IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 4

DotConnectAfrica Trust, Appellant, v. Internet Corporation for Assigned Names and Numbers, Respondent.	Court of Appeal Case No. B302739; B305993 (consolidated) Trial Court Case No. BC607494

On Appeal From a Judgment of the Superior Court,
County of Los Angeles, Honorable Robert B. Broadbelt, III

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Words do not exist in a vacuum; their meaning is determined by context and the time in which they were made. Yet Defendant-Appellee the Internet Corporation for Assigned Names and Numbers ("ICANN") urges this Court to disregard that basic rule, by casting aside context and advancing a misreading of specific words, plucked out of volumes of materials and devoid of all reference to the times they were made. But when viewed in context, Plaintiff-Appellant DotConnectAfrica Trust ("DCA") has made no statements that should judicially estop its current lawsuit. Instead, back in 2013, DCA said that it could not sue ICANN over the claims *that existed at that time*. DCA could not then have anticipated that it would have *new claims* later, based on ICANN's *later* misconduct, and thus DCA could not have made statements about any such *later* claims. That alone is enough to warrant reversal, and to allow DCA's claims to proceed to trial.

Worse, DCA's statements were made not to a court or an administrative agency, but within an ICANN-created Independent Review Process ("IRP"). Although that IRP said it was binding, ICANN certainly did not treat it as binding: Instead, the ICANN Board voted on whether to accept the IRP's recommendations, and DCA had no chance for judicial review. Nor does ICANN dispute those facts. Instead, it again insists

that the IRP was a binding, quasi-judicial forum because the IRP said so. But that argument ignores the problem that ICANN could have just as easily rejected the IRP's recommendations, and the fact that ICANN did leave DCA without any recourse after only pretending to accept the IRP's outcome. Under binding precedents, judicial estoppel does not apply to statements made before such a tribunal, whose decision one party chose to accept or reject, and from which there has been no opportunity for judicial review.

Indeed, at each turn, ICANN's arguments rest on confusion and bluster. But the harsh medicine of judicial estoppel requires much more. As the California courts have repeatedly held, judicial estoppel is "an extraordinary and equitable remedy" that "must be 'applied with caution and limited to egregious circumstances.'" (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449 (hereinafter *Minish*), quoting *Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 170 (hereinafter *Jogani*).) Disregarding that caution, ICANN insists that DCA's statements before the IRP should be interpreted harshly, precluding it from suing ICANN *forever* in *any* sort of lawsuit—based on statements that DCA made before ICANN had engaged in the misconduct at issue. Contrary to ICANN's claims, the California courts have consistently held that context matters

when applying judicial estoppel, and that changed circumstances are a critical part of that context.

Similarly, ICANN cannot avoid the simple fact that it cites no case that has applied judicial estoppel to a tribunal like the IRP that DCA received—or even a case that called such a tribunal "quasi-judicial." Instead, the caselaw has applied judicial estoppel only to proceedings before neutral tribunals that bind both parties, or at least provide recourse to judicial review. And applying judicial estoppel more broadly—as ICANN urges here—would be nonsensical, because one party could choose to ignore the proceeding and leave the other without recourse to judicial review. Indeed, here, ICANN was determined to override the IRP and prevent DCA from obtaining review of ICANN's actions.

Seeking to sidestep the weaknesses in its legal position, ICANN also incorrectly suggests that only factual disputes are at stake. (E.g., ICANN Br. at 12, 14.) But nowhere does ICANN identify what those factual disputes would be. That is because it cannot: the facts regarding judicial estoppel are not in significant dispute, with the relevant documents, statements, and exhibits largely reflected in the parties' pretrial stipulation. (19CT4256-66.) For example, DCA does not contest the statements it made to the IRP, and ICANN does not contest the Board minutes reflecting its immediate post-IRP action. And neither side

contests what the IRP panel said and did, or what DCA alleged in its Amended Complaint. Thus, this case turns on the legal import of those statements and actions.

Finally, the equities compel reversal here. At bottom, ICANN's supposed factual disputes are all about the merits of DCA's claims—such as whether ICANN threw out DCA's application on pretextual grounds, whether ICANN colluded with ZACR, and whether ICANN acted in bad faith after the IRP finished. But courts are reluctant to apply judicial estoppel precisely because it "can impinge on the truth-seeking function of the court" and prevent the truth from coming out. (*Minish*, *supra*, 214 Cal.App.4th at p. 449.) DCA has established the veracity of its case on the merits, but there was never a trial on the merits below because the trial judge short-circuited that process. Thus, DCA never received the chance to fully develop the record or cross-examine ICANN's witnesses on their dubious assertions. Respectfully, this Court should reverse, and allow for a trial on the merits of DCA's claims so that DCA can finally have its day in court.

STATEMENT OF FACTS

At several points, ICANN's opposition brief distorts important facts that are key to the merits of DCA's claims. Although DCA maintains that the place for such disputes are *at trial*, after reversal by this Court, DCA will briefly correct

ICANN's most egregious factual errors. And, although there are no real factual disputes relevant to judicial estoppel—such as what was said to the IRP and what the IRP did—DCA briefly corrects ICANN's warped framing of the IRP.[1]

A. ICANN's Pre-IRP Misconduct

ICANN's description of the events that preceded the IRP is remarkable in its distortions. Under ICANN's version of the facts, the "GAC issued consensus advice in April 2013 that DCA's application should not proceed." (ICANN Br. at 20.) And ICANN then purportedly accepted that advice because it carried a "strong presumption," apparently deciding to reject DCA's application on the basis of that advice alone. (*Ibid.*)

Missing from ICANN's description, however, are several key facts: ICANN never mentions or disputes the fact that it delayed evaluating DCA's rival applicant, ZA Central Registry ("ZACR")—and then drafted application documents for ZACR in June 2013. (16CT3648-17CT3650.) Nor does ICANN dispute the fact that the GAC had issued "consensus" advice even though one of its members—who had explicitly said not "to have . . . GAC advise on" the .AFRICA issue—was not present at the relevant meeting. (6CT1203.) Nor does ICANN rebut that the AUC had

[1] As to any facts or arguments not addressed in this Reply Brief, DCA rests on its Opening Brief. As noted above, the legal import of those facts is hotly contested.

driven the GAC's agenda at the relevant meeting, even though the AUC had a clear conflict of interest because it was sponsoring ZACR. (15CT3291; 2AEX860-62.)[2] And ICANN does not dispute that it had wholly failed to do any proper due diligence into the GAC's supposed "consensus" advice, as the IRP panel found. (2AEX870-71.)

