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NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

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

Defendant.

CASE NO. BC607494

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

ICANN'S RESPONSE TO PLAINTIFF DOTCONNECTAFRICA TRUST'S OBJECTION TO STATEMENT OF DECISION AND REQUEST FOR HEARING

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

INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") submits the following response to plaintiff DotConnectAfrica Trust's ("DCA") objections to this Court's August 22, 2019 decision on ICANN's affirmative defense of judicial estoppel ("August 2019 Decision"). Although DCA acknowledges in its objections that the purpose of "an objection to a proposed statement of decision is not to reargue the merits . . . ." (9/6/19 DCA Obj. at 2 (citing *Heaps v. Heaps*, 124 Cal. App. 4th 286, 292 (2004))), DCA's objections do nothing other than reargue the merits. For this reason alone, the objections should be summarily denied.

Prior to issuing the August 2019 Decision, this Court held a three-day bench trial and has devoted considerable time and resources to resolving ICANN's judicial estoppel defense. The Court has already been presented with the parties' pre-trial briefs, heard and weighed the evidence presented during the three-day trial, observed the witnesses' credibility, and considered the parties' closing arguments (presented via post-trial briefs) (2/8/19 Trial Tr. at 401:20–21;420:17–19). Thereafter, the Court issued a clear and thorough eleven-page tentative ruling setting forth its decision, and heard additional argument from both parties prior to making its decision final.

DCA now faults this Court for not stating "the factual and legal bases for its decision as to each principal issue at trial." (9/6/19 DCA Obj. at 3.) This assertion is utterly unfounded. The August 2019 Decision clearly laid out the Court's findings that were material to its rulings as to all five factors of judicial estoppel and as to equity. DCA does not identify any omissions of material issues or any inconsistencies between the Court's rulings and the August 2019 Decision. Rather, under the guise of asserting "objections," DCA mostly recycles the same case law and raises the same arguments it has presented many times before and which this Court already has rejected. DCA's "objections" rearguing the merits are wholly improper at this juncture and should be summarily dismissed. For this reason and the reasons set forth below, no hearing is necessary in order for the Court to reject DCA's objections.

LEGAL STANDARD

A statement of decision is "sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case." *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal. App. 4th 1372, 1379–80 (1993). Where the statement of decision sufficiently disposes of all the basic issues in the case, the trial court is not required to make an express finding of fact on every factual matter controverted at trial or every legal issue raised by the parties. *Bauer v. Bauer*, 46 Cal. App. 4th 1106, 1118 (1996), as modified (July 12, 1996); *Almanor Lakeside Villas Owners Assn. v. Carson*, 246 Cal. App. 4th 761, 770–71 (2016). Rather, a trial court is required only to set out ultimate findings that are essential to an element of a claim or defense. *Muzquiz v. City of Emeryville*, 79 Cal. App. 4th 1106, 1124–25 (2000) ("[A] trial court rendering a statement of decision under . . . section 632 is required to state only ultimate rather than evidentiary facts because findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them.") (citation omitted); *Almanor*, 246 Cal. App. 4th at 770–71.

Thus, a statement of decision "need do no more than state the grounds upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision." *Muzquiz*, 79 Cal. App. 4th at 1124–25. Indeed, "[t]he trial court is not required to respond point by point to the issues posed in a request for statement of decision." *Golden Eagle.*, 20 Cal. App. 4th at 1379–80; *Altavion, Inc. v. Konica Minolta Sys. Lab., Inc.*, 226 Cal. App. 4th 26, 45–46 (2014) ("Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (Citation omitted)).

An objection to statement of decision "has no merit" if it is "merely an expression of disagreement with the trial court's conclusion." *In re Marriage of Burkle*, 139 Cal. App. 4th 712, 736 n.15 (2006); *Heaps*, 124 Cal. App. 4th at 292 n.4 (filing "objections . . . simply to take advantage of one last opportunity to reargue the evidence" is improper). The purpose of an objection is "to bring to the court's attention inconsistencies between the court's ruling and the document that is supposed to embody and explain that ruling." *Heaps*, 124 Cal. App. 4th at 292;

Ermoian v. Desert Hosp., 152 Cal. App. 4th 475, 498 (2007) (objections must provide "meaningful guidance as to how to correct each particular defect").

