

DECLARATION OF
ERIN L. BURKE

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2 I, Erin L. Burke, declare:

3 1. I am a partner at Jones Day, counsel to the Internet Corporation for Assigned
4 Names and Numbers (“ICANN”). I am a member in good standing of the State Bar of California
5 and am admitted to practice before the Courts in this State. I have personal knowledge of the
6 matters set forth herein and am competent to testify as to those matters. I make this declaration in
7 support of ICANN’s Response to DCA’s Supplemental Closing Trial Brief and to DCA’s
8 Response to ICANN’s Report Following the Court’s Request that the Parties Meet and Confer
9 Regarding Stipulation for Separate Judges to Hear Phase of Trial.

10 2. On May 26, 2017, ICANN moved for summary judgment, arguing in part that
11 DCA’s claims were barred by the doctrine of judicial estoppel due to DCA’s repeated assertions
12 during the Independent Review Process (“IRP”) that it could not sue ICANN.

13 3. On August 9, 2017, this Court issued a ruling bifurcating the trial, and setting a
14 bench trial for February 28, 2018 on the issue of whether DCA’s claims were barred by the
15 doctrine of judicial estoppel (Phase One).

16 4. Phase One took place on February 28 and March 1, 2018. Phase Two of the trial
17 on DCA’s remaining fraud claims and ICANN’s remaining affirmative defenses (if any is
18 necessary following Phase One) is currently set for August 22, 2018.

19 5. On May 4, 2018, this Court issued a Tentative Ruling regarding the judicial
20 estoppel trial.

21 6. On May 22, 2018, DCA and ICANN appeared for Phase One closing arguments.
22 Judge Halm informed the parties that he was retiring on August 3, 2018, and therefore would not
23 be able to preside over the August 22, 2018 trial, if any was necessary. The Court also informed
24 the parties of his understanding that litigants are entitled to have the same judge try all phases of a
25 bifurcated trial, unless the parties stipulate otherwise. The Court set a tentative date of June 1,
26 2018 for closing arguments in order to allow the Parties time to consider whether they would
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1 stipulate to have two different judges preside over the two phases of trial if Phase Two was
2 necessary.

3 7. My colleagues and I met and conferred with counsel for DCA and ZACR, during
4 which ICANN informed DCA and ZACR that it did not stipulate to having different judges
5 preside over two phases of the trial. ZACR also did not agree to any such stipulation.

6 8. On May 30, 2018, ICANN filed a Report informing the Court that the parties did
7 not reach a stipulation and confirming its understanding that California law requires the same
8 judge to preside over all phases of a bifurcated trial. DCA also filed a Supplemental Closing
9 Trial Brief Regarding Mistrial setting forth its contrary position.

10 9. On May 31, 2018, DCA also filed a Response to ICANN's Report. The parties
11 jointly contacted the Court, affirming that they had not reached a stipulation. The Court set a July
12 20, 2018 hearing date for the parties' recent submissions on the issue of whether the Court could
13 decide Phase One and a new judge could decide Phase Two. The Court also set closing argument
14 for July 20, should the Court find that it can decide Phase One.

15 10. On June 11, 2018, ICANN and ZACR moved *ex parte* for an order vacating or
16 continuing the Phase Two trial date arguing, inter alia, that the case law supported that Phase One
17 would need to be retried before a new judge, making it unlikely that Phase Two could proceed on
18 August 22. The Court continued the *ex parte* hearing to July 20 and indicated that, contrary to its
19 prior position, it now understood California law, in particular Court Rule 3.1591, to allow
20 different judges to preside over different phases of a bifurcated trial.

21 11. California Rules of Court, rule 3.1591 was formerly rule 232.5. The only
22 difference between Rule 3.1591(b) and the former Rule 232.5 is that Rule 3.1591 changes "shall"
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1 to "must." The substance of the rules are otherwise the same. Attached hereto as **Exhibit A** are
2 true and correct copies of Rule 3.1591 and Rule 232.5.

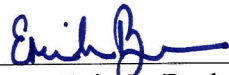
3 12. Attached hereto as **Exhibit B** is a true and correct copy of the California Court of
4 Appeal's decision in *European Beverage, Inc. v. Superior Court*, 43 Cal. App. 4th 1211 (1996).

5 13. Attached hereto as **Exhibit C** is a true and correct copy of the Los Angeles
6 Superior Court's Order Granting Intervenor's Motion for Mistrial in *Connetto v. Morrison*, No.
7 BS118649, 2012 WL 8133573 (Cal. Super. Ct. Jan. 27, 2012) (unpublished).

8 14. Attached hereto as **Exhibit D** is a true and correct copy Respondent's Opposition
9 to the Motion for Mistrial and to Strike Tentative Decision, No. BS118649, 2011 WL 10657335
10 (Cal. Super, Ct. July 15, 2011), submitted to the court in *Connetto v. Morrison*.

11 I confirm under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed July 9, 2018, in Los Angeles, California.

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16 _____
17 Erin L. Burke

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