Plainly, before the IRP, ICANN had preselected ZACR's application and simply latched onto a contrived fig-leaf of a reason to throw out DCA's application.

B. ICANN Tries, But Fails to Manipulate the IRP

ICANN's description of the IRP is similarly confounding. By ICANN's telling, DCA just happened to make the statements at issue (seemingly unprompted) without any context—such as DCA's underlying claims, ICANN's procedural games, or DCA's other arguments. (See ICANN Br. at 22-27.)[3] But the reality is that the context of the statements is critical here.

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[2] "AEX" refers to the Exhibit Volumes filed by DCA. Although DCA cites the Reporter's Transcript in this reply brief, it did not have access to the Reporter's Transcript when it filed its opening brief; nor were the Exhibit Volumes filed when DCA filed its opening brief. DCA is, of course, willing to submit a revised opening brief with revised citations if it would aid the Court.

[3] Notably, ICANN provides a list of instances where DCA made these representations—but winds up citing the same DCA quotes from DCA in different instances, apparently in an effort to

First, DCA had brought specific claims before the IRP: that ICANN had violated its Articles, Bylaws, and the new gTLD Rules by blindly accepting the GAC's advice and ignoring the AUC's clear conflicts of interest. (1AEX546-49.) The IRP was then charged with the defined task of comparing ICANN's actions with its Articles and Bylaws. (1AEX427-28; 2AEX856.) When DCA referred to the "first and last opportunity [it had] to have *its rights* determined," it was thus plainly referring to the claimed violations at issue in the IRP. (E.g., 2AEX1603; 19CT4261-62.)

Second, DCA was forced to make these arguments because ICANN was trying to manipulate the entire process to avoid any kind of discussion or hearing on the merits of DCA's claims (just as it has sought to do in this litigation). For example, before the IRP had even begun, ICANN moved to short-circuit everything by signing a contract to delegate .AFRICA to ZACR. (1AEX 553-54; 2AEX819-20.)[4] ICANN then argued that the IRP panel needed only to conduct a single, telephonic hearing—without any sort of

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exaggerate the importance of DCA's statements. (E.g., ICANN Br. at 23-24 (citing 1AEX585 twice in two distinct subsections).)

[4] ICANN brazenly asserts that DCA's arguments were made "without a single evidentiary citation." (ICANN Br. at 61.) The record citations are on this page and were in DCA's opening brief as well. And, plainly, ICANN's argument that the IRP could have been based off a single, written brief after .AFRICA had already been delegated was nothing short of an attempt to nullify the IRP. (See DCA Br. at 22-23.)

discovery, witness examination, or additional briefing. (See 3AEX1730; 4AEX1877-78; 4AEX1915-25.) Indeed, ICANN claimed that the proceedings did "not require counsel," and that there was no need for anything beyond the preliminary briefs filed by each party. (3AEX1717, 1730; 4AEX1920-21.) At every step, DCA was forced to fight just to be heard on the merits.[5]

Third, DCA's statements were made in the broader context of arguments about ICANN's own Articles, Bylaws, and Supplementary Procedures. For example, DCA argued that "[t]he Panel should be guided *first and foremost* by the text of the ICDR Rules and Supplementary Procedures." (2AEX1603; see also, e.g., 2AEX808; 2AEX1591-93.) And DCA argued that ICANN's own "Bylaws indicate that ICANN must respect fundamental principles of fairness." (1AEX615.) DCA's arguments therefore were mainly based on ICANN's own "Bylaws and the Guidebook." (See ICANN Br. at 61 n.22; 1AEX596-600.) Thus, it was unsurprising that the IRP panel based its decision on ICANN's Bylaws and Guidebook—not on DCA's statements about the litigation waiver. (E.g., 1AEX633-34.)

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[5] ICANN passingly claims that DCA's procedural arguments required "overriding specific provisions in ICANN's Bylaws." (ICANN Br. at 24 n.6.) Far from it, DCA's arguments were based on forcing ICANN to *comply* with its own Bylaws and Supplementary Procedures—and the IRP panel agreed. (See, e.g., 1AEX593-603, 1AEX633-54.)

C. The IRP Results

ICANN similarly distorts the results of the IRP. (See ICANN Br. at 28-29.) Although the IRP panel said its decision was "binding" and "declare[d]" that ICANN had acted inconsistently with its Bylaws, it only "*recommend[ed]* that ICANN" allow DCA's application to proceed. (2AEX878-79.) And ICANN indisputably did not treat the IRP panel's decision as binding: It reviewed—*i.e.*, its Board effectively reconsidered—whether or not to adopt the IRP panel's recommendations. (2AEX1613-14.)

As part of ICANN's assessment of its obligations in light of the IRP panel's decision, it asked for ZACR's input—a decision it does not even attempt to defend—even though ZACR clearly had a conflict of interest.[6] (5AEX2242.) And ICANN then voted on whether or not to adopt those recommendations, based in part of the input of a conflicted party. (*Ibid.*; 5AEX2244-46.) Indeed, ICANN's new gTLD program manager, Christine Willett, testified that "the Board gets to interpret—determine how to implement the panel's recommendations," confirming ICANN's

[6] ICANN feebly attempts to defend its decision to ask the GAC for further advice, saying that its "Bylaws required the Board to liaise with the GAC on this subject." (ICANN Br. at 30 n.7.) But the IRP's decision that the GAC's advice was fatally flawed should have foreclosed ICANN from seeking further flawed advice.

stance. (4RT2728:6-8.) Regardless of how closely ICANN hewed to the IRP panel's recommendations, it did so voluntarily, as if the recommendations were anything but binding.

D. ICANN's Post-IRP Misconduct

ICANN then attempts to downplay and distract from its own misconduct after the IRP. To be perfectly clear, these are disputes that should be resolved *at trial*. DCA should be given the chance to fully develop the record on these points, and to thoroughly examine ICANN executives and staff on these points. But even based on the current record, and limited trial below, it is already clear that ICANN's post-IRP actions were designed to harm DCA.

Most crucially, ICANN threw out DCA's application on the new pretext that DCA's letters of endorsement were insufficient. As DCA explained in its opening brief, the new gTLD Rules required DCA to provide letters of endorsement from relevant governments or public authorities in Africa. (1AEX81-83.) In accordance with that requirement, DCA provided numerous letters, including a letter from the United Nations Economic Commission for Africa ("UNECA"). (16CT3546, 3552.) ZACR, by contrast, submitted illegitimate letters from various African governments (as shown by the fact that ICANN then had to ghostwrite a single new AUC letter for ZACR to pass the geographic support requirement). (16CT3648-17CT3650;

15CT3306.)[7] ICANN breezily asserts that a third-party "expert firm[]" reviewed these letters, and found DCA's letters wanting, but the evidence paints a very different picture. (ICANN Br. at 19, 30-31.)

