Court of Appeal, Second Appellate District
Daniel P. Potter
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Court of Appeal, Second Appellate District
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IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT - DIVISION 4

DotConnectAfrica Trust,

Appellant,

v.

Internet Corporation for
Assigned Names and Numbers, et al.,

Respondent.

Trial Court Case No. BC607494
On Appeal From Los Angeles County Superior Court
Honorable Robert B. Broadbelt III, Judge

RESPONDENT'S BRIEF

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Attorneys for Respondent
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

CERTIFICATE OF
INTERESTED PARTIES

Pursuant to California Rules of Court, rule 8.208, the

following entity may have an interest in this case: ZA Central

Registry, a South African non-profit company.

Dated: March 3, 2021   Respectfully submitted,

JONES DAY

By: */s/ Jeffrey A. LeVee*
    Jeffrey A. LeVee

Attorney for Respondent
INTERNET CORPORATION
FOR ASSIGNED NAMES AND
NUMBERS

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INTRODUCTION

California courts apply judicial estoppel 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."[1]

This appeal follows a three-day bench trial where the trial court heard disputed live testimony and evidence, reached findings of fact supported by substantial evidence, and exercised its discretion to apply judicial estoppel to preclude the lawsuit filed by Appellant DotConnectAfrica Trust ("DCA") against Respondent Internet Corporation for Assigned Names and Numbers ("ICANN"). The trial court rightly concluded that DCA's lawsuit was totally inconsistent with DCA having secured various successes in a prior quasi-judicial proceeding based on its repeated representations that "[DCA] cannot take [ICANN] to Court. [DCA] cannot take [ICANN] to arbitration. [DCA] can't take [ICANN] anywhere. [DCA] can't sue [ICANN] for anything." (2AEX1397–1398.)[2] The trial court's judgment should be affirmed.

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[1] *Jackson v. County of L.A.* (1997) 60 Cal.App.4th 171, 181.

[2] Citations to "__CT__" are to the volume and page of the Clerk's Transcript for merits appeal only. Citations to "__SUPPCT__" are to the volume and page of the Supplemental Clerk's Transcript. Citations to "__RT__" are to the volume and page of the Reporter's Transcript. Citations to "__AEX__" are to the volume and page of the trial exhibits lodged by DCA. Citations to "REX" are to the one volume of trial exhibits lodged by ICANN. Page cites are to the stamped numbers at the upper-right corner in the Reporter's Transcript and to the lower right-most corner in the remainder.

ICANN oversees and coordinates the secure operation of the Internet's domain name system, which includes processing applications for certain generic top-level domain names ("gTLDs"); a top-level domain is the portion of the domain name to the right of the last dot (i.e., ".COM," ".ORG," or ".AFRICA"). DCA's prior representations were strategically made in an Independent Review Process ("IRP"), an accountability mechanism established pursuant to ICANN's Bylaws, that DCA initiated to challenge ICANN's decision to stop processing DCA's application for the .AFRICA gTLD. DCA's representations that it could not sue ICANN in court "in any way" related to DCA's application were repeated, unequivocal, and unqualified. DCA used those representations to secure success on multiple issues in the IRP, and DCA ultimately prevailed on the merits of the IRP.

Following the IRP, ICANN placed DCA's application for the .AFRICA gTLD back into processing, but even before ICANN made a final determination as to whether DCA met the requirements to obtain the gTLD, DCA did precisely what it repeatedly represented in the IRP that it could not do—DCA sued ICANN in court regarding ICANN's treatment of DCA's application. The trial court rightly rejected DCA's attempt to gain advantage by taking one position before the IRP and then seek a second advantage by taking a totally inconsistent position and filing a lawsuit in court.

Judicial estoppel has been invoked to bar litigation on *exactly* the type of egregious conduct DCA displayed here—deliberately "chang[ing] [its] tune" according to exigencies of the moment. (See *Owens v. County of L.A.* (2013) 220 Cal.App.4th 107, 122, 123.)

Indeed, substantial evidence supported the trial court's findings that all five of *Jackson*'s judicial estoppel factors were met: DCA repeatedly, unequivocally, and successfully argued in a quasi-judicial proceeding that it could not sue ICANN in court. DCA's argument that "context matters" rests on a contention that its claims in this lawsuit were different than its claims in the IRP, but DCA ignores the facts—DCA's representations that it could not sue ICANN regarding its .AFRICA application were unconditional *and* its lawsuit challenged ICANN's treatment of that application. The meaning of DCA's representations did not change simply because they were made in a different "context." Nevertheless, DCA sued ICANN in court, doing precisely what it repeatedly argued in the IRP that it could never do. And DCA's representations that it could not sue ICANN in court were not a result of ignorance, fraud, or mistake, but instead consisted of a "strategic" decision used to gain specific advantages in the IRP.

After weighing all the evidence, the trial court concluded that DCA's actions presented "egregious circumstances that would result in a miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA from taking the second position in this lawsuit." (19CT4522–4537.) That conclusion was well within the trial court's discretion.

DCA now argues this is a case of judicial estoppel gone "haywire." In so doing, DCA attempts to skew its prior unequivocal representations in the IRP, undermine its own success based on those representations, and attribute nefarious motives to ICANN—all of which lack *any* evidentiary support. To be clear, in the IRP that

DCA claims was "rigged," DCA fully prevailed on the merits. Despite DCA's efforts to mischaracterize the IRP on appeal, the *only* relief to which DCA was entitled was a declaration on the merits— that is, whether ICANN had violated its Articles of Incorporation ("Articles") or Bylaws. DCA prevailed in obtaining that declaration. DCA was never entitled to the .AFRICA gTLD as a result of the IRP. In addition, DCA persuaded the IRP Panel to provide "recommendations" to ICANN, including a recommendation that DCA's .AFRICA application be placed back into processing at the stage where it previously had been stopped, which ICANN fully implemented. After the IRP, DCA's application still did not meet the requirements and, after having received multiple opportunities to correct the deficiencies, DCA simply re-submitted the same insufficient documents it originally submitted. Then, before ICANN denied DCA's application, and totally inconsistent with DCA's repeated representations in the IRP that it could not sue ICANN in court, DCA sued ICANN in court.

The trial court rightly concluded that this case presented "egregious circumstances" that warrant imposing judicial estoppel to bar DCA's subsequent lawsuit. The trial court's judgment should be affirmed.

STATEMENT OF THE CASE

A. ICANN Coordinates and Ensures Stable and Secure Operations of the Internet's Domain Name System.

Formed in 1998, ICANN is a California nonprofit public benefit corporation and has a Board of Directors (the "Board") with members from around the world. (19CT4257.) Pursuant to its

Bylaws, ICANN's mission "is to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems."[3] (1AEX416; 19CT4257.) Among these identifiers are the particular generic top-level domains, or gTLDs, used in the Internet's domain name system, which converts easily remembered domain names (e.g., "lacourt.org") into numeric internet protocol ("IP") addresses understood by computers. (REX75–76.)

ICANN is an organization comprised of several groups and stakeholders from around the world, each representing different interests on the Internet. (1AEX415–521.) ICANN has supporting organizations that develop and provide policy recommendations to the Board, in addition to advisory committees that provide advice. (19CT4257; 1AEX448–482.) One such committee is the Governmental Advisory Committee ("GAC"). (19CT4257.) The GAC is composed of representatives from nearly 180 governments and unique economies around the world. (19CT4257.) The GAC is tasked with "consider[ing] and provid[ing] advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues." (19CT4257; 1AEX469–70.)

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[3] All references to ICANN's Bylaws are to the Bylaws that were in effect as of April 11, 2013.

B.   ICANN Launched the New gTLD Program and Established a Fair Application Process That DCA's CEO Was "Active[ly]" Involved in Developing.

In 2012, ICANN launched the application window of the "New gTLD Program," which invited interested parties to apply to be designated as the registry operator of the gTLDs for which they applied. (19CT4257–4258.) Registry operators manage the assignment of domain names within the gTLD, maintain its database, and contract with "Registrars" that, in turn, sell domain name subscriptions to consumers. (1AEX245–247.) ICANN adopted the Applicant Guidebook ("Guidebook"), which detailed processes and procedures, including the evaluation criteria, for new gTLD applications. (1AEX15–352.)

ICANN developed the New gTLD Program and the Guidebook through an extensive process reflecting input from hundreds of members of the Internet community. (4RT2498, 2500–2502, 2507; 1AEX16.) ICANN's Generic Names Supporting Organization ("GNSO") initially led this process, and Sophia Bekele, DCA's CEO, served as a policy advisor to the GNSO starting in 2005. (1AEX16; 7SUPPCT1923.) As an advisor, she actively participated in developing policy that led to the New gTLD Program, and later she provided feedback on the drafts of the Guidebook. (7SUPPCT1923 ["I was active. I participated in all meetings and all phone calls."].) Ms. Bekele testified that she paid special attention to the development of the New gTLD Program and helped "formulat[e] the rules and requirements." (7SUPPCT1922–1925; 2AEX724.)

To ensure ICANN's accountability to the Internet community, ICANN adopted "Accountability Mechanisms" that include the IRP relevant here. (1AEX421–431; see also 19CT4259.) The .AFRICA IRP involved an independent, three-member panel determining whether the ICANN Board's actions or inactions relating to ICANN's treatment of DCA's .AFRICA application were inconsistent with ICANN's Articles or Bylaws. (1AEX427–431.) The Bylaws set forth the procedures for IRPs, including the standard of review. (1AEX427–431.) All Accountability Mechanisms, including IRPs, were and are available to applicants in lieu of legal action. (1AEX348.)

