

# **EXHIBIT A**

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**FILED**  
Superior Court of California  
County of Los Angeles

OCT 03 2019

Sherri A. Carter, Executive Officer/Clerk  
By K. Mason Deputy  
K. Mason

**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

**~~PROPOSED~~ FINAL JUDGMENT**

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

**~~PROPOSED~~ FINAL JUDGMENT**

1 On January 20, 2016, plaintiff DotConnectAfrica Trust (“DCA”) filed its complaint in this  
2 action against defendant Internet Corporation for Assigned Names and Numbers (“ICANN”). On  
3 February 26, 2016, DCA filed a First Amended Complaint (“FAC”), which alleges causes of  
4 action for (1) breach of contract, (2) intentional misrepresentation, (3) negligent  
5 misrepresentation, (4) fraud and conspiracy to commit fraud, (5) unfair competition (violation of  
6 Cal. Bus. & Prof. Code § 17200), (6) negligence, (7) intentional interference with contract,  
7 (8) confirmation of IRP Award, (9) declaratory relief, (10) declaratory relief, and (11) declaratory  
8 relief. On August 1, 2016, ZA Central Registry (“ZACR”) successfully moved to intervene as a  
9 defendant; neither DCA nor ICANN has asserted any claims against ZACR.

10 On August 9, 2017, the above-entitled Court granted ICANN’s motion for summary  
11 judgment on the first, sixth, eighth, ninth, and eleventh causes of action on the ground that they  
12 are barred by a covenant not to sue, waiver, and release provision in ICANN’s gTLD Applicant  
13 Guidebook. The Court also ordered that the Court would hold a bifurcated court trial on the issue  
14 of ICANN’s affirmative defense of judicial estoppel as to the remaining causes of action.

15 On February 6, 7, and 8, 2019, the Court conducted a nonjury trial on phase one of  
16 bifurcated trial on the issue of ICANN’s affirmative defense of judicial estoppel. The Court, after  
17 considering the pleadings, evidence, and arguments presented by the parties thereon, found that  
18 “DCA’s successfully taking the first position in the IRP proceeding and gaining significant  
19 advantages in that proceeding as a result thereof, and then taking the second position that its  
20 totally inconsistent in this lawsuit, presents egregious circumstances that would result in a  
21 miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA  
22 from taking the second position in this lawsuit. The court therefore exercises its discretion to find  
23 in favor of ICANN, and against DCA, on ICANN’s affirmative defense of judicial estoppel and to  
24 bar DCA from bringing or maintaining its claims against ICANN alleged in the FAC in this  
25 lawsuit.” The Court’s findings, rulings, statement of decision and orders on the claims and issues  
26 presented for trial are set forth in the Court’s August 22, 2019 Order (“Order”), attached hereto as  
27 *(Phase One) on Affirmative Defense of Judicial Estoppel, filed October 3, 2019.*  
28 *Exhibit A.* That Order resolves all remaining causes of action in the litigation.

*Statement of Decision*

10/04/2019

*RS3*

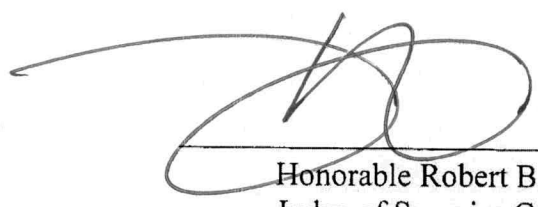
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**IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT** that judgment <sup>is</sup> ~~be~~  
entered in favor of ICANN and against DCA on all claims, that DCA takes nothing by its FAC,  
that ICANN <sup>is</sup> ~~be~~ permitted to recover its costs of suit (to be determined following ICANN's  
application to the Court), and that the FAC <sup>is</sup> ~~be~~ dismissed with prejudice.