In fact, the evidence shows that ICANN was playing games with these letters, looking for the right formula to allow ZACR's problematic letters to be accepted while rejecting DCA's. Before the IRP, ICANN was forced to delay its consideration of ZACR's application and ghostwrite a letter of endorsement from the AUC for ZACR—showing that ZACR's application should have failed without preferential treatment. (16CT3648-17CT3650.) Even then, the third-party firm, InterConnect Communications ("ICC") initially suggested that *neither* the AUC letter nor the UNECA letter should count. (See 2SUPPCT461.)[8] But that would have meant that ZACR's application would fail. So ICANN pressured ICC to reconsider—and ICC then found that *both* the AUC letter

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[7] As DCA explained in its opening brief, the AUC also provided a letter of endorsement for DCA. (16CT3546.) ICANN blithely asserts that the AUC withdrew that letter—ignoring DCA's arguments that the AUC's withdrawal was not proper under ICANN's own Guidebook. (See DCA Opening Br. at 20 n.4; 1AEX85.)

[8] Moreover, although ICANN paints ICC as an independent, neutral expert, it had the power to remove ICC panelists from their positions, and had input into ICC's interpretation of the endorsement-letter requirement. (4RT2738:26-2379:1.)

and UNECA letter should count. (*Ibid.*; 5CT1095.) Indeed, ICC seemed to view the two letters as linked. Mark McFadden, the ICC liaison for ICANN, wrote directly to ICANN that ICC had "reconsidered the additional letters of support for .africa as ICANN requested," and ICC's position seemed to be that the letters should rise or fall together. (5CT1095; 2SUPPCT461.)

Thus, during the IRP, ICANN explicitly said that the "UNECA . . . should be treated as a relevant public authority" and that its letter would be acceptable. (2AEX854; 4AEX1980; 17CT3681-82.) Consistent with that statement, ICANN further represented that "the UNECA's endorsement was taken into account." (4AEX1980.) By ICANN's representations, DCA's application thus needed only minimal further review. If the UNECA letter counted, then DCA's application would have met all of ICANN's stated requirements. (See 16CT3582-83.) And that would have allowed DCA's application to move to delegation. (See 1AEX29-30.)[9]

[9] ICANN notes that the IRP was not tasked with awarding .AFRICA to DCA. (ICANN Br. at 44.) But DCA has never suggested that. Instead, DCA's position is that, if ICANN had allowed DCA's application to proceed without fraud or chicanery, then DCA's application would have passed. And, if ICANN had not engaged in fraud and given ZACR preferential treatment, it never could have passed ZACR's application. (See 15CT3206 ["The .Africa gTLD can be re-delegated to DCA in the event DCA prevails in this litigation."].)

But ICANN could not allow that. So, in a sudden about-face, following the IRP, ICANN claimed that the UNECA's letter was insufficient. (See 16C 3598, 3570-71.) As part of its pretext for this complete change in position, ICANN suddenly claimed—at ZACR's urging—that a non-mandatory factor rendered all of DCA's letters worthless. (See *ibid.*; 5AEX2247.) Notably, ICANN never defends the propriety of asking for ZACR's input about DCA's application. Nor does it defend the AUC's improper backdoor lobbying after the IRP. Thus, the record only reveals that ICANN's post-IRP conduct was full of deception and pretext—as DCA should have the chance to prove at trial.[10]

STANDARD OF REVEW

Even after a bench trial, appellate courts review all questions of law regarding judicial estoppel *de novo*. (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 45-46 (hereinafter *Blix*).) Thus, although the appellate courts review

[10] ICANN also misleadingly says that the trial court suggested a bench trial to determine whether judicial estoppel barred ICANN's lawsuit. (ICANN Br. at 33.) But the trial judge had as part of the summary-judgment hearing concluded that judicial estoppel does not apply, and instead asked for the parties to "devise some type of a process where we can tease out the issue of judicial estoppel"—and ICANN then proposed a "two-day bench trial." (2RT632:5-6, 632:14-15.) And that initial trial concluded with a tentative ruling, (3RT1334:21, 1337:17-1339:13), that was militated by ICANN's claim of a mistrial. (19CT4114, 4122.)

the "findings of fact" themselves for "substantial evidence," the question of "whether judicial estoppel can apply to the facts is a question of law reviewed de novo." (*Ibid.*) And, "[e]ven if the necessary elements of judicial estoppel are found," the appellate court reviews "whether it should be applied" for "abuse of discretion." (*Id.* at 46-47.)

ARGUMENT

Judicial estoppel may *only* be applied where four elements are *all* established—but none of those elements are present here. *First*, DCA's positions were not "totally inconsistent." (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986.) When viewed in context, DCA's statements before the IRP were about the claims and facts then in dispute—not about claims and facts that arose only *after* the IRP. DCA simply could not have anticipated ICANN's later misconduct, or made any statements about its ability to sue for misdeeds that had not yet occurred.

Second, DCA's prior statements were not made in a "quasi-judicial" proceeding. (*Ibid.*) To the contrary, ICANN itself treated the IRP as non-binding and voted on whether or not to accept its outcome. And DCA has had no recourse to judicial review of ICANN's decisions, leaving DCA entirely at ICANN's mercy and wholly removing the IRP from the judicial process.

Third, DCA was not "successful" in its prior statements because the IRP panel did not "adopt[]" those statements "as

true." (*Ibid.*) The IRP panel said only that it was "assuming" that the litigation waiver was binding—but courts and litigants have long assumed facts or positions without adopting them as true. For this Court to allow DCA's current lawsuit to proceed, therefore, would not risk inconsistent judicial decisions of the type that animate judicial estoppel.

Fourth, DCA did not act out of bad faith. (*Lee v. W. Kern Water Dist.* (2016) 5 Cal.App.5th 606, 630 (hereinafter *Lee*).) It has instead been up front and consistently striven to hold ICANN accountable. Conversely, ICANN is the one who has pulled every procedural trick in the book to block DCA's claims—both before the IRP and before this Court. And thus, *fifth*, it would be inequitable to apply judicial estoppel here. Indeed, to apply judicial estoppel would reward ICANN's misconduct, allowing it to escape judicial scrutiny for twisting the results of the IRP and taking further action to harm DCA. Such a result is manifestly unjust.