Specifically, all applicants agreed to a Release and Covenant Not to Sue (the "Covenant") when they submitted their applications. (1AEX348, 19CT4258.) The Covenant unequivocally bars lawsuits against ICANN arising "in any way" out of ICANN's evaluation of new gTLD applications:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from 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. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE

> OR PROCEED IN COURT OR ANY OTHER JUDICIAL
> FORA ON THE BASIS OF ANY OTHER LEGAL
> CLAIM AGAINST ICANN AND ICANN AFFILIATED
> PARTIES WITH RESPECT TO THE APPLICATION. . . .

(1AEX348, original emphasis; 19CT4258.) As detailed *infra*, DCA repeatedly relied upon the Covenant to argue for and secure advantages before the IRP.

The new gTLD application review process involved several evaluation stages with input from independent expert panels and the GAC. (1AEX67–161; 4RT2507–2508.) One stage was the "Geographic Names Review," which considered whether the applied-for gTLD constituted a geographic region (such as the continent of Africa, here). (1AEX81–87.) If so, the applicant was required to submit letters demonstrating the support or non-objection from 60% of the relevant governments or public authorities of the region at issue. (1AEX81–84.) These letters had to meet specific criteria and were reviewed by one of two expert firms ICANN retained for this purpose. (1AEX82–87.) The letters associated with applications for .AFRICA were reviewed by InterConnect Communications ("ICC"). (19CT4316.)

In addition, the GAC could advise ICANN as to new gTLD applications, particularly those that governments might deem problematic or might raise public policy concerns. (1AEX27, 163–164.) The GAC's advice could take several forms, including reaching a consensus opinion that a particular application should not proceed. (1AEX164.) Under the Guidebook, the GAC's "consensus advice" created a "strong presumption for the ICANN

Board that the application should not be approved." (1AEX27163–164.)

C. The GAC Issued Consensus Advice That DCA's Application Should Not Proceed.

DCA and a South African nonprofit organization called ZA Central Registry ("ZACR") each applied for the .AFRICA gTLD. (4RT2498; 19CT4257–4258.) ICANN began processing the two applications as required by the Guidebook. (19CT4257–4258; 15CT3204.)

DCA's CEO, Ms. Bekele, testified that she understood DCA agreed to be bound by the Guidebook, including the Covenant, when it submitted its application for .AFRICA, and that the Covenant prevented applicants from suing ICANN in court. (3RT2175–2177 ["You understand the purpose of the covenant in Module 6 was to prevent applicants from suing ICANN in court with respect to their application?" Ms. Bekele: "Correct."].)

While DCA's application for .AFRICA was in the Geographic Names Review, the GAC issued consensus advice in April 2013 that DCA's application should not proceed. (19CT4259; 4RT2521–2523.) After considering the GAC's consensus advice and the strong presumption it carried, the ICANN Board adopted a resolution accepting the advice, which stopped DCA's application. (19CT4259; 4RT2521–2528.)

D. DCA Challenged ICANN's Decision Through an IRP—A Quasi-Judicial Proceeding Before an Independent Panel.

DCA initiated an IRP in October 2013 to challenge the Board's decision to accept the GAC's consensus advice. (19CT4259; 1AEX525–549.) The IRP was administered by the International Centre for Dispute Resolution ("ICDR")—the international arm of the American Arbitration Association. (19CT4259.) It was conducted in accordance with ICANN Bylaws, the ICDR's International Arbitration Rules, and the "Supplementary Procedures" that ICANN adopted for IRPs. (19CT4257.) A neutral and distinguished three-person panel (the "Panel") presided.[4] (19CT4310.)

The IRP proceeding was contentiously litigated for nearly two years. In conjunction with contested proceedings, the Panel ordered document productions, sworn witness statements, witness lists, a prehearing conference, and written briefs on the merits with citations to evidence. (20CT4531; 1AEX657–663; 19CT4260; 3RT2228.) The proceedings culminated in a two-day hearing transcribed by certified reporters. (20CT4531; 19CT4260; 3RT2184,

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[4] DCA selected Dr. Catherine Kessedjian, the Deputy Director of the College of Paris, Professor of Law, and the former Deputy Secretary General of the Hague Conference on Private International Law. (REX5–9.) ICANN selected the Honorable Richard C. Neal, a retired California Court of Appeal justice. (REX11.) Justice Neal passed away while proceedings were pending, prompting ICANN to select the Honorable William Cahill, a retired California Superior Court judge. (REX30–32.) The ICDR selected Babak Barin, an experienced Canadian commercial litigator and arbitrator, to chair the Panel. (REX16–28.)

2187; 2AEX890–1556.) Three witnesses who had previously
provided sworn written statements (Ms. Bekele, an ICANN Board
member, and the former chair of the GAC) testified under oath and
were cross-examined. (20CT4531; 19CT4260; 3RT2208, 2229;
2AEX890–1556.) The parties' counsel gave opening statements and
closing arguments. (20CT4531; 19CT4260; 3RT2186, 2212, 2230.)

> **E.   DCA Secured Success on Seven Different Issues
> Before the Panel Based on DCA's Repeated
> Representations That It Could Not Sue ICANN in
> Court.**

DCA repeatedly and unequivocally represented that the IRP
would be DCA's only opportunity to litigate any of its claims
against ICANN arising out of DCA's application because, under the
Covenant, DCA could not sue ICANN in court. DCA used that
representation to succeed on seven key issues before the Panel.

> **1.   DCA succeeded in obtaining interim relief
> based on its representation that it could not sue
> ICANN in court.**

Upon initiating the IRP, DCA requested a stay of the
assignment of .AFRICA during the pendency of the IRP. DCA
argued that such relief was necessary to protect DCA's "right to be
heard in a meaningful way in the *only proceeding available to review
ICANN Board's decision*." (1AEX567–568.[5]) The Panel agreed and
granted DCA's stay request. (2AEX821.)

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[5] All emphasis added, unless otherwise noted.

2. DCA succeeded in securing document discovery based on its representation that it could not sue ICANN in court.

DCA also requested extensive document discovery from ICANN, arguing the IRP would be its "first and last opportunity . . . to have its rights determined":

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

(2AEX1603; 19CT4261–4262). The Panel again agreed and ordered the parties to exchange document demands and productions. (1AEX637.)

3. DCA succeeded in securing live witness testimony based on its representation that it could not sue ICANN in court.

Although ICANN's Bylaws precluded live testimony during an IRP, DCA argued that, because "the IRP is their only recourse," the Panel should permit it:

> It is also critical to understand that 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 eight pages of terms and conditions, including a nearly page-long string of waivers and releases. *Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available.*

(1AEX585, 601–602; 19CT4261.) The Panel again agreed with DCA and, ordered live witness examinations.[6] (1AEX654.)

4.   DCA succeeded in securing additional briefing based on its representation that it could not sue ICANN in court.

Although each party submitted briefs on the merits, DCA requested additional briefing. (1AEX600–601.) DCA again justified this request by arguing that DCA had "waive[d] all of its rights to challenge ICANN's decision on DCA's application in court." (1AEX585.) The Panel agreed and ordered the parties to submit additional briefing. (1AEX639.)

5.   DCA succeeded in urging the Panel to issue a binding declaration on the merits based on DCA's representation that it could not sue ICANN in court.

DCA repeatedly argued that the Panel's declaration on the merits must be binding. Although ICANN argued to the contrary (1AEX646), DCA reasoned that the Covenant rendered the IRP its "only recourse" for "a final and binding resolution":

> DCA agreed to . . . *the 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*

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[6] DCA argues that ICANN "pulled every trick in the book in an effort to strip the IRP of basic procedural protections." (AOB 12.) But DCA fails to acknowledge that the Panel, in agreeing with DCA on several of these issues (particularly DCA's request for live testimony), was overriding specific provisions in ICANN's Bylaws. (4AEX1915–1919.)

> *resolution of disputes* between ICANN and persons
> affected by its decisions.

(1AEX585.) DCA reiterated this position later, explaining that "the

IRP is the sole forum" for review of ICANN's actions:

> Module 6 of the Guidebook contains eight pages of
> terms and conditions that an applicant "agrees to . . .
> without modification" by submitting an application for
> a gTLD, including significant waivers of rights. . . . In
> exchange for waiving these significant legal rights,
> Section 6 of Module 6 grants applicants the right to
> challenge a final decision of ICANN through the
> accountability mechanisms set forth in ICANN's
> Bylaws, including the IRP. *As a result, the IRP is the sole
> forum in which an applicant for a new gTLD can seek
> independent, third-party review of Board actions. . . .*

(1AEX609–610; 19CT4262.)

DCA also argued that the IRP was an arbitration under

California law in everything but name: "The IRP has all the

characteristics of an arbitration under California law and widely

accepted international arbitral practice and procedure." (1AEX575,

577, 585; 19CT4260.) DCA urged, therefore, that the IRP should

similarly include a binding resolution: "It is fundamentally

inconsistent with California law, U.S. federal law, and principles of

international law for ICANN to require applicants to waive all rights

to challenge ICANN in court or any other forum and not provide a

substitute accountability mechanism capable of producing a binding

remedy. . . . Thus, in order for this IRP not to be unconscionable, it

must be binding." (1AEX610; 19CT4262–4263.)

