posed questions relating to the propriety of ICANN's internal accountability mechanisms and the gTLD application signed by DCA including questions relating to due process and unconscionability. These questions are well outside the scope of the Panel's narrow mandate established under ICANN's Bylaws, i.e., to declare whether the Board violated ICANN's Bylaws or Articles of Incorporation in its consideration of DCA's Application for .Africa." (*See* ICANN's May 20, 2014 Further Memorandum Regarding Procedural Issue at ¶ 11.)[3]

In sum, as a result of ICANN's actions, the IRP was a non-binding and non-appealable procedure. ICANN should not be allowed to continuously argue that the IRP was nothing more

[3] As explained in Section II.B, the scope of the IRP is limited to declaring "whether the Board violated ICANN's Bylaws and Articles of Incorporation" and so DCA's claims for fraud and willful injury are outside the scope of the IRP.

than an "internal accountability mechanism," or "corporate accountability mechanism" and then characterize it as a "quasi-judicial proceeding" when it suits ICANN. ICANN's position is totally inconsistent and it is ICANN who is trying to take advantage of the judicial system to prevent a legitimate lawsuit from progressing to jury trial.

5. *There is no evidence that DCA's change in positions was fraudulent or made in bad faith*

"Case law indicates that the point of this element is to ensure that the bar of judicial estoppel operates only to prevent bad faith or intentional wrongdoing resulting in a miscarriage of justice." *Lee v. W. Kern Water Dist.* (2016) 5 Cal.App.5th 606, 630. Therefore, to establish the doctrine "there must be some basis in the record for a finding that [a party] engaged in a deliberate scheme to mislead and gain unfair advantage, as opposed to having made a mistake born of misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other innocent cause." *Id.* at 630-31. In *Lee*, a court affirmed the denial of judicial estoppel because the opposing party had offered "nothing to support the fifth element—that Lee's first position was not taken as a result of ignorance, fraud, or mistake." *Id.* at 631. The Court stated: "There is no basis in the record for a finding that Lee engaged in a deliberate scheme to mislead and gain unfair advantage, as opposed to having made a mistake born of misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other innocent cause …." *Id.* (internal citations omitted). Likewise, there is no evidence that DCA schemed to mislead or gain unfair advantage in its positioning on the prospective release issue, which has remained consistent.

As seen in *Lee*, the law places the burden of proof on the Defendant to establish evidence that DCA has acted fraudulently. But ICANN offers no such evidence. In fact, the evidence will show that any statements DCA made regarding the waiver were in the context of its mistaken belief regarding the binding nature of the IRP.

Again, DCA has actually been consistent in its positions. However, even if the Court were to determine there was an inconsistency, that is not sufficient to show that there has been bad faith. *See Kelsey v. Waste Mgmt. of Alameda Cty.* (1999) 76 CA4th 590, 598 (rejecting judicial estoppel, despite inconsistency, because defendant failed to show that plaintiff's failure to list claim was

intentional and not result of ignorance); *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018 (rejecting judicial estoppel, despite inconsistency, because defendant "did not act with the intent to play fast and loose with the courts that is required for application of the judicial estoppel doctrine") (internal citations omitted). Any change in DCA's position resulted from ICANN's position during and after the IRP that the IRP was in no way binding on ICANN and in the fact that the claims before this Court are outside the scope of an IRP. Because ICANN has failed to show any evidence of bad faith or fraudulent actions on the part of DCA, this element is not satisfied, which is sufficient in itself to reject the application of judicial estoppel.

The evidence shows that ICANN believed that DCA Trust had had acted in good faith. In a letter to the DCA v. ICANN IRP Panel dated July 1, 2015, ICANN's counsel wrote that "[t]he parties respective positions in this IRP were asserted in good faith. Although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took." Contrary to what ICANN has stated in this proceeding, DCA has not tried at any time to play "fast and loose" with the IRP Panel or the judicial system.

B. The Court Has Already Ruled That DCA's Current Claims Are Outside the Scope of the Covenant Not to Sue

The Court has already decided that the Covenant does not apply to the claims at issue because the remaining causes of action are within the domain of fraud and willful injury. The Covenant applies to "any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN…in connection with ICANN's …review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application." (Module 6 of the Guidebook.) In its order on ICANN's motion for summary judgment, the Court stated that "*acts of fraud or those that cause 'willful injury' do not arise out of ICANN's processing* of applications in that they are extra-procedural: they are not related to the processing itself, but are acts that take ICANN outside of the process governed by its bylaws...What that means in this case, therefore, is that any *claims that do not lie in fraud or willful injury are barred by the Covenant.*

Those that do, are not." (Aug. 9, 2017 MSJ Order at 5 (emphasis added).) The Court held that second, third, fourth, fifth, seventh, and tenth causes of action were therefore outside the scope of the Release. **Thus, even if DCA were judicially estopped from making arguments regarding the enforceability of the Covenant, those arguments are irrelevant to the remaining causes of action in light of the Court's substantive ruling on summary judgment: if the remaining claims are outside the scope of the Covenant, it does not matter if the Covenant is enforceable or not.** This, of course, begs the question of whether it is sensible for the parties to proceed with this judicial estoppel trial at all.

III. CONCLUSION

For the foregoing reasons, the Court should either find that pursuant to its ruling on summary judgment the application of judicial estoppel would not bar DCA's remaining causes of action, or that ICANN has not proven the elements of judicial estoppel.

ICANN seeks to dismiss DCA's claims because DCA was successful in convincing the IRP that the result should be binding on the parties – a ruling that ICANN refused to accept even after this proceeding was filed. The parties never asked the panel whether the Covenant was applicable and if DCA could bring an action in a court of law. Judicial estoppel is an equitable principle, "an extraordinary remedy that is applied with caution" (*Kitty-Anne Music Co v. Swan* (2003) 112 Cal.App.4th 30, 35) and "limited to egregious circumstances, i.e., when a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449. Giving DCA its day in court for claims that have never been adjudicated is not "a miscarriage of justice."

Accordingly, this case should proceed to the jury trial on the merits.

Dated: January 17, 2019

BROWN NERI SMITH & KHAN, LLP

By: _____
Ethan J. Brown

Attorneys for Plaintiff,
DotConnectAfrica Trust