ICANN's arguments to the contrary are based on bluster and misdirection. Again and again, ICANN dismisses DCA's case citations as inapposite without bothering to distinguish them on any substantive legal basis. And, although ICANN insists that the questions here are factual, requiring deference, it never explains what facts are in dispute. Nor can it. At bottom, the

disputes here are legal, not factual. And the caselaw only confirms that none of the four required elements are met here.

I. The Elements Of Judicial Estoppel Are Not Met Here.

A. DCA's Positions Were Not "Totally Inconsistent."

For judicial estoppel to apply, DCA's statements to the IRP must "*necessarily* exclude[]" its current lawsuit. (*Bell v. Wells Fargo Bank, N.A.* (1998) 62 Cal.App.4th 1382, 1387 (hereinafter *Bell*), quoting *Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 960 (hereinafter *Prilliman*).) That is a "very high threshold." (*Ibid.*) Yet, ICANN sweeps it aside, arguing that DCA's statements were not explicitly self-limiting and thus apply to any lawsuit that DCA might bring. (ICANN Br. at 44-45.) That view is both factually and legally incorrect. California's courts always "consider the legal context" before applying judicial estoppel. (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1473 (hereinafter *Levin*).) And judicial estoppel does not apply if it is even "possible to reconcile the statements"—a standard that ICANN conspicuously ignores. (*Bell*, *supra*, 62 Cal.App.4th at p. 1388.)[11]

[11] ICANN bizarrely asserts that DCA "seeks to create a new factor by arguing that courts are required to expressly evaluate 'context.'" (ICANN Br. at 46 n.15.) Far from it, DCA has simply repeated and quoted the holdings of these cases.

When viewed under the proper standard, DCA's statements are easy to reconcile. Before the IRP, DCA said that it could not sue ICANN in the context of the claims and issues in play at that point in time—*i.e.*, that ICANN had violated its Articles and Bylaws by blindly taking the GAC's advice. Those are not the same claims at issue in this lawsuit. Instead, in this litigation, DCA argues that ICANN defrauded DCA and engaged in unfair competition by promising to respect the IRP results and treat DCA fairly, but then rejecting DCA's application based on pretext about DCA's letters of endorsement through collusion with ZACR.

Nowhere does ICANN dispute that the facts at issue in this current lawsuit did not occur until *after* the IRP. And because DCA's current lawsuit turns on conduct and issues that arose only *after* the IRP, it was impossible for DCA to have addressed such conduct and claims in its statements to the IRP.[12]

Seeking to invert the analysis, ICANN asserts that DCA never conditioned its statements "on ICANN's future actions," and that its statements were "unequivocal." (ICANN Br. at 39-40, 45-46.) But that argument does not even make logical sense.

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[12] ICANN effectively conceded as much when it told the IRP panel that it was limited to the issue of the GAC's advice—an issue that ICANN's own counsel said should have been for a "Phase II" trial on the merits of DCA's claims. (See 4RT2431:11-13, 2433:11-13.)

Judicial estoppel does not require a party to foresee whether its opponent will engage in further misconduct—and clarify that any current statements do not apply to any such hypothetical future events. It does not punish litigants for failing to cabin and limit their statements based on unforeseen potential contingencies that might occur. DCA's statements simply could not have addressed or anticipated conduct or claims that had not yet occurred. ICANN has no legal or logical answer to that fact.

The caselaw squarely supports that conclusion. For example, the respondents in *Montegani* did not "condition [their] representations on [the other party's] future actions." (See ICANN Br. at 40.) Yet the court held that the respondents' categorical admission did not bar them from later changing their position when the facts changed. (*Montegani v. Johnson* (2008) 162 Cal.App.4th 1231, 1238-39 (hereinafter *Montegani*); ICANN Br. at 47-48.) Nor did the lawyer in *Daar* "qualify [his] representations" or limit his denials of jurisdiction "with regard to [the] specific claims" at hand. (See ICANN Br. at 39-40.) But the court held that those denials of jurisdiction did not estop the lawyer from later asserting jurisdiction when the later case involved new "claim[s] and different facts." (*Daar & Newman v. VLR International* (2005) 129 Cal.App.4th 482, 490-91 (hereinafter *Daar*).) Judicial estoppel always takes into account

changed circumstances, and recognizes that statements are made in light of the claims and facts at issue.

Instead of dealing with those holdings, ICANN baldly asserts that these and other cases are "distinguishable on the facts"—without ever explaining what relevant facts distinguish them. (ICANN Br. at 46-48.) ICANN's need to claim factual distinctions for a two-page string cite of cases only highlights the strength of their holdings: that the facts and circumstances give statements context, and can reconcile those statements to later positions. (See also *Prilliman*, *supra*, 53 Cal.App.4th at p. 962-63; *Bell*, *supra*, 62 Cal.App.4th at p. 1388.) Nowhere does ICANN explain, for example, how *Daar* was somehow limited to its "unique facts and law," or how *Montegani*'s holding is not on-point. (See ICANN Br. at 47 nn.16-17.) That is because it cannot. *Daar* clearly shows that two seemingly contradictory statements can be reconciled if they were made in the context of "different claim[s] and different facts." (*Daar*, *supra*, 129 Cal.App.4th at pp.490-91.) And *Montegani* shows (as ICANN admits) that changed facts can reconcile a party's two statements. (*Montegani*, *supra*, 162 Cal.App.4th at pp. 1238-39.)[13] Those key doctrinal points are fatal to ICANN's arguments here.

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[13] ICANN also tries to distinguish *State Farm*, but its efforts fall flat. (ICANN Br. at 47 n.17.) The fact that the party in *State*

Contrary to ICANN's assertions, *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, does not undercut any of those cases. In *Levin*, the court took care to explain that the party had taken contrary positions as to "the *exact same assets.*" (*Id.* at p. 1479, emphasis added.) It was totally inconsistent for that party to first assert that he had lost "any interest" in those assets, and then claim a "property interest in these *same financial assets.*" (*Id.* at 1480.) No facts or circumstances had changed regarding the assets, and thus no context could reconcile the party's positions.[14]

Farm brought the *same claim* in a *different matter* only confirms that "different circumstances" can reconcile statements. (*State Farm Gen. Ins. Co. v. Watts Regulator Co.* (2017) 17 Cal.App.5th 1093, 1102.) And ICANN ignores the fact that the same arbitration agreement apparently covered both claims—yet a change in the arbitration agreement and "different circumstances" reconciled the party's earlier admission that the agreement covered the claims. (*Id.* at pp. 1096, 1102.)