RSB

**IT IS SO ORDERED.**

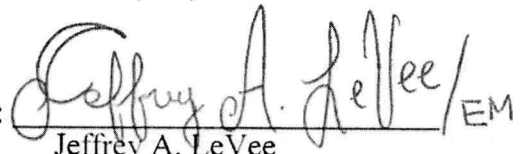
Dated: \_\_\_\_\_, 2019



Honorable Robert B. Broadbelt III  
Judge of Superior Court

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INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

NAI-1508783132

10/04/2019

# **EXHIBIT B**

OCT 03 2019

Sherri A. Carter, Executive Officer/Clerk  
By K. Mason Deputy

1  
2 **SUPERIOR COURT OF CALIFORNIA**  
3 **COUNTY OF LOS ANGELES – CENTRAL DISTRICT**  
4 **DEPARTMENT 53**

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8 DOTCONNECTAFRICA TRUST,

9 Plaintiff,

10 vs.

11  
12 INTERNET CORPORATION FOR  
13 ASSIGNED NAMES AND NUMBERS, et  
14 al.,

15 Defendants.

Case No.: BC607494

Hearing Date: August 22, 2019

Time: 10:00 a.m.

**STATEMENT OF DECISION ON  
BIFURCATED TRIAL (PHASE ONE) ON  
AFFIRMATIVE DEFENSE OF  
JUDICIAL ESTOPPEL**

16 On January 20, 2016, plaintiff DotConnectAfrica Trust (“DCA”) filed its complaint in  
17 this action against defendant Internet Corporation for Assigned Names and Numbers  
18 (“ICANN”). On February 26, 2016, DCA filed a First Amended Complaint (“FAC”) against  
19 defendants ICANN and ZA Central Registry, which alleges cause of action for (1) breach of  
20 contract, (2) intentional misrepresentation, (3) negligent misrepresentation, (4) fraud and  
21 conspiracy to commit fraud, (5) unfair competition (violation of Cal. Bus. & Prof. Code §  
22 17200), (6) negligence, (7) intentional interference with contract, (8) confirmation of IRP Award,  
23 (9) declaratory relief, (10) declaratory relief, and (11) declaratory relief.

24 On August 9, 2017, the court granted defendant ICANN’s motion for summary judgment  
25 on the first, sixth, eighth, ninth, and eleventh causes of action on the ground that they are barred  
26 by a covenant not to sue, waiver, and release provision (“Covenant”) in ICANN’s gTLD  
27 Applicant Guidebook (Ex. 2, p. 334, § 6). (Order Re: ICANN’s Motion for Summary Judgment,  
28 filed August 9, 2017, pp. 5, 10.) The court denied ICANN’s motion for summary judgment as to

1 the second, third, fourth, fifth, and tenth causes of action because the Covenant is not enforceable  
2 as to those claims pursuant to Civil Code section 1668 since they are based on alleged fraud or  
3 willful injury to the property of another. (Civ. Code, §1668 [“All contracts which have for their  
4 object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful  
5 injury to the person or property of another, or violation of law, whether willful or negligent, are  
6 against the policy of the law.”].) (August 9, 2017 Order, pp. 5, 10.) However, the court ordered  
7 that the court would hold a bifurcated court trial on the issue of defendant ICANN’s affirmative  
8 defense of judicial estoppel as to the remaining causes of action. (August 9, 2017 minute order.)

9 On February 6, 7, and 8, 2019, the court conducted a nonjury trial on phase one of a  
10 bifurcated trial on the issue of defendant ICANN’s affirmative defense of judicial estoppel.

11 After each party rested its case and the presentation of evidence was completed on  
12 February 8, 2019, the court ordered the parties to present closing arguments by written briefs to  
13 be filed and served no later than March 1, 2019. On March 1, 2019, the parties filed their closing  
14 argument briefs. The court continued the bifurcated court trial on the issue of defendant  
15 ICANN’s affirmative defense of judicial estoppel to August 22, 2019.