In further arguing that the IRP "must be binding," DCA later stated, without qualification, that it had "surrendered all of its rights to challenge ICANN in court," making the IRP its "sole forum":

> [A]s a condition of applying for a gTLD, DCA unilaterally surrendered *all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws*. As a result, the IRP is the *sole forum* in which DCA can seek independent, third-party review of the actions of ICANN's Board of Directors.

(1AEX620–621, original emphasis; 19CT4263.) Thus, DCA argued, "[i]f the panel were to determine that this IRP was non-binding, DCA would effectively be deprived of any remedy." (1AEX621; 19CT4263.)

The Panel adopted DCA's position, concluding that under the Covenant, "[t]he avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts"; instead, "the ultimate 'accountability' remedy for applicants is the IRP." (1AEX632–633, original emphasis.) The Panel thus held it had binding authority on procedural matters and its declaration on the merits. (1AEX654.)

6. DCA succeeded in securing the Panel's de novo review based on DCA's representation that it could not sue ICANN in court.

DCA argued that, because the IRP was DCA's "only opportunity" for "independent and impartial review of ICANN's conduct," the Panel should apply a "de novo" standard of review:

> *This is the only opportunity that a claimant has for independent and impartial review of ICANN's conduct, the only opportunity.* And within that context of that only

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opportunity, really, there should [not] be a deferential standard [of] review, deference to the regulator, whose very conduct is being questioned. I think that is wrong.

(2AEX911–912 [noting Covenant provided ICANN "with a protection from the public courts"]; see also 2AEX1380–1381 [stating, "at the end of the day, the only people that ICANN is accountable to are the three of you . . . the Independent Review Panels [sic]"].) In arguing for de novo review, DCA again emphasized that it could not sue ICANN: "We cannot take [ICANN] to Court. We cannot take [ICANN] to arbitration. We can't take [ICANN] anywhere. We can't sue [ICANN] for anything." (2AEX1397–1398.) The Panel agreed with DCA again and held that it would review ICANN's actions de novo. (2AEX839.)

> **7.   DCA succeeded in obtaining its costs based on its representation that it could not sue ICANN in court.**

Lastly, DCA argued that ICANN should pay DCA's costs if DCA prevailed because the IRP "is the only independent accountability mechanism available [to] parties such as DCA." (2AEX794.) After ruling in DCA's favor on the merits, the Panel agreed with DCA and recommended that ICANN pay DCA's costs, which ICANN did.

F. The Panel Issued a Binding Declaration on the Merits in DCA's Favor and Also Made Recommendations That ICANN Fully Implemented.

1. The Panel concluded its declaration on the merits in DCA's favor was binding.

As noted, DCA repeatedly argued that the Panel had the authority to issue "final and binding" declarations: "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 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." (1AEX585.)

Although ICANN argued otherwise, the 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." (1AEX654; see also 1AEX627.) The 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.[']" (2AEX811, original emphasis [citing Bylaws Article IV, Section 3]; see also 1AEX654; 2AEX818–880, 1AEX431.) Thus, the Panel concluded it had binding authority on 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." (1AEX654.)

The Panel then exercised that authority: "[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." (2AEX878.) ICANN did not dispute that declaration. (See 2AEX1612–1619.)

2. The Panel made recommendations to ICANN that ICANN implemented.

Before the Panel issued its declaration, DCA asked that, if the Panel declared ICANN to be in violation of its Articles or Bylaws, the Panel also should recommend a course of action to the ICANN Board. (2AEX834; 2AEX787.) The Panel concluded it had the "power," beyond issuing a declaration on the merits regarding whether ICANN violated its Articles or Bylaws, "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." (2AEX873; see also 2AEX835.)

As a result, the Panel made several recommendations, each of which DCA had suggested. (See 3RT2171–2172; 2AEX787; 2AEX834.) Specifically, the Panel recommended that ICANN: (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 of $198,046.04. (2AEX878–879; 19CT4265.)

Thereafter, the Board convened a special meeting "to take action on this matter as quickly as possible," and adopted the

Panel's recommendations in full. (2AEX1612–1619.) Specifically,

ICANN did not delegate .AFRICA while DCA's application was

being processed following the IRP. (3RT2202 [Ms. Bekele testifying

that ICANN did not delegate .AFRICA until after the trial court

denied DCA's preliminary injunction application].) ICANN

returned DCA's application to exactly where it had been in the

review process when the Board accepted the GAC's consensus

advice. (4RT2717–2718.) And ICANN paid DCA's costs. (3RT2227–

2228; see also 4RT2706–2709.) ICANN thus abided by the Panel's

declaration on the merits and recommendations in every respect.

(2AEX834, 2AEX1612–1619; 4RT2710, 2769.)

> **3. The IRP's declaration on the merits did not mean DCA was to be awarded the .AFRICA gTLD.**

When DCA's application stopped being processed, it was

pending Geographic Names Review by ICC. (4RT2524.) Following

the IRP, ICANN placed DCA's application back into processing at

that exact point[7] and ICC resumed its review of DCA's application.

(4RT2719.)

ICC evaluated DCA's letters of support and determined they

did not meet the Guidebook's requirements.[8] (3RT2261–2262;

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[7] Having now rejected the GAC's consensus advice as a result of the Panel's ruling, ICANN's Bylaws *required* the Board to liaise with the GAC on this subject, contrary to DCA's suggestion that this was somehow nefarious. (1AEX471 [requiring ICANN to notify the GAC when it does not accept the GAC's advice]; cf. AOB 28.)

[8] DCA seeks to defend two of those letters — one from the African Union Commission ("AUC") and the other from the United Nations Economic Commission for Africa ("UNECA"). (AOB 20.)

4RT2719–2720.) ICANN then offered DCA two opportunities to re-
submit new conforming letters. *DCA refused* and maintained that its
previous letters were sufficient.[9] (4RT2719–2721; 3RT2262–2263;
4RT2720–2721.)

ICANN then offered DCA an "extended evaluation," giving
DCA several additional months to provide sufficient letters of
support. (3RT2261–2263; 2262–2263; 4RT2720–2721.) DCA again
refused and continued to rely upon the same, outdated letters that
already had been rejected. (*Id.*) Having failed to satisfy the
Geographic Names Review, ICANN could not (and did not)
approve DCA's .AFRICA application.[10] (3RT2263; 4RT2721.)

The AUC, however, withdrew its letter in 2010, two years before
DCA even submitted its application to ICANN. (9CT1962, 2RT339.)
UNECA's letter was rejected because UNECA did not qualify as a
relevant entity, per UNECA itself. (9CT1966–1967.)

[9] DCA correctly states that, prior to the IRP, ICANN had not
conveyed to DCA that its letters were insufficient (AOB 29), but that
was only because ICC had not finished its review yet. ICANN never
represented that it would accept DCA's UNECA letter as sufficient,
and ICC ultimately concluded UNECA did not qualify as a relevant
government authority for purposes of the Geographic Names
Review.

[10] Contrary to DCA's argument (AOB 29), ICANN's evaluator
did *not* advise that DCA's application should pass. For some reason
DCA cites to its initial evaluation results, but those results clearly
demonstrate that DCA did not pass Geographic Names Review.
(AOB 29 [citing 16CT 3582-83].)

G. Despite DCA's Repeated Representations That It Had No Right to Sue ICANN in Court, DCA Sued ICANN in Court.

Unhappy with ICANN's treatment of its application following the IRP, DCA could have initiated a process that would have resulted in another IRP. (See 4RT2721–2722, 2765–2767.) Instead, DCA sued ICANN in Los Angeles Superior Court. (1CT36.) The operative complaint pled ten causes of action against ICANN, including claims for breach of contract and declaratory relief. (2AEX1558–1586.) *Every single one* of DCA's causes of action arose from and directly related to ICANN's processing of DCA's .AFRICA application—either before or after the IRP. (2AEX1558–1586.) Thus, DCA's lawsuit was totally inconsistent with DCA's prior representations that it could not sue ICANN in court related "in any way" to its .AFRICA application.

DCA attempts to argue otherwise by restating what it claims were "pretextual" and deceptive actions by ICANN with regard to DCA's .AFRICA application. (See, e.g., AOB 12–21, 27–30.) However, DCA's fraud-based claims, which include allegations regarding the competing application submitted by ZACR, were nothing more than reincarnations of DCA's complaints about the application process. And, of course, any applicant could *characterize* the processing of its application as pretextual or fraudulent if the applicant disagrees with the process or outcome, even where there plainly is no pretext or fraud. In any event, the specific nature of DCA's underlying allegations are irrelevant to whether judicial

estoppel barred DCA's lawsuit based on DCA's prior representations that it could not sue ICANN in court.

ICANN thereafter moved for summary judgment on the grounds that DCA's lawsuit was barred by the Covenant and judicial estoppel. (15CT3220–3245.) The trial court granted ICANN's motion in part, finding that the Covenant barred DCA's non-fraud claims, but not DCA's fraud claims. (17CT3847–3857.)[11] The trial court—not ICANN, as DCA now contends (AOB 32)—then suggested a bench trial to determine whether judicial estoppel barred DCA's lawsuit. (2RT632.)[12]

H.   After a Bench Trial, the Trial Court Concluded That Judicial Estoppel Barred DCA's Lawsuit.

The trial court held a three-day bench trial on ICANN's judicial estoppel defense. (20CT4523; 4RT2787, 2806.) The trial court's eleven-page statement of decision made clear and express findings supported by substantial evidence, and it provided a thorough analysis of each judicial estoppel factor. (20CT4526–4537.) Specifically, the trial court found that DCA had taken two "totally inconsistent" positions by suing ICANN in court after it represented it could not, and it emphasized that DCA's representations were

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[11] DCA does not challenge the trial court's summary judgment order.