ARGUMENT

A. THE AUGUST 2019 DECISION MORE THAN ADEQUATELY SETS FORTH ULTIMATE FINDINGS TO APPLY JUDICIAL ESTOPPEL.

DCA's challenge to the August 2019 Decision, which DCA claims is lacking factual and legal bases with regard to "each principal issue at trial," is unsubstantiated, and a thinly-veiled attempt to improperly reargue the evidence. Without pinpointing actual deficiencies or unresolved issues that are material in applying judicial estoppel, DCA simply repeats its arguments and expresses disagreement with the Court's ultimate ruling. Indeed, as explained below, DCA made the very same arguments in its post-trial brief, which the Court reviewed carefully. Repeating these arguments is improper, at best.

The August 2019 Decision is a thorough, eleven-page order that makes clear and sufficient findings, and provides an objective analysis as to each and every factor California courts weigh when applying the doctrine of judicial estoppel. This Court carefully disclosed its determinations on all ultimate facts and material issues by setting out the legal standard and making essential findings as to each factor of judicial estoppel.

First, this Court ruled that DCA had taken two different positions by suing ICANN in court while previously arguing, on multiple occasions and relating to a variety of different issues, that DCA could not sue ICANN. The Court analyzed these occasions in detail. (8/22/19 Ct. Dec. on Bifurcated Trial ("Dec. on Bifurcated Trial") at 3:26–5:6.)

Second, the Court found that the evidence established that the IRP proceeding had all of the hallmarks of, and thus was, a quasi-judicial proceeding for purposes of applying judicial estoppel. (*Id.* at 5:12–6:14, 7:23–24.) Where the parties disagreed on the issue of whether the IRP proceeding was binding, this Court carefully addressed both parties' arguments by analyzing numerous documents, including ICANN's Bylaws and various IRP declarations. (*Id.* at 6:26–7:22.) In so doing, the Court recognized that "[t]he IRP Panel determined that its decisions were binding[]" (*id.* at 7:4) and "exercised its authority by making a decision on the merits of the

dispute regarding the ICANN Board's actions" (*id.* at 7:5–9). The Court rejected DCA's additional arguments regarding the binding nature of that decision, finding that none of them "change[d] the fact the IRP Panel's decision was binding on both parties." (*Id.* at 7:10–26.)

Third, this Court ruled that DCA was successful in asserting in the IRP that DCA could not sue ICANN in court. (*Id.* at 8:2–9:5.) The Court supported its conclusion with detailed findings of *seven* different occasions where the IRP Panel relied on and adopted DCA's position. (*Ibid.*) It truly would be impossible for DCA to argue otherwise.

Fourth, the Court held that DCA's arguments in the IRP that DCA could not sue ICANN in court followed by DCA suing ICANN in court are irreconcilable and inconsistent positions. (*Id.* at 9:7–13.) Again, there was virtually no dispute on this issue throughout the trial, and the Court easily dispatched DCA's efforts at misdirection on this issue.

Fifth, in finding that DCA's first position before the IRP Panel was not taken as a result of ignorance, fraud, or mistake, this Court addressed and analyzed (with citations to case law, evidentiary documents, and testimony) at least three of DCA arguments in connection with this factor. (*Id.* at 9:16–11:10.)

Sixth, after making determinations on facts the Court found to be material, this Court also considered equity. (*Id.* at 3:20–24; 11:12–19.) Indeed, when weighing all evidence from the three-day bench trial and the parties' briefs, this Court concluded that the facts presented egregious circumstances that would result in a miscarriage of justice if the Court did not apply judicial estoppel to bar DCA's lawsuit. (*Id.* at 11:12–19.)

In sum, the August 2019 Decision clearly addressed the ultimate issue in this case: ICANN has met its burden in proving its affirmative defense of judicial estoppel, allowing the Court to exercise its discretion to bar DCA from bringing or maintaining its claims alleged in this lawsuit. In addition to setting out its express determination, this Court's August 2019 Decision properly set out the ultimate facts supporting that determination, and the legal basis for its decision. This is precisely what the Court was required to do under Code of Civil Procedure section 632. *See also Almanor*, 246 Cal. App. 4th at 770–71 ("A trial court's statement of decision need not address all the legal and factual issues raised by the parties; it is sufficient that

it set forth its ultimate findings, such as on an element of a claim or defense."). This Court was not required to address how it resolved intermediate evidentiary conflicts, or respond point by point to the arguments DCA had asserted previously. Rather, DCA is merely attempting to recycle its arguments under the guise of "objections."