16 On August 22, 2019, the court took the bifurcated court trial on the issue of defendant  
17 ICANN’s affirmative defense of judicial estoppel under submission and issued its written  
18 Tentative Decision on Bifurcated Trial (Phase One) on Affirmative Defense of Judicial Estoppel,  
19 which stated that it is the court’s proposed statement of decision, subject to a party’s objection  
20 under subdivision (g) of California Rules of Court, rule 3.1590. On September 6, 2019, DCA  
21 filed its objection to the court’s proposed statement of decision. On September 12, 2019,  
22 ICANN filed its response to DCA’s objection. On October 3, 2019, the court issued an order  
23 ruling on DCA’s objection.

24 After considering the pleadings, evidence, and arguments presented by the parties,  
25 including DCA’s objection to the court’s proposed statement of decision and ICANN’s response  
26 thereto, the court hereby announces its final decision on the trial of this matter, and makes the  
27 following findings, rulings, and orders on the claims and issues presented for trial. This final  
28 decision is the court’s statement of decision.

1 **DEFENDANT ICANN’S EVIDENTIARY OBJECTIONS TO PLAINTIFF DCA’S**  
2 **CLOSING TRIAL BRIEF**

3 On March 28, 2019, defendant ICANN filed “Defendant ICANN’s Evidentiary  
4 Objections to Plaintiff DCA’s Closing Trial Brief and [Proposed] Order.” The court orders that  
5 document stricken as unauthorized because it violates the court’s order that closing arguments  
6 are to be submitted by written briefs, not to exceed 20 pages, no later than March 1, 2019.  
7 (February 8, 2019 minute order.) ICANN’s evidentiary objections to DCA’s closing trial brief  
8 are closing arguments that are untimely and which exceed the 20-page limit on closing argument  
9 briefs since ICANN previously filed a 20-page closing argument brief on March 1, 2019.

10 **DISCUSSION**

11 Defendant ICANN contends that plaintiff DCA’s remaining causes of action in the FAC  
12 are barred by the doctrine of judicial estoppel because, in a prior proceeding called an  
13 Independent Review Process (“IRP”) it instituted against ICANN, DCA asserted repeatedly that  
14 it cannot sue ICANN in court in any way related to DCA’s application for the generic top-level  
15 domain .AFRICA because of the Covenant, and DCA prevailed on that position numerous times  
16 in the IRP proceeding.

17 “The doctrine of judicial estoppel, sometimes called the doctrine of “preclusion of  
18 inconsistent positions” [citation], “precludes a party from gaining an advantage by taking one  
19 position, and then seeking a second advantage by taking an incompatible position. [Citations.]  
20 The doctrine’s dual goals are to maintain the integrity of the judicial system and to protect parties  
21 from opponents’ unfair strategies. [Citation.] Application of the doctrine is discretionary.”  
22 [Citation.]” (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4<sup>th</sup> 39, 47 [citing *Aguilar*  
23 *v. Lerner* (2004) 32 Cal.4<sup>th</sup> 974, 986].) “The doctrine applies when ‘(1) the same party has taken  
24 two positions; (2) the positions were taken in judicial or quasi-judicial administrative  
25 proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted  
26 the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first  
27 position was not taken as a result of ignorance, fraud, or mistake.” (*Blix Street Records, Inc. v.*  
28 *Cassidy, supra*, 191 Cal.App.4<sup>th</sup> at p. 47 [citations and internal quotations omitted].)



1 “Judicial estoppel is an equitable doctrine to protect against fraud on the courts. It has  
2 been said that ‘[b]ecause of its harsh consequences, the doctrine should be applied with caution  
3 and limited to egregious circumstances.’” (*Id.* at p. 47 [citations omitted].) “Judicial estoppel  
4 may be based on a position taken by a party or party’s legal counsel.” (*Id.* at p. 48 [citation  
5 omitted].)