[12] A previous bench trial on ICANN's judicial estoppel defense was later declared a mistrial after the presiding trial judge retired between phases of the proceedings, and ICANN properly exercised its statutory right to have one judge preside over ongoing proceedings—DCA's aspersions (AOB 33) notwithstanding. (See *European Beverage v. Superior Court* (1996) 43 Cal.App.4th 1211, 1213.)

"repeated" and "strategic," with no evidence that they were taken as a result of ignorance, fraud, or mistake. (20CT4526–4537.) The trial court further found that DCA used those representations to secure successes throughout the IRP, which the trial court found was a quasi-judicial proceeding. (20CT4526–4537.)

After concluding that each factor had been satisfied, the trial court "exercised its discretion to find in favor of ICANN, and against DCA, on ICANN's affirmative defense of judicial estoppel and to bar DCA from bringing or maintaining its claims against ICANN alleged in the FAC." (20CT4536.) The trial court balanced the equities and rightly reasoned that the "egregious circumstances" of this case would "result in a miscarriage of justice" if DCA's claims were *not* barred:

> DCA's successfully taking the first position in the IRP proceeding and gaining significant advantages in that proceeding as a result thereof, and then taking the second position that [is] totally inconsistent in this lawsuit, presents egregious circumstances that would result in a miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA from taking the second position in this lawsuit.

(20CT4535.)

The trial court thereafter entered a final judgment in favor of ICANN and against DCA on all claims. (20CT4522–24.) DCA's appeal followed.

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STANDARD OF REVIEW

Where the application of judicial estoppel is determined through a statement of decision following a bench trial and the facts are disputed, as here, the trial court's factual determinations relevant to whether the doctrine's elements are satisfied are reviewed for substantial evidence. (See *Owens, supra,* 220 Cal.App.4th at p. 121 ["We review the findings of fact upon which the application of judicial estoppel is based under the substantial evidence test."]; *Kerley v. Weber* (2018) 27 Cal.App.5th 1187, 1195 [same].) This is a deferential standard that "applies to both express and implied findings of fact." (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613, internal quotation marks and citation omitted.) Under substantial evidence review, findings of fact must be liberally construed to support the judgment. (See *ibid.*)

Moreover, the reviewing court must "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]." (*Ibid,* internal quotation marks and citation omitted.) "All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity [ ] to be accepted by the trier of fact." (*McClain v. Octagon Plaza, LLC* (2008) 159 Cal.App.4th 784, 804, fn. 8, internal quotation marks and citation omitted.) The reviewing court "may not reweigh the evidence and [is] bound by the trial court's credibility determinations." (*Citizens, supra*, 218

Cal.App.4th at p. 613, internal quotation marks and citation omitted.) Ultimately, "the appellate court's power begins and ends with a determination of whether there is any substantial evidence—contradicted or uncontradicted—to support the trial court findings." (*Schmidt v. Superior Court* (2020) 44 Cal.App.5th 570, 582.)

A trial court's determination that judicial estoppel should apply where the necessary elements are satisfied is reviewed for an abuse of discretion. (*Owens, supra*, 220 Cal.App.4th at p. 121; *Kerley, supra*, 27 Cal.App.5th at p. 1195.) "Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566, internal quotation marks and citation omitted.) A reviewing court "should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice." (*Ibid.*) The burden is on the complaining party to establish such an abuse. (*Ibid.*)

ARGUMENT

I.   JUDICIAL ESTOPPEL IS AN EQUITABLE DOCTRINE INVOKED TO PREVENT GAMESMANSHIP IN EVEN LESS EGREGIOUS CIRCUMSTANCES THAN THOSE PRESENT HERE.

Judicial estoppel is an equitable doctrine designed to maintain the integrity of the judicial system and to protect the parties from unfair strategies and manipulation. (See *Owens*, *supra,* 220 Cal.App.4th at p. 121; *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47 ["[S]ometimes called the doctrine of 'preclusion of inconsistent positions.'"], citation omitted.) "[T]he equitable

doctrine of judicial estoppel targets not only unfairness between individual parties, but also abuse of the judicial system itself." (*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 424.) It "precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." (*People ex rel. Sneddon v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189.)

In determining whether to apply judicial estoppel, courts consider five factors: (1) whether 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*, *supra*, 60 Cal.App.4th at p. 183; *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986–987 [quoting *Jackson*'s five factors].) Even where all factors are satisfied, the trial court retains discretion on whether to apply the doctrine. (*Owens*, *supra*, 220 Cal.App.4th at p. 121.)

Judicial estoppel is not dependent on the potential merits of a claim because the purpose of the doctrine is to prevent gamesmanship and the intentional assertions of inconsistent positions. (*Jackson, supra*, 60 Cal.App.4th at p. 181; see also *Blix, supra,* 191 Cal.App.4th at pp. 49–50.) Thus, the doctrine has been applied in far less egregious circumstances than those present here, even if the result is harsh and bars a plaintiff's claims.

In *Blix*, this District affirmed a trial court's ruling applying judicial estoppel to bar the plaintiff's claim that a settlement agreement was unenforceable when the plaintiff had previously represented that the agreement was enforceable. (*Blix, supra,* 191 Cal.App.4th at pp. 49–51.) The court concluded that, even if the settlement agreement had not been legally binding, the plaintiff was judicially estopped from denying its enforceability because it had represented to the court that the parties had reached an enforceable settlement, resulting in dismissal of the case: "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." (*Id.* at p. 51.)

Similarly, in *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175, 187–189, the plaintiffs' lawsuit for fraud and breach of contract was barred because the plaintiffs had previously stipulated to arbitrate those same claims. Later, the plaintiffs refiled the same claims against the defendants in court. (*Ibid.*) The court of appeal affirmed the lower court's holding and applied judicial estoppel to bar the subsequent lawsuit where the plaintiffs took two inconsistent positions by stipulating to arbitrate their claims and then refiling "virtually the same case for litigation." (*Id.* at p. 188.)

In *Owens*, this District affirmed application of judicial estoppel to bar the plaintiff's lawsuit challenging a ballot measure as being misleading and unconstitutional because the plaintiff had "changed his tune" after he previously argued for and touted the benefits of that ballot measure in a prior lawsuit. (*Owens, supra,* 220 Cal.App.4th at pp. 122–123.) The court reasoned: "This is not a

difficult decision. [The plaintiff's] attempt to revive his action against the County is exactly the kind of litigation conduct judicial estoppel is meant to prevent." (*Id*. at p. 122; see also *Jackson, supra*, 60 Cal.App.4th at pp. 190–191 [officer judicially estopped from bringing a disability discrimination claim because of a position he took in a workers' compensation proceeding].)

For similar reasons, the same outcome should result here.

II. **SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDINGS THAT DCA SUCCESSFULLY REPRESENTED TO THE PANEL THAT DCA COULD NOT SUE ICANN IN COURT AND THEN TOOK A TOTALLY INCONSISTENT POSITION WHEN IT LATER SUED ICANN IN COURT (FIRST, THIRD, AND FOURTH FACTORS).**

A. **DCA Repeatedly Represented That It Could Not Sue ICANN in Court and Secured Repeated Successes in the IRP Based on Those Representations (First and Third Factors).**

The first and third factors of judicial estoppel are met if a party took its first position and the tribunal "adopted the position or accepted it as true." (*Jackson*, *supra*, 60 Cal.App.4th at p. 183; *Sneddon, supra,* 102 Cal.App.4th at p. 189 ["The party invoking judicial estoppel must show that . . . the position was adopted by the first tribunal in some manner such as by rendering a favorable judgment."].) Here, DCA repeatedly, unambiguously and unequivocally represented to the Panel that it could not sue ICANN in court and the Panel adopted DCA's position and ruled in DCA's favor on seven different issues. (See Section E, *supra*.)

Not once did DCA qualify its representations that it could not sue ICANN; *not once* did DCA state that it could not sue ICANN

only with regard to DCA's specific claims before the Panel or that DCA might be able to sue ICANN with respect to other claims; *not once* did DCA condition its representations on ICANN's future actions and whether ICANN would treat the IRP decision as binding; *not once* did DCA state that it could not sue ICANN only if the Covenant is enforceable. Indeed, *not once* did DCA say (or even hint) that, although it was arguing to the Panel that it could not sue ICANN "in any way" related to its .AFRICA application, DCA was reserving its right to file a lawsuit against ICANN later if things did not go DCA's way after the IRP. (See, e.g., 3RT2192–2196 [Ms. Bekele confirming that DCA did not mention the enforceability of the Covenant in its representations to the Panel].)

Rather, DCA's representations to the Panel were unwavering, unconditional, and untethered to any specific circumstance: "We cannot take [ICANN] to Court. We cannot take [ICANN] to arbitration. We can't take [ICANN] anywhere. We can't sue [ICANN] for anything." (19CT4261; see also 1AEX585, 601–602 [DCA arguing that, "[f]or DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available."]; 1AEX609–610 [DCA arguing that "the IRP is the sole forum in which an applicant for a new gTLD can seek independent, third-party review of Board actions. . . ."].) Indeed, DCA's position that it could not sue ICANN in court regarding its .AFRICA application formed the basis of DCA's success on multiple issues in the IRP.