[14] For the same reason, ICANN's other two cited cases, *Nist v. Hall* (2018) 24 Cal.App.5th 40, 48-49 (hereinafter *Nist*), and *Bucur v. Ahmad* (2016) 244 Cal.App.4th 175 (hereinafter *Bucur*), are similarly off-point. (ICANN Br. at 48-49.) *Bucur* involved a party who took two different positions as to the same facts about the termination of a contract; nothing changed between the two statements. (*Bucur*, *supra*, 244 Cal.App.4th at pp.182, 188.) And *Nist* involved one party who first claimed that the other party violated a statute, then asserted the statute had never applied, as to the same facts regarding the sale of property from a storage unit. (*Nist*, *supra*, 24 Cal.App.5th at p. 43, 48-49.)

Again, that is not the case here. DCA's earlier statements were about the facts and claims then before the IRP. Its claims here are different, and about facts and claims that arose *after* the IRP. Although ICANN generically says that the "context of both proceedings [are] the same," it offers no support for that anachronistic argument. (ICANN Br. at 46, 49-50.) That is because there is none.

At best, ICANN's position is that all of DCA's claims "arose from and directly related to ICANN's processing of DCA's .AFRICA application." (ICANN Br. at 32.) But judicial estoppel turns on the substance of a party's statements, not labelling games built on levels of abstraction. (See *Daar*, *supra*, 129 Cal.App.4th at pp.490-91.)[15] Indeed, such sweeping classifications conflict with the core logic of *Daar*. If ICANN were correct, then the *Daar* Court could have just said that the lawyer's two statements both dealt with "jurisdiction." (*Ibid.*) Or the two statements in *Daar* both dealt with the "respondent's underlying action" or "the same client." (*Ibid.*) But that was not *Daar*'s holding. Instead, *Daar* looked to the underlying "claim[s] and facts," just as this Court should do. (*Ibid.*)

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[15] See also *Prilliman*, *supra*, 53 Cal.App.4th at p. 962-63; *Bell*, *supra*, 62 Cal.App.4th at p. 1388 [both looking at the substance of statements].

When looking to the substance of DCA's claims, the differences are plain. The pre-IRP claims were about the GAC's advice and ICANN's violation of its Bylaws. That context is plainly different than the post-IRP claims for fraud and unfair competition based on ICANN's collusion with ZACR and newly-fabricated dismissal of DCA's letters—especially the UNECA letter. Those new facts and new claims reconcile DCA's statements and thus preclude judicial estoppel. (*Daar*, *supra*, 129 Cal.App.4th at pp.490-91.)

Moreover, DCA's statements to the IRP were made on the basic assumption that, if the IRP said it was binding, then ICANN would treat the IRP's outcome as binding and respect its recommendations. (E.g., 1AEX610-11.) Those expectations were dashed, however, when ICANN twisted the IRP results and contrived new reasons to throw out DCA's application. Contrary to ICANN's assertions, ICANN *did not* respect the IRP's outcome. Although it said it would implement the IRP panel's recommendations, ICANN did not actually allow DCA's application to proceed through the rest of the application process, as the IRP panel had said it should. Instead, ICANN made up a new reason to reject DCA's application, thwarting the purpose of the IRP recommendations. And although ICANN nominally "adopted" the IRP recommendations, it did so only after

consulting with the GAC that already had objected to DCA's application and asking DCA's opponent ZACR for its input.

Thus, DCA's statements are not so "totally inconsistent" that one "*necessarily* excludes" the other. (*Bell*, *supra*, 62 Cal.App.4th at p. 1387.) DCA's current lawsuit deals with new claims, new misconduct, and new circumstances that arose only after the IRP ended—and therefore could not have been within the scope of DCA's prior statements. Thus, judicial estoppel does not apply.

B. The IRP Was Not a "Quasi-Judicial Proceeding."

Nor were DCA's statements made before a quasi-judicial proceeding. Again, although the IRP panel said it was binding, ICANN's own actions prevented the IRP from having binding effect. And DCA has had no recourse to judicial review, leaving it at the mercy of ICANN once the IRP had concluded. Thus, ICANN voted on *whether* to implement the IRP results, and then it proceeded to take actions inconsistent with the IRP panel's own recommendations. ICANN tellingly cannot cite a single case that applied judicial estoppel to a proceeding like this, or called such a proceeding "quasi-judicial."

When assessing whether a proceeding qualifies as "quasi-judicial," courts consider several factors—including the legal formality of the proceeding, its procedural safeguards, the availability of judicial review, and the "ability to make a decision"

that binds both parties. (*Nada Pacific Corp. v. Power Eng'g and Mfg., Ltd.* (N.D. Cal. 2014) 73 F. Supp. 3d 1206, 1216-18 (hereinafter *Nada*); *Eaton v. Siemens* (E.D. Cal., May 23, 2007, No. civ.s-07-315) 2007 WL 1500724, at *5 (hereinafter *Eaton*); *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 829.) Because of ICANN's own misconduct, the IRP here lacked two critical safeguards: it was not treated as binding by both parties, and neither party had a right to judicial review.

ICANN's own misconduct prevented the IRP from having binding effect. ICANN does not dispute that it voted on *whether or not* to accept the IRP panel's "recommendations," and felt fully empowered to disregard those "recommendations" if it had wished to do so. (2AEX1613-14; 2 AEX878-78.) That makes this case just like *Nada* or *Eaton*, in which a tribunal issued recommendations that the parties "could choose to ignore." (*Eaton*, *supra*, 2007 WL 1500724, at p. *5; *Nada*, *supra*, 73 F. Supp. 3d at p. 1216-17.) Likewise, although ICANN notes that it mostly adopted the IRP panel's recommendations here, it never even attempts to grapple with *Eaton*'s holding that a proceeding does not become binding just because a party, in a particular case, "chose to follow" its outcome. (*Eaton*, *supra*, 2007 WL 1500724, at p. *5.)

Indeed, Akram Atallah, ICANN's former head of Global Domains Divisions, confirmed that ICANN changed its own

Bylaws to make IRPs binding *after* DCA filed this lawsuit. (4RT2758:11-20.) That fact only buttresses the position that—at the time of the IRP—ICANN did not view the panel's decision as binding. Moreover, although ICANN voted to accept the IRP panel's recommendations, it also invited the GAC and ZACR to give input as to DCA's application—which was completely contrary to the spirit and purpose of the IRP's outcome, or any view that the IRP panel's decision was binding on it. (See 2AEX1613-15; 5AEX2242.) If the decision was binding, why did ICANN ask the GAC and ZACR for advice on whether to accept it? ICANN has no explanation.