6 **1. First Factor: The Same Party Has Taken Two Positions**

7 In the IRP proceeding, DCA made numerous statements to the IRP Panel that, because of  
8 the Covenant, it could not sue ICANN in court for acts or omissions with respect to DCA’s  
9 application.

10 First, to support its argument that the IRP should allow document discovery, DCA stated  
11 in its April 20, 2014 letter brief to the IRP Panel that “these proceedings will be the first and last  
12 opportunity that DCA Trust will have to have its rights determined by an independent body.”  
13 (Ex. 39, p. 2; Stipulation of Facts for Judicial Estoppel Trial, filed January 17, 2019 (“Stip.”),  
14 Fact 29.)

15 Second, to support its argument for extended briefing and a hearing with live witness  
16 testimony, DCA stated in its May 5, 2014 Submission on Procedural Issues: “It is critical to  
17 understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by  
18 courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and  
19 conditions, including a nearly page-long string of waivers and releases. Among those conditions  
20 was the waiver of all its rights to challenge ICANN’s decision on DCA’s application in court.  
21 For DCA and other gTLD applicants, the IRP is their only recourse; no other remedy is  
22 available.” (Ex. 15, p. 14, ¶ 22; Stip., Fact 24.)

23 Third, to support its request that the IRP Panel apply a *de novo* review standard, DCA’s  
24 attorney stated to the IRP Panel: “Now, what I think should inform your decision about an  
25 objective standard review, or what we might call ‘a de novo standard review,’ is the following:  
26 This is the only opportunity that a claimant has for independent and impartial review of  
27 ICANN’s conduct, the only opportunity.” (Ex. 35, p. 22:16-22.) DCA’s attorney further stated  
28

1 to the IRP Panel: “We cannot take you to Court. We cannot take you to arbitration. We can’t  
2 take you anywhere. We can’t sue you for anything.” (Ex. 36, p. 30:2-5.)

3 Fourth, to support its request for a declaration that the IRP is binding, DCA stated in its  
4 May 29, 2014 letter brief to the IRP Panel: “[A]s a condition of applying for a gTLD, DCA  
5 unilaterally surrendered *all of its rights to challenge ICANN in court or any other forum outside*  
6 *of the accountability mechanisms in ICANN’s Bylaws*. As a result, the IRP is the sole forum in  
7 which DCA can seek independent, third-party review of the actions of ICANN’s Board of  
8 Directors. If the Panel were to determine that this IRP was non-binding, DCA would effectively  
9 be deprived of any remedy.” (Ex. 17, pp. 2-3 [emphasis in original].)

10 Fifth, in support of its request for emergency interim relief in the IRP proceeding, DCA  
11 stated in its request: “DCA has a right to be heard in a meaningful way in the only proceeding  
12 available to review the ICANN Board’s decisions.” (Ex. 11, p. 18.)

13 Sixth, in support of its request that ICANN pay DCA’s costs in the IRP proceeding, DCA  
14 stated in its July 1, 2015 letter brief to the IRP Panel that the IRP process “is the only  
15 independent accountability mechanism available to parties such as DCA.” (Ex. 31, p. 3.)

16 In contrast to the position taken by DCA in the IRP, DCA has now taken the position that  
17 it can sue ICANN in court for acts or omissions with respect to DCA’s application by filing this  
18 lawsuit against ICANN. Thus, the court finds that DCA has taken two positions on this issue.

19 **2. Second Factor: The Positions Were Taken in Judicial or Quasi-Judicial**  
20 **Proceedings**

21 As discussed above, in this lawsuit, DCA has taken the position that it can sue ICANN in  
22 court for acts or omissions with respect to DCA’s application. Thus, DCA’s second position was  
23 clearly taken in a judicial proceeding.

24 But DCA and ICANN dispute whether DCA’s first position was taken in a quasi-judicial  
25 proceeding. ICANN contends that the IRP proceeding was a quasi-judicial proceeding. DCA  
26 contends that it was not.