B. ICANN'S RESPONSES TO DCA'S OBJECTIONS

Each of DCA's "objections" improperly attempts to reargue the merits. In fact, as discussed below, DCA already made many of these arguments in its post-trial brief—which ICANN has already responded to, and this Court has already ruled upon. Indeed, none of DCA's "objections" addresses any ambiguity or inconsistencies between the Court's ruling and the August 2019 Decision. Therefore, in an effort to respond more efficiently to DCA's "objections," ICANN will direct the Court to the portions of ICANN's post-trial brief where DCA's arguments are addressed.

Response to Objection No. 1

DCA already made this argument in its post-trial brief in connection to the second factor of judicial estoppel (quasi-judicial) (*see* DCA Post-Trial Br. at 2–6), and ICANN already addressed this argument, indicating that DCA asked the IRP Panel to issue a binding decision, the IRP Panel concluded that it had the authority to issue binding decisions, and ICANN abided by the IRP Panel's declaration in every respect. ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 10–12.)

DCA does not cite to any authority supporting its argument that, in evaluating judicial estoppel claims, courts consider whether the prior forum provided an opportunity for judicial review or enforcement. Instead, DCA cites *Sanderson v. Niemann*, 17 Cal. 2d 563, 573–75 (1941), and *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829 (1999), both of which are inapplicable because these cases concern collateral estoppel or res judicata. Those doctrines, and the factors courts weigh, are quite distinguishable from judicial estoppel. The doctrines of res judicata or collateral estoppel deal 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 v. Cty. of Los Angeles*,

60 Cal. App. 4th 171, 182 (1997). It is this distinction that leads courts to inquire whether or not a prior forum provided opportunity for judicial review *when applying res judicata/collateral estoppel* because that inquiry is consistent with the focal element of these doctrines (whether the prior proceeding provided the parties a full and fair opportunity to litigate the issues to be foreclosed). The doctrine of judicial estoppel does not weigh this.[1]

Ultimately, this Court considered and rejected DCA's arguments, finding that: (1) "the IRP Panel exercised its authority by making a decision on the merits of the dispute"; (2) that the Board's vote to implement the IRP Panel's recommendations did "not undermine the quasi-judicial nature of the proceeding that led to that vote"; and (3) language in the July 2015 ICANN Board Resolution did not change the fact that the IRP Panel's decision was binding on the parties. (Dec. on Bifurcated Trial at 7:4–16.)

Response to Objection No. 2

DCA already made this argument in its post-trial brief in connection to the second factor of judicial estoppel (quasi-judicial) (*see* DCA Post-Trial Br. at 3–5) and ICANN already addressed this argument, indicating, among other things, that the IRP Panel exercised its authority by making a binding decision on the merits regarding the ICANN Board's actions when declaring that the Board's actions and inactions were inconsistent with ICANN's Articles of Incorporation and Bylaws. ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 11–13.)

Ultimately, this Court considered and rejected DCA's arguments, finding that: (1) "the IRP Panel exercised its authority by making a decision on the merits of the dispute"; (2) that the Board's vote to implement the IRP Panel's recommendations did "not undermine the quasi-judicial nature of the proceeding that led to that vote"; and (3) language in the July 2015 ICANN Board Resolution did not change the fact that the IRP Panel's decision was binding on the parties. (Dec. on Bifurcated Trial at 7:4–16.)

[1] Further, the evidence at trial demonstrated that, in the event that ICANN failed to abide by the IRP Panel's declaration, DCA could have instituted a second IRP to challenge the decision regarding the action taken by ICANN's staff and vendors (after seeking reconsideration by the Board of those actions). ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 24–25, 25 n.15.)

Response to Objection No. 3

DCA already made this argument in its post-trial brief in connection to the fourth factor of judicial estoppel (inconsistent positions) (*see* DCA Post-Trial Br. at 14–15) and ICANN already addressed this argument, indicating that DCA's positions are logically inconsistent, that "context" is irrelevant to the application of judicial estoppel, and that DCA could have instituted a second IRP to challenge the decision regarding the action taken by ICANN's staff and vendors (after seeking reconsideration by the Board of those actions). ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 20–21; 22–23, 24–25, 25, n.15.)

Ultimately, this Court considered and rejected DCA's arguments, stating that the Court "agree[d] with ICANN's analysis," which showed that DCA suing ICANN is totally and logically inconsistent with its first position that DCA could not sue ICANN in any way related to its application. (Dec. on Bifurcated Trial at 9:7–13.)

