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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE 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.

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

Case No.: BC607494

**PLAINTIFF DCA'S TRIAL BRIEF**

Date: February 20, 2018
Time: 8:30 a.m.
Dep't.: 53

## I. INTRODUCTION

The remaining causes of action in this proceeding are DCA's second, third, fourth, fifth, seventh, and tenth causes of action, which in the Court's words "relate to fraudulent actions or those causing willful injury." The Court has already found that there are triable issues in the lawsuit. ICANN has argued that DCA should be judicially estopped from making an argument as to the enforceability of the Release and Covenant Not to Sue ("the Covenant") in Module 6 of ICANN's Guidebook. DCA will show that ICANN's affirmative defense of judicial estoppel is inapplicable here. First, ICANN failed to plead judicial estoppel as an affirmative defense. **Second, the Court has already ruled that DCA's remaining claims are outside the scope of the Covenant. Therefore, the Court should allow the remaining causes of action to proceed directly to jury trial.** Third, none of the required elements for the application of judicial estoppel are met here. Accordingly, the Court should rule that judicial estoppel is inapplicable to any of DCA's remaining arguments or claims.

## II. ARGUMENT

### A. ICANN Failed to Plead Judicial Estoppel As An Affirmative Defense

DCA will show that ICANN should not have the opportunity to present evidence on their affirmative defense of judicial estoppel because a defendant cannot raise an affirmative defense after the filing of an answer. *See Lee v. West Kern Water Dist.*, (2016) 5 Cal. App. 5th 606, 622 ("Judicial estoppel is an affirmative defense that must be plead by a defendant. Defendants did not plead judicial estoppel in their answer and never sought leave to amend their answer...this failure meant the judicial estoppel defense was forfeited"). ICANN raised the affirmative defense of judicial estoppel for the first time on its motion for summary judgment with the hope that its MSJ will succeed after receiving a favorable ruling on the Motion for Preliminary Injunction Because ICANN did not plead the affirmative defense of judicial estoppel in its answer to the legal complaint filed by DCA Trust, it has waived its right to do so at trial. *See id.*

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

DCA will still be able to proceed with a trial on the merits because there are triable issues in the lawsuit and 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 or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party'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.*" 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 nonbinding nature 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 doesn't matter if the Covenant is binding 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.

### C. The First Amended Complaint is not barred by judicial estoppel

Even if the Court were to determine that ICANN's judicial estoppel defense could be asserted against DCA's remaining claims, ICANN will be unable to prove the elements of judicial estoppel. 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.*, 60 Cal. App. 4th 171, 183 (1997). "[E]ach case must be decided on its own facts and in light of equitable considerations." *Jogani v. Jogani* (2006) 141 Cal. App. 4th 158, 181. Here, Defendant's attempts to establish judicial estoppel will fail because it cannot prove the requisite elements.

***1. DCA has not taken two positions***

DCA will show that it has not taken two separate 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. This Court should not allow a non-governmental organization like ICANN to act above the law under any circumstances.

***2. DCA's positions are not totally inconsistent***

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 v. Jogani* (2006) 141 Cal. App. 4th 158, 188 (emphasis added). Judicial estoppel is applied only against a party that has taken positions or made statements that are "totally inconsistent." *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997). Put another way, the party must have taken positions that are so irreconcilable that "one necessarily excludes the other." *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 962–963 (1997). Ultimately, this element is a "very high threshold" and a "rigorous standard." *Bell v. Wells Fargo Bank, N.A.*, 62 Cal. App. 4th 1382, 1387 (1998). Furthermore, if the litigant can explain how the positions are consistent, generally the court will not apply judicial estoppel. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 798 (1998). ICANN will be unable

to show that DCA's positions were so inconsistent as to warrant judicial estoppel. There is no risk of inconsistent judicial determinations here because even assuming the IRP was a judicial forum, the IRP panel made determinations regarding the binding nature of the IRP and whether the ICANN Board followed its rules with respect to the GAC decision. DCA's remaining causes of action in the lawsuit do not require the Court to rule on either of those issues.

ICANN will be unable to show that DCA's positions are 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 completely 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 in a vacuum. The thrust of DCA's argument was 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." (LeVee's Decl., Ex. G, ¶ 27) (quoting DCA's submission to the IRP). The IRP's final declaration reflects the fact that DCA never conceded that the Covenant was enforceable 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.* However, as ICANN consistently maintained that the IRP proceedings were not binding, (LeVee's Decl., Ex. G, ¶ 28), DCA maintains, as it always has, that it is still entitled to binding remedies for the harms ICANN caused DCA.