From this evidence, the trial court rightly ruled that DCA secured "significant advantages" in the IRP based on these

representations. (20CT4536.) The trial court found that the evidence demonstrated that the Panel, in ruling on these issues, repeatedly accepted as true, relied upon, and adopted DCA's representations that it could not sue ICANN in court. (20CT4533–4534; see also *Jackson*, *supra*, 60 Cal.App.4th at p. 183 [explaining success factor is met if "tribunal adopted the position or accepted it as true"].)

For example, in ruling that it had the power to determine IRP procedure, the Panel quoted the Covenant and stated "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." (1AEX632; 1AEX654 [deciding IRP declarations should be binding, and ordering document exchange and extended briefing].) The Panel repeated the same language when ordering live testimony at the IRP hearing (2AEX811–812), and again, in its declaration (2AEX839).

DCA's attempt to now minimize its repeated representations by claiming they were "offhand comments" or made "in passing" to "buttress" DCA's arguments on "ancillary issues" (AOB 11, 24, 25) is duplicitous, contrary to the evidence, and contrary to the trial court's express findings based on that evidence:

> [T]he first position was not taken by DCA in an isolated or off-the-cuff remark by DCA or its attorneys . . . but instead in repeated statements made at different times throughout the IRP procedure as a consistent strategic position adopted by DCA to support its request that the IRP Panel rule in its favor on seven separate issues.

(20CT4535.)[13]

DCA's other attempts to minimize its success based on its repeated representations are also disingenuous. First, DCA claims that it did not succeed on "any prior position it took" because the Panel never concluded that DCA could not sue ICANN or that the Covenant was binding and enforceable. (AOB 58–60.) DCA is confusing judicial estoppel with the doctrines of collateral estoppel and res judicata. Judicial estoppel does not require that the prior claim or position actually be adjudicated:

> 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 the subject of a final judgment.

(*Jackson*, *supra*, 60 Cal.App.4th at p. 182, internal quotation marks and citation omitted; see also *AFN, Inc. v. Schlott, Inc.* (D.N.J. 1992) 798 F.Supp. 219, 223 [stating 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"].)

Thus, for judicial estoppel to apply, the Panel did *not* need to decide whether the Covenant was enforceable; the Panel simply needed to rely upon or accept DCA's representations that DCA

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[13] Notably, DCA's lead counsel in the IRP, who is lead counsel on this appeal, did not provide any testimony in conjunction with the judicial estoppel bench trial in an attempt to explain DCA's prior representations.

could not sue ICANN in court when it repeatedly granted DCA's requested relief on that basis, which is exactly what happened. Likewise, that the Panel did not address the Covenant's enforceability and instead stated it was "assuming" it was "valid and enforceable" does not support DCA's argument. (See AOB 26, 60.) Rather, as the trial court reasoned, the Panel's statement shows that it adopted DCA's argument when ruling in DCA's favor. (20CT4533 [quoting statement in finding that DCA was successful in asserting its first position]; 4RT3005–3006 [trial court: "I gave that issue some thought actually. Didn't the IRP panel when they said assuming, aren't they assuming that DCA's position is correct; that it was arguing about the covenant and the effect of the covenant not to sue?"].)

Second, DCA's claim that its success was "fleeting and illusory" because ICANN "intentionally distorted the rules" to deny DCA an effective remedy (AOB 10) is false. The evidence overwhelmingly shows that the Panel ruled in DCA's favor on several issues based on DCA's representations that it could not sue ICANN in court, which in some instances had the effect of *overriding* ICANN's Bylaws.[14] As discussed in Section E, *supra*, the Panel ruled

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[14] DCA also argues that the Panel "ultimately accepted most of DCA's procedural proposals, mainly because these were plainly required by the applicable procedural rules and the circumstances of the dispute before it." (AOB 13.) DCA thereby concedes that it did, in fact, succeed on its requests. But DCA ignores that ICANN opposed several of DCA's requests because the relief sought was not authorized under (or was contrary to) ICANN's Bylaws and the Guidebook. (4AEX1890.) In any event, the Panel rejected ICANN's

in DCA's favor not only on procedural matters, such as discovery, additional briefing, and live witnesses, but also on the merits. To the extent DCA purports to challenge the fact that it ultimately failed to secure the .AFRICA gTLD, DCA misconstrues the issue. The Panel was not, and could not have been, tasked with determining whether DCA should be granted .AFRICA; the Panel, therefore, never made such a determination. (And, indeed, ZACR's competing application for .AFRICA remained pending throughout the IRP.) What is relevant for purposes of judicial estoppel is that DCA secured success on seven different issues based on its representations that it could not sue ICANN; none of those representations or successes were "offhand," "in passing," "fleeting," or "illusory."

B. DCA's Positions Were Totally Inconsistent, Even When Considering the "Context" in Which They Were Made (Fourth Factor).

The fourth factor of judicial estoppel is met when a party takes a subsequent position that is totally inconsistent with the party's first position. (See, e.g., *Jackson*, *supra,* 60 Cal.App.4th at pp. 182–183; *AP-Colton LLC v. Ohaeri* (2015) 240 Cal.App.4th 500, 507–509 [judicially estopping party from arguing on appeal that case was of "limited" jurisdiction after party previously checked "unlimited" box on case management statement and designated cross-complaint and notice of appeal as "unlimited"].)

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arguments, accepted DCA's representations as true, and ruled in DCA's favor based on those representations.

As the trial court correctly concluded, DCA's subsequent lawsuit against ICANN was totally inconsistent with DCA's first position that it could not sue ICANN in court in any way related to its .AFRICA application. (20CT4534.) DCA nevertheless attempts to reframe its two positions, arguing that they actually are "remarkably consistent" (AOB 43)—an argument that is impossible to credit. First, DCA's argument that its representations before the IRP were based on the expectation that ICANN would treat the IRP as binding (AOB 48) is a non sequitur. As discussed further in Section III.B, *infra*, the evidence demonstrates that ICANN *never challenged* the Panel's declaration on the merits and ICANN *fully adopted* the Panel's recommendations.

Further, DCA's repeated representations that it could not sue ICANN were not conditioned on whether ICANN would treat the IRP's declaration as binding. And DCA's novel contention that it represented that it could not sue ICANN *because* it understood the IRP was binding (AOB 41–43) is directly refuted by DCA's repeated argument that the IRP *needed to be* binding because the Covenant barred DCA from suing ICANN (1AEX620–621).

Second, DCA argues that its representations were made in the "context" of "certain" claims it brought—namely, whether ICANN violated its Articles or Bylaws with regard to DCA's application, and the proper IRP procedure for resolving that issue—and that those representations can be reconciled with the claims in DCA's lawsuit. (AOB 51.) DCA's after-the-fact characterizations are again belied by DCA's unequivocal and broad representations to the Panel regarding DCA's inability to sue ICANN (i.e., "We can't take

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[ICANN] anywhere. We can't sue [ICANN] for anything") and *all* gTLD applicants' inability to sue ICANN ("[f]or DCA and *other gTLD applicants*, the IRP is their only recourse; no other legal remedy is available"). (2AEX1397–1398; 1AEX585, 601–602; 19CT4261.)

At a minimum, DCA's representations certainly applied to DCA's ability to file a lawsuit against ICANN regarding its .AFRICA application. (See, e.g., 1AEX585 [arguing DCA waived "rights to challenge ICANN's decision on DCA's application in court"].) But the meaning of DCA's representations is no different in the "context" of the IRP versus in the "context" of this lawsuit. Rather, DCA's prior representations that it could not sue ICANN regarding its .AFRICA application are totally inconsistent with DCA's subsequent lawsuit against ICANN regarding its .AFRICA application. There is no "context" that possibly could change the meaning or import of DCA's representations in relation to its lawsuit that somehow makes them "consistent."[15]

DCA cites to several cases that are distinguishable on the facts. (See *Daar & Newman v. VRL Internat.* (2005) 129 Cal.App.4th 482, 486 [reversing judicial estoppel as applied to motion to quash

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[15] DCA effectively seeks to create a new factor by arguing that courts are required to expressly evaluate "context" (AOB 48), but courts do not separately analyze this issue. Rather, in evaluating whether two positions are inconsistent, courts inherently consider the circumstances in which the two positions were taken to determine whether those positions can be reconciled or are totally inconsistent, as the trial court properly did here. (See 20CT4529-4530, 4534 [trial court "consider[ed] the pleadings, evidence, and arguments presented by the parties," prior to finding DCA's positions "are irreconcilable and mutually exclusive"].)

where party's argument that California lacked personal jurisdiction in one lawsuit regarding tort claim could be reconciled with party's argument that California had jurisdiction in another lawsuit over contract claim];[16] *State Farm Gen. Insurance Co. v. Watts Regulator Co.* (2017) 17 Cal.App.5th 1093, 1102–1103 [affirming trial court's denial of motion to compel arbitration because party's consent to arbitrate products liability claim in Tennessee was consistent with that party withholding consent to arbitrate products liability claim in a different matter following a rule change governing the arbitration agreement];[17] *Kitty-Anne Music Co. v. Swan* (2003) 112 Cal.App.4th 30, 35–36 [party's argument that "'at [bare] minimum'" there were triable issues of fact sufficient to defeat opposing party's motion for summary judgment was consistent with that party filing its own motion for summary adjudication]; *Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238–1239 [declining to apply judicial estoppel against party that made factually accurate statement at the time that

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[16] DCA cites *Daar* for the proposition "that this Court has squarely held [that] two positions are not consistent when '[t]he operative facts and law'" are different from a prior action. (AOB 48, quoting *Daar, supra,* 129 Cal.App.4th at p. 486.) This Court made no such sweeping holding in *Daar*, but merely noted the unique facts and law at issue *in that case* were not inconsistent.