Nor did DCA ever concede that the IRP was quasi-judicial or binding, regardless of how non-binding ICANN might treat the IRP's outcome or how much ICANN might twist its results. (See ICANN Br. at 55-56.) Although DCA argued, during the IRP, that the IRP was akin to "an arbitration" and thus would be binding, ICANN's own actions, after the IRP, proved that it had no intention of treating the proceeding as binding. (See 1AEX577-758.) Because DCA could not foresee that, even if the IRP said it was binding, ICANN would still vote on whether or not to accept its recommendations or that ICANN would twist the results as it did, its prior statements could not possibly have conceded that the IRP, as it actually unfolded, was somehow quasi-judicial.

Importantly, DCA never had the chance to obtain judicial review of ICANN's vote on the IRP's outcome. ICANN brushes off that concern, saying that judicial review matters only for collateral estoppel and res judicata, but not for judicial estoppel. But that is simply wrong as a doctrinal matter. The only case ICANN cites for its distinction is *Jackson*, which explicitly says that "[j]udicial estoppel is designed to maintain the purity and integrity *of the judicial process*"—a quote that ICANN omits. (*Jackson v. Cnty. of Los Angeles* (1997) 60 Cal.App.4th 171, 182 (hereinafter *Jackson*).) Moreover, judicial estoppel "focuse[s] on the relationship between the litigant and the judicial system," preventing any "perver[sion of] the judicial machinery." (*The Swahn Grp., Inc. v. Segal* (2010) 183 Cal.App.4th 831, 841 (hereinafter *The Swahn Grp.*).) But if the proceeding was wholly *removed* from the judiciary because ICANN made it so—without any possibility of judicial review—then concerns about the judicial system are not present.

Tellingly, ICANN does not cite a single case that distinguishes the term "quasi-judicial proceeding" in different contexts, or applies judicial estoppel to a proceeding that lacked judicial review. Instead, ICANN itself falls back on cases that deal with collateral estoppel and administrative mandamus, confirming that the scope of "quasi-judicial proceedings" is the same across these fields. (See ICANN Br. at 53, 59-60, citing

Risam v. Cnty. of Los Angeles (2002) 99 Cal.App.4th 412, 418-19, 421-22 (hereinafter *Risam*); *Bray v. Int'l Molders & Allied Workers Union* (1984) 155 Cal.App.3d 608, 612, 615-16 (hereinafter *Bray*); *Westlake Cmty. Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 471, 478-83.)

But those cases actually undermine ICANN's arguments. ICANN correctly notes that, in several of these cases, courts described a proceeding as "quasi-judicial" even though the proceeding was internal to, *e.g.*, a trade union, with the union voting on the proceeding's outcome. (See, e.g., *Bray*, *supra*, 155 Cal.App.3d at p. 612.) But ICANN ignores that *all* of these cases involved some sort of judicial review—usually, with one party seeking administrative mandamus in order to resolve a claim that the organization improperly implemented the proceeding's result. (See, e.g., *id.* at pp. 612, 615-16.; *Risam*, *supra*, 99 Cal.App.4th at p. 423.) Here, by contrast, ICANN has invoked judicial estoppel to *prevent* any judicial review of its actions. Thus, far from supporting ICANN's view, those cases refute it.[16]

[16] ICANN cites the trial court's remark that a court proceeding is no "less binding" just because "one of the parties says, I don't view that as binding." (ICANN Br. at 55 n.20.) But that hollow notion only underscores DCA's point: Court proceedings, where the parties are on equal footing, are enforceable through attachment and seizure proceedings, if necessary. But, here, ICANN treated itself as above and unbound by its own IRP

At bottom, ICANN offers no support for its view that a proceeding is quasi-judicial even though one party voted on whether to abide by its outcome, and the other party had no recourse to judicial review. Such a holding would be illogical, and completely untethered from the purpose of judicial estoppel: to protect the "integrity of the judicial process." (*Jackson*, *supra*, 60 Cal.App.4th at p. 182.) Instead, cases like *Nada* and *Eaton* should dispose of this case. (*Nada*, *supra*, 73 F. Supp. 3d at p. 1216-17; *Eaton*, *supra*, 2007 WL 1500724, at p. *5.) The IRP here was not quasi-judicial because ICANN chose whether or not to follow its result, and DCA has had no chance for judicial review.

C. DCA Did Not "Succeed" On Any Prior Position It Took.

Additionally, DCA never succeeded in any sense relevant to judicial estoppel. As ICANN concedes, the "success" element requires that the IRP panel "*adopted*" DCA's positions as true. (See ICANN Br. at 39, quoting *Jackson*, *supra*, 60 Cal.App.4th at p. 183; see also *The Swahn Grp.*, *supra*, 183 Cal.App.4th at p. 845.) Once again, that element is essential because of the underlying purpose of judicial estoppel (which ICANN ignores): to protect "judicial integrity." (*The Swahn Grp.*, *supra*, 183 Cal.App.4th at p. 846.) Even setting aside the non-judicial

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proceedings, and has blocked any chance for DCA to enforce the IRP's outcome.

nature of the IRP, if the IRP panel never adopted DCA's position, then its current positions (which are not inconsistent) introduce "no risk of inconsistent court determinations" or potential "perception that either the first or second court was misled." (*Ibid.*)

In fact, the IRP panel never adopted DCA's positions as true. As ICANN admits, the IRP panel said only that it was "assuming" the litigation waiver was valid. (ICANN Br. at 43; 1AEX632-33.) Yet courts and litigants routinely assume facts or claims for the sake of argument without adopting them as true. (E.g., *Lindh v. Murphy* (1997) 521 U.S. 320, 333 & n.7; *Seminole Tribe of Fl. v. Florida* (1996) 517 U.S. 44, 65; *People v. Taylor* (2010) 48 Cal.4th 574, 615.) And, just like the trial court, ICANN never explains how an assumption is the same as adopting a position as true. Nor could it—to assume the litigation waiver is binding is plainly to *assume* that DCA could not sue ICANN, not to *adopt* that statement as true.[17]

In an attempt to sidestep this point, ICANN again asserts that judicial estoppel is different from collateral estoppel, without

[17] As with its other arguments, ICANN suggests that this is a factual question. (See ICANN Br. at 40-41.) But what the IRP panel said is not in dispute—the only issue in dispute on this point is the legal question of whether the IRP panel's statements "adopted" DCA's positions as true in a way sufficient for judicial estoppel.

identifying any substantive legal distinction that would make a difference on this point. (ICANN Br. at 42.) Again, its quote from *Jackson* completely ignores what came next in that decision: "Judicial estoppel is designed to maintain the purity and integrity of the judicial process." (*Jackson*, *supra*, 60 Cal.App.4th at p. 182, emphasis added.) As *The Swahn Group* case explained, that concern is simply not present if the first tribunal did not adopt the party's position as true. (*The Swahn Grp.*, *supra*, 183 Cal.App.4th at p. 845-46.)[18] Thus, because the IRP did not adopt DCA's positions as true, judicial estoppel does not apply to DCA's case.