Response to Objection No. 4

ICANN incorporates its Response to Objection No. 3 herein.

Additionally, DCA's objection here (and in Objection Nos. 5–9) that this Court fails to address whether it was "fair" to judicially estop DCA is without merit. DCA already made this argument in its post-trial brief (*see* DCA Post-Trial Br. at 16–17) and ICANN already responded to this argument, indicating that judicial estoppel has been invoked to bar litigation in far less egregious circumstances in order to prevent the exact gamesmanship DCA has displayed and continues to display. ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 24–25.)

The Court clearly and appropriately addressed this issue by concluding that "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 its 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. . . ." (Dec. on Bifurcated Trial at 11:12–19 (emphasis added).) The Court's finding in this regard clearly addresses DCA's repeated arguments that it was treated "unfairly."

Further, judicial estoppel is an equitable doctrine, and courts use their discretion to apply the doctrine in appropriate circumstances, with all factors considered. "Egregiousness" is not a factor for applying judicial estoppel. Whether equity requires the application of judicial estoppel is an inquiry that should be conducted by a court with all facts and factors considered, which is exactly what the Court here did. (*See* Dec. on Bifurcated Tr. at 11:12–19.)

Response to Objection No. 5

ICANN incorporates its Response to Objection No. 4 herein.

DCA already made this argument in its post-trial brief in connection to the fifth factor of judicial estoppel (fraud, ignorance, or mistake) (*see* DCA Post-Trial Br. at 10–13), and ICANN already addressed this argument, indicating that there is no evidence that DCA acted as a result of ignorance, fraud, or mistake, and that 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. ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 15–18.)

Ultimately, this Court considered and rejected DCA's arguments, finding that "[t]here is no indication from the evidence presented that DCA took the first position as a result of ignorance, fraud, or mistake." (Dec. on Bifurcated Trial at 9:26-27.) The Court further acknowledged that DCA's CEO questioned the enforceability of the covenant in 2009, three years before submitting her application for .AFRICA. Even so, the Court made clear, "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." (*Id.* at 10:11–18, 11:3–6 (quoting ICANN's Post-Trial Brief).)

Response to Objection No. 6

ICANN incorporates its Response to Objection No. 4 herein.

DCA already made this argument in its post-trial brief in connection to the third factor of judicial estoppel (success in asserting first position) (*see* DCA Post-Trial Br. at 6–10), and ICANN already addressed this argument, indicating that the legally enforceable scope of the Covenant is irrelevant to judicial estoppel, and judicial estoppel does not require that the first position taken be adjudicated. ICANN directs this Court to ICANN's response. (ICANN Post-

Trial Br. at 21–22, 23–24.)

Ultimately, this Court already considered DCA's arguments and clearly found that when ruling in DCA's favor on at least seven different issues, "the IRP Panel relied on and adopted DCA's position that it could not sue ICANN because of the Covenant." (Dec. on Bifurcated Trial at 8:2–9.) The Court further explained that the legally enforceable scope of the Covenant is irrelevant to judicial estoppel: "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." (*Id.* at 11:3–6 (quoting ICANN's Post-Trial Brief).)

Response to Objection No. 7

ICANN incorporates its Response to Objection No. 4 herein.

DCA already made this argument in its post-trial brief in connection to the fourth factor of judicial estoppel (inconsistent positions) (*see* DCA Post-Trial Br. at 15–16) and ICANN already addressed this argument, indicating that, although not required for judicial estoppel to apply, DCA always had another remedy available—a second IRP. Accordingly, ICANN is in no way "judgment-proof." ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 24–25.)

Ultimately, this Court considered DCA's and ICANN's positions, and "agree[d] with ICANN's analysis" that DCA suing ICANN is totally and logically inconsistent with its first position that DCA could not sue ICANN in any way related to its application. (Dec. on Bifurcated Trial at 9:7–13.)

Response to Objection No. 8

ICANN incorporates its Response to Objection No. 4 herein.

DCA raises for the first time a new argument that the relief DCA obtained did not constitute an advantage because ICANN was afforded the same relief. The time for new arguments has long passed, and these arguments have been waived. Additionally, the advantage to DCA is obvious. After DCA was awarded all of the relief it sought, DCA won the IRP outright. Had DCA not taken the repeated position that it could not sue ICANN, the scope of the IRP (and the evidence presented) would have been very different, and the outcome could have

been different as well.[2] Additionally, DCA overlooks that the Panel ruled in DCA's favor when requiring ICANN to pay DCA's IRP costs, which clearly did not constitute an advantage for ICANN.