[17] DCA also misconstrues *State Farm*. There was no ambiguity as to whether the party had previously consented to arbitration of the same claim in a separate proceeding. (AOB 44–45 fn. 17, 48–49.) But litigating that same claim later in a different matter was not totally inconsistent with the party's prior consent to arbitrate such claims: "[W]e cannot see why a party's consent or stipulation to arbitration in one case should estop it from taking a different position in a different matter." (*State Farm, supra*, 17 Cal.App.5th at p. 1102.)

sibling was a trust beneficiary (albeit seemingly not to gain an advantage in the case), and trial court later concluded sibling was not a trust beneficiary because sibling violated no-contest clause]; *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 963 [reversing judicial estoppel applied on summary judgment where party's claims of disability when applying for disability benefits could be reconciled with party's subsequent claims under Fair Employment and Housing Act, alleging employer failed to reasonably accommodate their disability]; *Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1388–1389 [same].)

The meaning and import of a statement—especially one as unequivocal as DCA's—does not change simply because it is made in a different "context." For example, in *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, the plaintiff was precluded from claiming a community property interest in his former spouse's assets under California law because the plaintiff had successfully settled a malpractice claim in England against his former counsel predicated on the representation that he had "'permanently lost [his] entitlement'" to those same assets. (*Id.* at pp. 1460–1462.) The plaintiff attempted to resist the application of judicial estoppel by asserting that his representation that he had lost his entitlement to the assets was implicitly limited by the statement's context to the specific claim he was asserting under English law. (*Id.* at p. 1479.) Rejecting the plaintiff's attempts to read caveats into his own unambiguous language, the court held that the two positions were totally irreconcilable. (*Id.* at p. 1482; see also *Nist v. Hall* (2018) 24 Cal.App.5th 40, 48–49 [affirming judgment and estopping renter

who previously argued statute applied to its rental facility agreement in litigation against facility's owner from later arguing statute did not apply to avoid statute's good-faith purchaser defense]; *Bucur, supra*, 244 Cal.App.4th at pp. 188–189 [affirming judgment on the pleadings and barring plaintiff's lawsuit for fraud and breach of contract where plaintiff previously agreed to arbitrate similar but distinct claims containing "essentially the same allegations"].)[18]

Finally, this Court can easily reject DCA's argument that its representations made "during the IRP could not have referred to causes of action and conduct that arose *after* that IRP concluded." (AOB 10, 39–41.) DCA's allegations before the IRP and in this lawsuit all stem from the same circumstance—ICANN's processing of DCA's .AFRICA application. DCA did not tell the Panel that it

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[18] DCA also misinterprets *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4th 950. (See AOB 51.) There, contrary to DCA's suggestion, this Court did not rely on "context" prior to concluding the representations were totally inconsistent; rather, this Court affirmed the trial court's finding that an employee's representation that he was disabled from "performing all of his duties" and from "'any occupation'" was totally inconsistent with later litigation predicated on the argument that his employer should have accommodated his disability. (*Drain, supra*, 69 Cal.App.4th at pp. 957–959.) Additionally, contrary to DCA's assertion, *Drain* did not involve a former officer's Americans with Disabilities Act ("ADA") suit; that was *Jackson*. Even *Jackson*, however, does not support DCA's contention. There, the court concluded that "disability" may have different meanings in the context of the ADA and benefits programs, but also rightly found that the officer's unequivocal, logically inconsistent statements about the stress involved in being a safety officer could not be reconciled, regardless. (*Jackson, supra*, 60 Cal.App.4th at pp. 187–190.)

could not sue ICANN over the claims asserted in the IRP but that

DCA might be able to file a lawsuit over other claims it might have

then or in the future. Moreover, most of DCA's allegations in the

present suit mirror its claims in the IRP and relate to conduct that

arose *prior* to the IRP. Thus, to put it in DCA's words, the "context"

of both proceedings was the same.

C. To the Extent DCA's Representations Are Not Considered Factual, Judicial Estoppel Still Applies to Legal Positions.

DCA argues for the first time on appeal that judicial estoppel

applies "*only*" to purely factual positions, not legal ones. (AOB 52.)

DCA failed to raise this argument before the trial court, and

therefore waived it on appeal. (*In re Marriage of Nassimi* (2016) 3

Cal.App.5th 667, 695 ["As a general rule, theories not raised in the

trial court cannot be asserted for the first time on appeal; appealing

parties must adhere to the theory (or theories) on which their cases

were tried."], internal quotation marks and citations omitted.)

Accordingly, the discussion can end here. However, DCA also

misstates the law.

Some courts have observed that inconsistent positions for

purposes of judicial estoppel are "generally" factual in nature. (*ABF

Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832; see also *Cal.

Amplifier, Inc. v. RLI Insurance Co.* (2001) 94 Cal.App.4th 102, 118.)

But DCA does not cite a single case, and ICANN is not aware of one,

concluding that judicial estoppel *cannot* apply to legal arguments;

rather, "[o]ur Supreme Court . . . did not reject the application of this

doctrine simply because the inconsistent positions are legal rather

than factual." (*Levin, supra,* 140 Cal.App.4th at p. 1468 [noting that although not directly considered by the California Supreme Court in *Aguilar,* the Court did not bar the application to legal inconsistencies]; *id.* at p. 1469 ["'The greater weight of federal authority . . . supports the position that judicial estoppel applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion.'"], quoting *Helfand v. Gerson* (9th Cir. 1997) 105 F.3d 530, 535.)

Indeed, whether a party's statements are factual or legal is not, and should not be, determinative, especially considering the equitable purpose of judicial estoppel—that is, to preclude litigants from "argu[ing] out of both sides of [their] mouth," whether it's "fabricat[ing] facts" *or* "rules of law." (*Owens, supra,* 220 Cal.App.4th at p. 121.)

Moreover, DCA's repeated representations that it could not sue ICANN reflected, at a minimum, DCA's *belief* on the issue, which *is* a factual matter. Thus, at best for DCA, its representations were *mixed* statements of fact and law. (See *Levin, supra,* 140 Cal.App.4th at p. 1481 ["[R]arely will the position involve a purely factual statement."].) Indeed, a position is "strictly legal" only when it has no application to the facts, which is not the case here.

For example, in *California Amplifier*, upon which DCA relies (AOB 52), the court considered judicial estoppel in connection with a *strictly legal* argument as to whether a statute required a negligence showing—an issue that did not require consideration of any facts. (*Cal. Amplifier, supra,* 94 Cal.App.4th at pp. 117–118.) The party that had changed its position on the issue was not judicially estopped

from doing so because it had a reasonable litigation tactic that did not undermine the integrity of the judicial process *and* it had not been successful in asserting its position initially. (*Ibid.*)

By comparison, in *Levin*, the plaintiff's statement was of a mixed legal and factual nature when he first argued he was entitled to damages because he had interest in certain assets. *(Levin, supra,* 140 Cal.App.4th at pp. 1481–1482 [contrasting from *California Amplifier*].)* After receiving compensation in the first proceeding based on his declaration that he had no interest in those assets, he later claimed that he never lost his interest in those very same assets. (*Ibid.*) The court considered these two mixed factual and legal positions to be totally inconsistent and ultimately affirmed the trial court's ruling applying judicial estoppel.[19]

Thus, *even if* DCA's representations that it could not sue ICANN are considered mixed factual and legal representations, the trial court still properly concluded that judicial estoppel barred DCA's totally inconsistent positions on the matter.

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[19] Multiple courts have concluded similarly. (See, e.g., *Cal. Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 259 [affirming grant of motion to enforce previously entered judgment and concluding landowner who waived right to litigate whether development permit exclusion applied and agreed to comply with state commission's order was estopped from later asserting that permit exclusion applied and he had no obligation to obey commission's orders]; *Blix, supra,* 191 Cal.App.4th at pp. 51–52 [affirming judicial estoppel applied to plaintiff that changed positions regarding enforceability of settlement agreement]; *Nist, supra,* 24 Cal.App.5th at pp. 48–49 [affirming trial court's judgment that appellant was estopped from changing its position regarding whether statute applied to self-storage rental agreement].)

III. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S FINDING THAT THE IRP WAS 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" (*Sneddon, supra,* 102 Cal.App.4th at p. 189), but can be made in any quasi-judicial proceeding (*Jackson, supra,* 60 Cal.App.4th at p. 183). To be sure, "[t]he truth is no less important to an [entity] acting in a quasi-judicial capacity than it is to a court of law." (*Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.* (C.D.Cal. 2008) 568 F.Supp.2d 1152, 1184, internal quotation marks and citation omitted, affd. (9th Cir. 2012) 692 F.3d 983, 998–999.)