D. DCA's Positions Were Not Taken in Bad Faith.

Moreover, DCA's positions were not taken with the "bad faith or intentional wrongdoing" required for judicial estoppel. (*Lee*, *supra*, 5 Cal.App.5th at p. 630.) At bottom, judicial estoppel is a "harsh" doctrine, standing against the courts' "truth-seeking function" and need to do justice. (*Minish*, *supra*, 214 Cal.App.4th at 449.) Accordingly, judicial estoppel is meant only to ensure that parties "did not act with the intent to play fast and loose

[18] ICANN weakly notes that the IRP panel "ruled in DCA's favor on several issues." (ICANN Br. at 43.) But the question is not whether the IRP panel sided with DCA; it is whether the IRP panel adopted DCA's statements at issue as true—as ICANN concedes. (See ICANN Br. at 39, quoting *Jackson*, *supra*, 60 Cal.App.4th at p. 183.)

with the courts." (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 1018 (hereinafter *Cloud*).) It is "*not* meant to be a technical defense for litigants seeking to derail potentially meritorious claims." (*Ibid.*, emphasis added.)

But that is precisely how ICANN has sought to weaponize the doctrine here. Rather than upholding judicial integrity, applying judicial estoppel to DCA would leave DCA without any recourse to judicial review. ICANN does not dispute that DCA has had no chance for judicial review of the IRP's outcome.[19] And it has now invoked judicial estoppel to prevent DCA from suing ICANN for its wrongful post-IRP actions, meaning that DCA will never have the chance to be heard on the merits for ICANN's fraud, unfair competition, and collusion with ZACR.

ICANN only notes that DCA made its statements multiple times during the IRP, and was not ignorant about the litigation waiver's potential validity. (ICANN Br. at 61-63.) But, given the context of those statements, they do not remotely suggest that DCA "act[ed] with the intent to play fast and loose with the courts." (*Cloud*, *supra*, 67 Cal.App.4th at 1018.) Nor does it show that DCA acted in "bad faith." (*Lee*, *supra*, 5 Cal.App.5th at p.

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[19] ICANN passingly asserts that DCA could have instituted yet another IRP after the first one had ended. (ICANN Br. at 32.) But that is irrelevant and disingenuous. After seeing the first IRP's outcome so twisted by ICANN, DCA wanted only to obtain real, judicial review of ICANN's acts.

630.) Indeed, DCA's statements to the IRP were made only because ICANN had tried to manipulate and short-circuit the proceedings. (2AEX819-20; 3AEX1730; 4AEX1877-78.) As it seeks to do here, ICANN had tried to avoid any hearing on the merits, and it attempted to finish the entire IRP after the parties had submitted only preliminary briefs—without any discovery, hearing, or other procedural safeguards. (See 3AEX1730; 4AEX1915-25.)[20] And DCA's statements were based on the expectation that, if it prevailed in the IRP, then ICANN would actually permit it to proceed through the rest of the application process without fraud or unfair competition—which, of course, did not happen.

Next, ICANN claims that *Lee* is "distinguishable" because the facts in that case "hardly showed [that the plaintiff] intended to deceive the court or take unfair advantage of her opponents." (ICANN Br. at 63 n.23.) But that proposition is precisely why DCA cited *Lee* in the first place: *Lee* underscores that judicial estoppel should not apply if DCA did not "intend[] to deceive the courts or take unfair advantage of [its] opponents." (*Ibid.*) As just explained, DCA has not tried to deceive anyone or take

[20] ICANN complains that DCA made these statements without evidentiary citations in its opening brief. (ICANN Br. at 61.) But DCA did provide evidentiary citations for these propositions. (See DCA Br. at 22-23.)

unfair advantage of ICANN. To the contrary, DCA seeks only to hold ICANN accountable for its further misconduct *after* the IRP ended. That is far from the bad faith or "intent to play fast and loose with the courts that is required for . . . judicial estoppel." (*Cloud*, *supra*, 67 Cal.App.4th at p. 1018.)

II. ICANN's Cited Authorities Confirm That Judicial Estoppel Does Not Apply Here.

Moreover, ICANN's own cited authorities confirm that judicial estoppel is precluded here. ICANN relies on three cases that it claims represent "less egregious circumstances" where the courts have applied judicial estoppel. (ICANN Br. at 36-39.) But, if anything, its three cited authorities only further illuminate the strength of DCA's position. Those three cases, *Blix*, *Bucur*, and *Owens*, all involved prior representations made in actual judicial proceedings. (*Blix*, *supra*, 191 Cal.App.4th at pp. 49-51; *Bucur*, *supra*, 244 Cal.App.4th at pp. 187-89; *Owens v. Cnty. of Los Angeles* (2013) 220 Cal.App.4th 107, 122-23 (hereinafter *Owens*).) And all three cases involved parties who knew all the facts relevant to their changed positions at the time they made their initial statements—no facts or circumstances changed after their initial representations. (*Blix*, *supra*, 191 Cal.App.4th at pp. 49-51; *Bucur*, *supra*, 244 Cal.App.4th at pp. 187-89; *Owens*, *supra*, 220 Cal.App.4th at pp. 122-23.) Accordingly, all three parties were plainly acting in bad faith, and playing fast and loose with the courts. (*Blix*, *supra*, 191 Cal.App.4th at pp. 49-51; *Bucur*,

supra, 244 Cal.App.4th at pp. 187-89; *Owens*, *supra*, 220 Cal.App.4th at pp. 122-23.)

It is thus mystifying that ICANN treats these cases as talismanic. Indeed, *Owens* took pains to clarify that the party to be judicially estopped there "knew all of the facts he now claims made the election a sham when he claimed the election was a priceless benefit." (*Owens*, *supra*, 220 Cal.App.4th at p. 122.) *Blix* similarly explained that the estopped party already "believed the settlement agreement lacked material terms at the same time [it] . . . [represented] in the trial court there was an enforceable settlement agreement." (*Blix*, *supra*, 191 Cal.App.4th at p. 51.) And *Bucur* carefully made sure that the same party had initially "agreed to arbitrate their claims" in a first lawsuit, but then "refiled virtually the same case," "arising out of the same transaction nucleus of facts"—again without any apparent change in facts or law. (*Bucur*, 244 Cal.App.4th at p. 188.)