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, DCA's statements concerning waiver do not establish judicial estoppel because they 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.*, 213 Cal. App. 4th 1, 10 (2013). The IRP panel focused entirely

on whether the ICANN *Board* followed its own Bylaws *and the IRP panel did not analyze whether the Covenant was enforceable;* this litigation focuses on whether ICANN is liable for actions by a number of actors in addition to the ICANN Board (including staff, ICANN committees, the geographic names panel, and individual board members) - under multiple theories including fraud, not excluding intentional misconduct - in handling DCA's application and issues related thereto. ICANN's liability for fraud, the other causes of action at issue in this litigation, and the enforceability of the Covenant, were never adjudicated by the IRP. Moreover, much of the harmful conduct by ICANN that forms the basis for DCA's claims in the instant matter 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 – until it became clear: (1) how limited it was (to Board action and further consideration); (2) how it was not binding on ICANN if the IRP Panel held otherwise; (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. DCA did not succeed in its first position***

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 v. Jogani*, (2006) 141 Cal. App. 4th 158, 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). However, the panel never stated that it was adopting any position of DCA's with regard to the Covenant. Instead, the IRP panel stated that "[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). Therefore the panel's position on the waiver was

an assumption not a ruling. Furthermore, even after the IRP's ruling, ICANN continued to claim that the IRP panel's declaration was not binding. *See* (LeVee's Decl., Ex. D, ¶ 9). Suggesting that the binding nature of the IRP declaration had not already been determined by the IRP panel itself, 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). It cannot be said that DCA *actually* succeeded in its position that the IRP should be binding 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 from an external review panel, which is merely considered as input into ICANN's decision-making process. And, ICANN's position was that DCA could not have enforced the IRP or any subsequent ruling if entirely disregarded by ICANN.

***4. ICANN does not actually recognize the IRP as a true "quasi-judicial proceeding"***

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*, No. 1:11-CV-01141-AWI, 2014 WL 897337, at *6 (E.D. Cal. Mar. 7, 2014). Furthermore, in determining whether to apply estoppel, "courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings." *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829 (1999); *see also Sanderson v. Niemann*, 17 Cal. 2d 563, 573–575 (1941) (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. There was no appeal process provided for by ICANN's Bylaws if an applicant did not like the outcome of an IRP. 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:

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- 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[1] to fashion whatever relief it deemed appropriate. The panel merely had the authority to "declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws." *See* April 2013 Bylaws Section 3.11.

[1] 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

1 Furthermore, ICANN presented a letter to the IRP Panel dated June 1, 2015 arguing that:
2 "Because the Panel's authority is **limited** to declaring whether the Board's conduct was
3 inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question
4 and refrain from recommending how the Board should then proceed in light of the Panel's
5 declaration. …. In all events, the Bylaws mandate that the Board has the responsibility of
6 fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's
7 conduct was inconsistent with ICANN's Articles of Incorporation of Bylaws. The Bylaws do not
8 provide the Panel with the authority to make any recommendations or declarations in this respect."
9 (Emphasis added).
10 Needless to say that ICANN treated the IRP Panel as lacking authority to make rulings that
11 would be binding on ICANN, and the actions of the ICANN Board following the conclusion of
12 the IRP proceedings. ICANN treated the Panel's ruling with total derision and elected to fashion
13 a solution of its own contrivance. ICANN disregarded the ruling of a Panel that it thought should
14 be enfeebled (by a direct challenge to the Panel's authority), and when the Panel tried to asset its
15 authority by making a binding ruling, ICANN ignored the Panel's ruling. Thus the IRP was not a
16 judicial or even quasi-judicial proceeding.
17 DCA will show that on multiple occasions ICANN tried to limit the scope of the IRP.
18 Specifically, ICANN took the position that "The Panel has posed questions relating to the propriety
19 of ICANN's internal accountability mechanisms and the gTLD application signed by DCA
20 including questions relating to due process and unconscionability. These questions are well
21 outside the scope of the Panel's narrow mandate established under ICANN's Bylaws, i.e., to
22 declare whether the Board violated ICANN's Bylaws or Articles of Incorporation in its
23 consideration of DCA's Application for .Africa." See ICANN's May 20, 2014 Further
24 Memorandum Regarding Procedural Issue at ¶ 11. Moreover, the Court has already ruled that the
25 Covenant does not even apply to DCA's remaining claims. (*Infra*, Section II.2.)
26 In sum, as a result of ICANN's actions, the IRP was a non-binding and non-appealable
27 procedure. ICANN should not be allowed to continuously argue that the IRP was nothing more
28 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.*, 5 Cal. App. 5th 606, 630 (2016). 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 Management of Alameda County*, 76 C.A.4th 590, 598, 90 C.R.2d 510 (1999) (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*

1 *Corp.*, 67 Cal. App. 4th 995, 1018 (1998) (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 Defendant 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.

Nevertheless, 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.

**III. CONCLUSION**

For the foregoing reasons, the Court should either find that pursuant to its ruling on summary judgment, judicial estoppel is not applicable to DCA's remaining causes of action, or that ICANN has not proven the elements of judicial estoppel apply to DCA's position that the Covenant is unenforceable. Accordingly, this case should proceed to the jury trial on the merits.

Dated: February 9, 2018

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