Courts consider a variety of factors, or "hallmarks" of judicial proceedings, to determine whether a proceeding is quasi-judicial; the inquiry is not rigid, and courts consider differing combinations of factors. (See *Tri-Dam v. Schediwy* (E.D.Cal., Mar. 7, 2014, No. 1:11-cv-01141-AWI-MJS) 2014 WL 897337, at *5–6 [finding proceeding was quasi-judicial where parties could call witnesses, witnesses testified under oath, and neutral party presided]; *Nada Pacific Corp v. Power Eng'g and Mfg., Ltd.* (N.D.Cal. 2014) 73 F.Supp.3d 1206, 1216–1217 [analyzing whether parties submitted briefs, cited to evidence, responded to the others' arguments, and whether panel had ability to issue decision, to determine whether proceeding was quasi-judicial]; *Westlake Community Hospital v. Superior Court* (1976) 17 Cal.3d 465, 471, 478, 483 [finding hospital procedure was quasi-judicial where oral hearing was held before hospital's judicial

review committee, parties were represented by counsel, witnesses were called, documentary evidence was introduced, and proceeding was transcribed by certified reporters].) Notably, courts frequently acknowledge an organization's internal dispute resolution process as a quasi-judicial proceeding. (See, e.g., *Bray v. Internat. Molders and Allied Workers Union* (1984) 155 Cal.App.3d 608, 616 [trade union's grievance procedure prescribed by the International Union's constitution and defendant's bylaws].)

Here, substantial evidence supported the trial court's finding that the IRP was a quasi-judicial proceeding. The Panel was comprised of three well-respected jurists; the IRP was fiercely litigated over nearly a two-year period; the parties were represented by counsel; there were multiple rounds of briefing; the parties produced documents and witness statements to one another; the Panel conducted a live, two-day hearing during which three witnesses testified under oath and were cross-examined; and the Panel had the ability to make (and did make) decisions, including its decision that its declaration on the merits would be binding. (20CT4531; 3RT2189–2191; 19CT4264; 1AEX654; 2AEX822–823.)

In fact, it was DCA that expressly (and repeatedly) argued that the Panel was authorized to issue "final and binding" decisions. (1AEX585; 4RT 3006 [DCA conceding to trial court that, upon DCA's request, the Panel adopted DCA's position that IRP procedure was binding]; cf. *Nada*, *supra*, 73 F.Supp.3d at p. 1217 [concluding commission's dispute resolution board was not quasi-judicial where it had no power to "make a decision" and "was limited to issuing a nonbinding (albeit written) recommendation that [the parties] could

accept or reject"]; *Eaton v. Siemens* (E.D.Cal., May 23, 2007, No. CIV.

S.-07-315 FCD KJM) 2007 WL 1500724, at *5 [arbitration not quasi-

judicial where expressly limited to providing only advisory

opinion].)

As discussed above, one of DCA's primary arguments in the

IRP was that the Panel's decision had to be binding *because* DCA

could not sue ICANN. (1AEX585; 1AEX610–611 [DCA argued:

"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.) And although ICANN

argued against DCA's position,[20] the Panel agreed with DCA and

ruled that it had the power to determine IRP procedure. Later, the

Panel specifically held that its decisions on procedure and

declaration on the merits were binding. (20CT4532; 1AEX654;

19CT4264; 2AEX822–823.)

DCA already has conceded (and cannot dispute) the quasi-

judicial nature of the IRP:

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[20] Of course, ICANN's position on the matter is irrelevant
here. As the trial court correctly noted, "Let's say there's a court
proceeding and the Court makes—it's a judicial proceeding. The
court makes an order, and one of the parties says, I don't view that
as binding . . . I don't think that makes the Court's decision any less
binding." (4RT3006.) Indeed, whether a proceeding is quasi-judicial
is properly determined by looking at the actual characteristics of the
proceeding, not the parties' arguments on the issue.

> Under California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision.

(1AEX577–758; 19CT4260–4261; 1AEX577–578; see also 7SUPPCT1945–1946 [Ms. Bekele confirming that DCA compared IRP to arbitration]; 7SUPPCT1948 [Ms. Bekele confirming that DCA's lawyers took position that IRP was an arbitration in all but name].) California courts consistently hold that arbitrations are quasi-judicial proceedings. (See, e.g., *Moore v. Conliffe* (1994) 7 Cal.4th 634, 644–645.)

DCA argues that the IRP lacks judicial review, but judicial review is relevant only to res judicata and collateral estoppel, *not* judicial estoppel. Indeed, the four cases DCA cites for this argument all concern collateral estoppel or res judicata, *not* judicial estoppel. (AOB 54–56; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829 [collateral estoppel]; *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 906–907 [same]; *Wehrli v. County of Orange* (9th Cir. 1999) 175 F.3d 692, 694–695 [same]; *Lambert v. Andrews* (9th Cir. 2003) 79 F.App'x 983, 984–985 [res judicata].)[21]

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[21] DCA's reliance upon three cases to which ICANN previously cited for a different issue is misplaced. (AOB 57–58, citing *Bray, supra,* 155 Cal.App.3d at pp. 612, 616; *Risam v. County of L.A.* (2002) 99 Cal.App.4th 412, 418; *Powers v. Northside Independent School Dist.* (W.D.Tex., Jan. 27, 2016, No. A-14-CA-1004-SS) 2016 WL 8788185, at *2–3.) Specifically, in its post-trial briefing, and in Section III.B *infra*, ICANN cites to these cases to illustrate how courts

Collateral estoppel and res judicata concern the "finality of judgment on factual matters that were fully considered and decided[;] [j]udicial estoppel, on the other hand, prevents inconsistent positions whether or not they have been the subject of a final judgment." (*Jackson*, *supra*, 60 Cal.App.4th at p. 182, internal quotation marks and citation omitted.) This distinction leads courts to inquire whether a prior forum provided an opportunity for judicial review *when applying collateral estoppel/res judicata* so as to ensure that the prior proceeding provided the parties a full and fair opportunity to litigate the issues to be foreclosed. (See, e.g., *Wehrli, supra*, 175 F.3d at p. 695 ["We agree, therefore, with the Third Circuit that 'the issue of a full and fair opportunity to litigate includes the possibility of a chain of appellate review.'"], citation omitted.) Judicial estoppel, however, is concerned with inconsistent positions across proceedings, not with the binding effect of findings upon conclusion of proceedings, thus rendering judicial review irrelevant to whether the IRP was a quasi-judicial proceeding for purposes of judicial estoppel.

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commonly find an organization's dispute resolution process to be quasi-judicial, even where a vote may be required to effectuate that organization's action. (20CT4422.) But none of these cases draws any connection between the ability to seek judicial review and whether a proceeding is quasi-judicial, despite DCA's contrary suggestion.

B.   ICANN's Board Vote Following the IRP Did Not Undermine the IRP's Quasi-Judicial Nature.

DCA's primary challenge to the quasi-judicial nature of the IRP is that ICANN "sabotaged any binding effect" of the IRP because the ICANN Board *voted* to implement the Panel's recommendations. (AOB 54–57.) DCA is wrong as a matter of fact and law.

First, there is no dispute that the Panel concluded it had binding authority when ruling on IRP procedure. ICANN could not alter that. (20CT4532; 1AEX654.) The Panel first exercised that authority by ruling in DCA's favor on a number of procedural issues—over ICANN's objections—based on DCA's representations that it could not sue ICANN in court. Each party proceeded in accordance with these rulings. (1AEX654; 3RT2211–2212, 2228, 2208, 2229–2230; see generally 2AEX890–1556; 19CT4260.)

Second, as the trial court found, the Panel declared that ICANN's conduct regarding DCA's application was inconsistent with ICANN's Articles or Bylaws, and the Panel's decision in this respect also was binding. (20CT4532; 2AEX878.) ICANN did not dispute the Panel's determination that its declaration on the merits was binding and, most importantly, never acted inconsistently with the Panel's declaration. (See generally 2AEX 1612–1619.)

Third, the fact that ICANN's Board voted to adopt the Panel's *recommendations* regarding ICANN's future actions is not unusual and does not undermine the IRP's quasi-judicial nature. Pursuant to the Bylaws, ICANN's Board is required to vote on actions taken by the organization. (See 3RT2171–2172; 2AEX787 [DCA characterizing

Panel's guidance on ICANN's actions following declaration on the merits as "recommendations," thus implicitly recognizing ICANN Board would need to take action thereon]; 2AEX834.)

As the trial court correctly found, the Board's actions neither undermined the IRP's declaration on the merits nor the IRP's quasi-judicial nature. (4RT3007 [trial court stating, "Just because a party or because a party may have to—for example, an organization may have to get approval of the board to implement relief taken or measures taken to implement the court's order. I don't think that makes the order any less binding."]; *id.* [DCA's counsel concurring with trial court that regardless whether ICANN agreed with Panel that its declaration was binding, Panel determined that it was].) And the case law is consistent. (See, e.g., *Bray*, *supra*, 155 Cal.App.3d at p. 612 [trade union's grievance procedure was quasi-judicial notwithstanding that union's membership subsequently voted to approve recommended sanction]; *Risam, supra,* 99 Cal.App.4th at p. 418 [proceeding before civil service commission hearing officer was quasi-judicial notwithstanding that commission subsequently approved hearing officer's findings]; *Powers, supra,* 2016 WL 8788185, at *2–3 [proceeding before education agency was quasi-judicial notwithstanding that board subsequently adopted agency's findings and voted to terminate employees].)