Thus, these cases only underscore when judicial estoppel is proper, and why applying it here would be inappropriate. Unlike those cases, DCA's prior statements were not made to a court; they were made to an IRP that ICANN then treated as non-binding and from which DCA has had no chance for judicial review. And, unlike those cases, DCA's prior claim did not arise out of the same facts; its current lawsuit is based on ICANN's

misconduct *after* the IRP had ended. Thus, judicial estoppel should not apply here.

III. The Equities Compel Reversal.

If nothing else, applying judicial estoppel in this case would be highly inequitable and unjust. Because the trial court never even considered whether the equities justified the harsh medicine of judicial estoppel, this Court should reverse. As ICANN admits, judicial estoppel is an equitable discretionary doctrine "even where all [the] necessary elements are present." (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 132 (hereinafter *Gottlieb*); ICANN Br. at 64.) Yet, oddly, ICANN then insists that the trial court somehow "implicitly conduct[ed]" that equitable analysis by "weighing the . . . *Jackson* factors." (ICANN Br. at 65). But neither the trial court nor ICANN explain how that hypothetical, overlapping, and "implicit" analysis remotely satisfies the requirement that a court separately consider the equities—let alone how applying judicial estoppel is fair or just here.

On the contrary, applying judicial estoppel would be manifestly unjust here. At every turn, ICANN has raised procedural defenses to avoid decisions on the merits. It tried to short-circuit the IRP by delegating .AFRICA before DCA was even heard. (2AEX819-20.) It then tried to railroad the IRP process by insisting that the IRP required only a single set of preliminary briefs, and no discovery, hearings, or witnesses.

(3AEX1730; 4AEX1915-25.) When that failed, ICANN found new ways to throw out DCA's application: colluding with ZACR, defrauding DCA, and engaging in unfair competition. (See, e.g., 2AEX1614-16.) And when DCA sued in court, ICANN raised both judicial estoppel and the litigation waiver to prevent DCA from being heard on the merits.

Thus, no miscarriage of justice would occur from DCA being heard on the merits. Instead, it is plain that ICANN has used judicial estoppel as one of an arsenal of "technical defense[s]" it has employed "to derail" DCA's claims—completely against the purpose of judicial estoppel. (See *Cloud*, *supra*, 67 Cal.App.4th at p. 1018.) Conversely, DCA has sought all along to hold ICANN accountable, and to obtain real, binding relief that ICANN could not twist or distort. Thus, applying judicial estoppel was a manifest abuse of discretion, and DCA should be given the chance to prove its claims on their merits in court.

IV. Neither ICANN Nor ZACR Should Have Been Awarded Costs.

ICANN concedes that the costs award rises or falls with the underlying judgment. (ICANN Br. at 65.) It is black letter law that "[a]n order awarding costs falls with a reversal of the judgment on which it is based." (See *Merced Cnty. Taxpayers' Ass'n v. Cardella* (1990) 218 Cal.App.3d 396, 402 (hereinafter *Merced Cnty.*).) Thus, because this Court should reverse on the merits, it should reverse the costs order in its entirety.

On March 31, 2021, ZACR filed a brief, arguing in the face of that well-settled principle that it was entitled to costs even if the judgment is reversed. But ZACR long ago defaulted on any such claim. Indeed, under this Court's rules, ZACR's brief is wildly late and should not be considered. DCA filed its opening brief on October 30, 2020. Under California Rule of Court 8.212(a)(2), ZACR had 30 days after that date to file its brief. But that date came and went without ZACR filing a brief or requesting any extension to its deadline. Although ICANN asked for two extensions to file *its* brief, ICANN's extension requests never mentioned ZACR, and ZACR never requested one. (See ICANN Extension Request, filed Nov. 12, 2020; ICANN Extension Request, filed Jan. 27, 2021.) Thus, ZACR's brief is late by *three months*.[21] That blatant procedural default is particularly inexcusable given that ZACR's only argument in its brief rests on a highly technical (and incorrect) forfeiture theory. This Court should not countenance that delay, and should disregard ZACR's brief. (See *Estate of Butler* (1988) 205 Cal.App.3d 311, 314; 9 Witkin, Cal. Proc. 5th Appeal § 719 (2020).)

In all events, ZACR's brief is also wrong on the merits. DCA did not forfeit any argument that the full cost award must

[21] Indeed, ZACR had not even filed a notice of appearance or taken part in the appeal *at all* before March 3.

be reversed if the underlying judgment is reversed. (ZACR Br. at 6-7.) On the contrary, DCA's opening brief argued that, because the underlying judgment should be reversed, the cost award should in turn be reversed. That simple legal principle—that a cost award cannot stand if the underlying judgment is reversed—is hardly party-specific. As noted above, until its out-of-time brief, ZACR had not filed an appearance or participated in this appeal at all. And neither of ZACR's two cited cases hold that a party's argument is limited to the respondents noted in the relevant section of a brief. (See *ibid.*, citing *Safeway Wage & Hour Cases* (2019) 43 Cal.App.5th 665, 687 n.9 (hereinafter *Safeway Wage*); *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 686 (hereinafter *Paulus*).) Nor is that how forfeiture works. To the contrary, ZACR's own cases confirm that forfeiture operates at the level of "arguments" and "issues," such as whether certain evidence was hearsay. (See *Safeway Wage*, *supra*, 43 Cal.App.5th at p. 687 n.9; *Paulus*, *supra*, 139 Cal.App.4th at p. 686.)

On its face, DCA's opening brief made perfectly clear that the "*order* awarding costs [must] fall[] with a reversal of the judgment on which it is based." (DCA Br. at 67, quoting *Merced Cnty.*, *supra*, 218 Cal.App.3d at p. 402, emphasis added.) Thus, it has not forfeited anything as to the cost award. DCA argued in its opening brief that the costs order should fall if the judgement

is reversed; that argument applies equally to ZACR's untimely defense of the costs award.

CONCLUSION

For all the foregoing reasons, DCA respectfully requests that this Court reverse the decision below, reverse the related costs award, and allow DCA to litigate its claims on the merits at trial.

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CERTIFICATE OF COMPLIANCE

Appellate counsel herby certifies, pursuant to California Rules of Court, Rule 8.204(c)(1), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 7,572 words, exclusive of the materials stated in Rule 8.204(c)(3), which is less than the 14,000 words permitted by this rule. Counsel relied on the word count of the computer program used to prepare this brief.

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