Response to Objection No. 9[3]

ICANN incorporates its Response to Objection No. 4 herein.

DCA raises for the first time a new argument that the relief DCA obtained in the IRP did not constitute "egregious circumstances." The time for new arguments has long passed, and these arguments have been waived. Additionally, DCA misunderstands the judicial estoppel doctrine. The "egregiousness" of DCA's conduct is not the relief it sought in the IRP, but the complete reversal of its position in the IRP by filing a lawsuit against ICANN. The Court agreed: "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 its 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. . . ." (Dec. on Bifurcated Trial at 11:12–19 (emphasis added).)

Response to Objection No. 10

ICANN incorporates its Response to Objection No. 6 herein.

This Court considered DCA's and ICANN's positions, and "agree[d] with ICANN's analysis" that DCA suing ICANN is totally and logically inconsistent with its first position that DCA could not sue ICANN in any way related to its application. (Dec. on Bifurcated Trial at 9:7–13.)

Response to Objection No. 11

DCA already made this argument in its post-trial brief in connection to the fifth factor of judicial estoppel (fraud, ignorance, or mistake) (*see* DCA Post-Trial Br. at 10–13) and ICANN

[2] As DCA has pointed out numerous times, ICANN opposed DCA's requests for relief at every turn. It is, therefore, absurd to argue that DCA's victories were also somehow victories for ICANN. The IRP Panel repeatedly rejected ICANN's positions after DCA argued that its positions should be given greater weight because DCA could not sue ICANN.

[3] To be clear, the fact that DCA prevailed in the IRP does not mean that ICANN's conduct was "unlawful." An IRP panel's sole remit is to determine whether the challenged ICANN actions or inactions were inconsistent with ICANN's Articles of Incorporation and/or Bylaws.

already addressed this argument, indicating that DCA's position was not taken as a result of ignorance, fraud, or mistake. ICANN directs this Court to ICANN's response. (*See* ICANN Post-Trial Br. at 15–18.)

This Court considered DCA's and ICANN's positions, and did, in fact, make "findings with regard to DCA's state of mind." The Court held, "the first position was not taken by DCA in an isolated or off-the-cuff remark by DCA or its attorneys made out of ignorance or mistake, but instead in repeated statements made at different times throughout the IRP procedure as a consistent strategic position adopted by DCA to support its requests that the IRP Panel rule in its favor on seven separate issues." (Dec. on Bifurcated Trial at 9:22–25.)

Response to Objection No. 12

DCA raises for the first time a new argument that DCA seeking redress in this Court for claims that it could not bring in the IRP does not constitute a "second advantage." The time for new arguments has long passed, and these arguments have been waived. Even so, it should be obvious to DCA that the second advantage is DCA's ability to pursue this lawsuit after repeatedly and successfully taking the position during the IRP that it could never file a lawsuit against ICANN.

CONCLUSION[4]

DCA's objections are a thinly-veiled attempt to reargue the merits of its case. In some instances, DCA belatedly advances new arguments, which are waived. And at other times, it repeats arguments it has already made and which this Court has already (and thoroughly) rejected. DCA's objections and request for a hearing are improper, and this Court should enter its statement of decision.

[4] Although the Court may order a hearing on objections to a statement of decision, *see* Cal. Rules of Ct., rule 3.1590, ICANN objects to DCA's request for a hearing given DCA's improper objections and in light of the procedural history. Both parties had ample opportunity to present their cases during a three-day bench trial, through pre-and post-trial briefs, and at the August 22, 2019 hearing.

Dated: September 12, 2019

JONES DAY

By: _____
Jeffrey A. LeVee

Attorney for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

NAI-1508913855

PROOF OF SERVICE

I, Diane Sanchez, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On September 12, 2019, I served a copy of the within document(s):

ICANN'S RESPONSE TO PLAINTIFF DOTCONNECTAFRICA TRUST'S OBJECTION TO STATEMENT OF DECISION AND REQUEST FOR HEARING

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery Service agent for delivery.

☐ by causing to be personally delivered the document(s) listed above to the person(s) at the address(es) set forth below as noted

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on September 12, 2019, at Los Angeles, California.

Diane Sanchez