ICANN always has acknowledged that the Board would need to consider how to fashion an appropriate remedy following an IRP declaration that the Board violated its Articles or Bylaws. (5AEX2028–2029 [ICANN's letter addressing DCA's request that Panel make recommendations as to ICANN's course of action

following declaration on the merits]; see also 2AEX831–832; 2AEX 1612–1619.) That does not mean that ICANN treated the Panel's recommendations as "mere suggestions," as DCA contends. (AOB 28.) ICANN abided by the Panel's declaration on the merits and recommendations *in every respect*. (See 2AEX834; 4RT2710, 2769.) Thus, the trial court correctly concluded that the fact that a vote may be required to effectuate ICANN's organizational action does not undermine the quasi-judicial nature of the IRP proceeding that precipitated that vote. (20CT4532.)

IV. SUBSTANTIAL EVIDENCE SUPPORTED THE TRIAL COURT'S CONCLUSION THAT DCA'S FIRST POSITION WAS NOT TAKEN AS A RESULT OF IGNORANCE, FRAUD, OR MISTAKE (FIFTH FACTOR).

A. There Is No Evidence That DCA Took Its First Position as a Result of Ignorance, Fraud, or Mistake.

The fifth factor of judicial estoppel is met where there is no evidence that the first position was taken "as a result of ignorance, fraud, or mistake." (*Blix, supra*, 191 Cal.App.4th at p. 51; *Bucur, supra*, 244 Cal.App.4th at p. 188 [applying judicial estoppel where "[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"].)

Here, after hearing witness testimony—including the lengthy examination of DCA's CEO, Ms. Bekele—and weighing all the evidence, the trial court properly concluded that there was "no indication" that "DCA took the first position as a result of ignorance, fraud, or mistake." (20CT4535.) The trial court found that DCA's representations before the IRP were not "isolated or off-the-cuff

remark[s] by DCA or its attorneys made out of ignorance or mistake." (20CT4535.) Rather, the evidence established that DCA's "repeated statements" were taken "as a *consistent strategic position* adopted by DCA to support its requests that the Panel rule in its favor on seven separate issues." (20CT4535.) Indeed, there is no evidence to support DCA's contrary suggestion that its position was taken as a result of a good-faith mistake or ignorance. (Cf. *Kelsey v. Waste Management of Alameda County* (1999) 76 Cal.App.4th 590, 599–600 [drawing reasonable inferences on summary judgment in favor of plaintiff who merely failed to list his lawsuit as a claim in a bankruptcy proceeding]; *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1017–1018 [concluding that failure to include lawsuit as a claim in bankruptcy proceeding where it was reasonable to omit it is an insignificant inconsistency].)

DCA attempts to justify its repeated and unequivocal representations before the Panel by impugning ICANN's own conduct (AOB 22), albeit without a single evidentiary citation.[22] In any event, ICANN's conduct is irrelevant for purposes of judicial estoppel. It was DCA, not ICANN, that "was the planner or originator of [its] own inconsistent positions and deliberately attempted to take advantage of these inconsistent positions." (*Levin, supra*, 140 Cal.App.4th at p. 1484.)

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[22] To be clear, ICANN did *not* attempt to "nullify the IRP process" or "railroad a result"; ICANN's arguments regarding procedure were based on its Bylaws and the Guidebook. Ultimately, the Panel concluded it had the power to issue its own binding decisions, and it ruled in DCA's favor.

The trial court also rightly rejected DCA's argument that DCA was "ignorant or mistaken as to the scope of the litigation waiver" because the evidence confirmed that Ms. Bekele was represented by counsel at the IRP, and fully understood the import of the Covenant before she submitted DCA's application for .AFRICA to ICANN. (See 20CT4535 ["[F]or purposes of judicial estoppel 'ignorance of the law is no excuse,' particularly where, as here, [the declarant] was represented by counsel."], quoting *Carr v. Beverly Health Care & Rehab. Servs., Inc.* (N.D. Cal. Nov. 5, 2013) No. C-12-2980 EMC, 2013 WL 5946364, at *6; 20CT4535 ["'[T]he law is clear that legal advice and ignorance of the law are not defenses to judicial estoppel.'"], quoting *Galin v. IRS* (D. Conn. 2008) 563 F.Supp. 2d 332; 341; see also 20CT4535 [trial court referencing evidence of Ms. Bekele's 2009 public comment regarding the Covenant's enforceability].) Additionally, the trial court correctly concluded that whether DCA was unaware that a subsequent court might find the Covenant unenforceable as to certain types of claims was irrelevant: "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." (20CT4535–4536, citing *Blix, supra*, 191 Cal.App.4th at pp. 49–51 [estopping plaintiff from denying enforceability of agreement that might otherwise be unenforceable].)

B. ICANN Did Not Have the Burden to Show That DCA Acted in Bad Faith for the Fifth Factor to Be Satisfied.

DCA attempts to misrepresent the standard under the fifth factor of judicial estoppel by arguing that ICANN needed to prove, and the trial court needed to find, that DCA acted in bad faith or

engaged in intentional wrongdoing. (AOB 61.) The fifth factor

neither requires such a finding nor imposes on ICANN the burden

of affirmatively proving DCA's bad faith or intentional

wrongdoing.[23] In fact, this Court has expressly held 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." (*Internat. Engine Parts, Inc. v.

Feddersen and Co.* (1998) 64 Cal.App.4th 345, 354.) Indeed, a party

deliberately taking inconsistent positions is the definition of

wrongdoing for purposes of judicial estoppel. (*Levin, supra*, 140

Cal.App.4th at p. 1483 ["Wrongdoing for the purposes of judicial

estoppel results when the party deliberately takes inconsistent

positions."].) There need not be any finding of bad faith or

intentional wrongdoing by DCA for judicial estoppel to apply.

DCA's deliberately inconsistent positions are sufficient.

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[23] DCA only cites to *Lee v. West Kern Water District* (2016) 5
Cal.App.5th 606, which is distinguishable. (AOB 61.) There,
defendants argued that, because plaintiff stipulated in workers'
compensation proceedings that her injury arose from her
employment, she was estopped from asserting differently before the
trial court. (*Lee, supra*, 5 Cal.App.5th at pp. 630–631.) The court
affirmed the trial court's decision to not estop plaintiff where her
employer had urged her to seek medical treatment and asked her to
complete a form containing a boilerplate stipulation that her injury
arose from her employment. (*Ibid.*) The court found these facts
hardly showed she intended to deceive the court or take unfair
advantage of her opponents. (*Id*. at p. 631.) Thus, *Lee* did not alter
the fifth factor or raise ICANN's burden.

V. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CONCLUDING THAT A "MISCARRIAGE OF JUSTICE" WOULD RESULT IF JUDICIAL ESTOPPEL DID *NOT* BAR DCA'S LAWSUIT.

Judicial estoppel is an equitable doctrine; even if the all factors are satisfied, whether to apply the doctrine is a matter within the discretion of the trial court. (*Owens*, *supra*, 220 Cal.App.4th at p. 121.) DCA incorrectly argues that the trial court somehow missed this step, but the trial court presided over a three-day bench trial, heard witness testimony, weighed the evidence, considered multiple rounds of briefing and arguments, and issued an eleven-page statement of decision. (20CT4522–4537; 4RT3003 [trial court: "I really did give the evidence and the arguments of counsel and the closing argument briefs a great deal of consideration."]; 4RT3004 [trial court: "I spent a lot of time writing the tentative decision. It's 11 pages. I put a lot of thought into it."].)

As detailed above, the trial court findings as to each factor were supported by substantial evidence. And it was well within the trial court's discretion to then balance the equities and conclude that DCA's actions presented "*egregious* circumstances that would result in a miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA from taking the second position in this lawsuit." (20CT4536.)

The trial court found that DCA "repeated[ly]," "strategic[ally]" and "consistent[ly]" argued to the Panel that it could not sue ICANN in court for "anything," doing so to gain advantages in the IRP. (20CT4535.) When that position was no longer beneficial, DCA "changed its tune" (*Owens, supra*, 220

Cal.App.4th at p. 122) and sued ICANN. As *Levin* teaches, deliberately taking inconsistent positions is the very definition of wrongdoing for the purposes of judicial estoppel. (*Levin, supra*, 140 Cal.App.4th at p. 1483.) The truth is that DCA had *not* "been up front" about its representations and successes in the IRP, which continues to be true in this appeal.

DCA cites no authority for its argument that the trial court must provide some separate and distinct analysis balancing the equities. Rather, in weighing the five *Jackson* factors, courts implicitly conduct that balancing analysis, which is precisely what the trial court did here. (20CT4528–4536 [finding Panel adopted DCA's position that the Covenant precluded a lawsuit in ruling in DCA's favor on multiple issues, and finding DCA's prior representations were totally inconsistent and mutually exclusive with DCA's lawsuit]; cf. AOB 66.) The trial court was well within its discretion to apply judicial estoppel to bar DCA's lawsuit, and the trial court's judgment should be affirmed.

VI.   THE TRIAL COURT'S COST AWARD SHOULD BE AFFIRMED.

DCA's separate appeal of the trial court's cost award to ICANN as the prevailing party is premised entirely on DCA's appeal of the judicial estoppel ruling; DCA does not otherwise challenge any specific elements of the cost award. (AOB 67.) Inasmuch as the trial court's judgment in favor of ICANN should be affirmed for all the reasons discussed above, the trial court's cost award also should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court's judgment in favor of ICANN and the cost award should be affirmed.

Dated: March 3, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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