27 For judicial estoppel to apply, the “prior inconsistent assertion need not be made in a  
28 court of law” (*People ex rel. Sneddon v. Torch Energy Servs., Inc.* (2002) 102 Cal.App.4<sup>th</sup> 181,

1 189), but can be made in a “quasi-judicial’ proceeding . . .” (*Nada Pacific Corp. v. Power Eng’g*  
2 *and Mfg.* (N.D. Cal. 2014) 73 F.Supp.3d 1206, 2016). As DCA points out in its closing  
3 argument brief, while there is no clear definition of what qualifies as “quasi-judicial,” courts  
4 usually require that the proceeding have “the formal hallmarks of a judicial proceeding such as:  
5 the ability to call witnesses, the swearing of an oath of truthfulness by the parties, and a neutral  
6 party presiding over the hearing.” (*Tri-Dam v. Schediwy* (E.D. Cal. Mar.7, 2014) No. 1:11-CV-  
7 01141-AWI-MJS, 2014 WL 897337, at \*6.)

8 Here, the evidence establishes that the IRP proceeding had all of the hallmarks of a quasi-  
9 judicial proceeding, which DCA does not dispute except for the issue of whether the IRP was  
10 binding. The IRP was conducted pursuant to ICANN’s Bylaws, the *International Dispute*  
11 *Resolution Procedures* (“ICDR Rules”) of the International Centre for Dispute Resolution  
12 (“ICDR”), the *Supplementary Procedures for ICANN Independent Review Process*, and the  
13 procedural orders issued by the IRP Panel. (Stip., Fact 12.) The ICDR is the international  
14 division of the American Arbitration Association. (Stip., Fact 12.) The IRP Panel consisted of  
15 three panelists, one appointed by each of the parties, and a third appointed by the ICDR, to hear  
16 the dispute. (Stip., Fact 13.) During the IRP proceedings, the parties conducted discovery  
17 through the exchange of documents, and the parties submitted written briefs and written witness  
18 declarations to the IRP Panel. (Stip., Facts 14, 15.) The IRP included a two-day evidentiary  
19 hearing, at which both parties made opening statements, closing arguments, and called witnesses  
20 who testified under oath, including cross-examination by the IRP Panel and the other party’s  
21 counsel. (Stip., Facts 16, 17.) The IRP Panel determined, consistent with DCA’s arguments to  
22 the IRP Panel, that its decisions on procedural issues and on the merits of the case were binding  
23 on the parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.)

24 In its closing argument brief, DCA relies on *Nada Pacific Corp. v. Power Eng’g and*  
25 *Mfg., supra*, 73 F.Supp.3d at p. 2016, to support its argument that the IRP proceeding was not a  
26 quasi-judicial proceeding. In *Nada*, the district court found that the Dispute Review Board  
27 proceeding at issue in that case “had many of the hallmarks of a judicial or quasi-judicial-  
28 proceeding: it was adversarial; the parties submitted briefs making arguments and citing to

1 evidence; the parties could respond to each other's arguments; the parties could submit the  
2 opinions of experts; etc." (*Ibid.*) But the court found that "it lacked the most important hallmark  
3 – the ability to make a decision" and that it "was limited to issuing a nonbinding (albeit written)  
4 recommendation that [the parties] could accept or reject." (*Id.* at p. 2017.) Thus, the court  
5 concluded that the proceeding was not quasi-judicial and did not justify invoking judicial  
6 estoppel. (*Id.* at p. 2017.)

7 Here, by contrast, the IRP Panel could and did make a decision as to whether ICANN had  
8 acted inconsistently with its Bylaws, Articles of Incorporation, the New gTLD Applicant  
9 Guidebook. (Ex. 4, p. 15, Art. IV, § 3.11(c) ["The IRP Panel shall have the authority to . . .  
10 declare whether an action or inaction of the Board was inconsistent with the Articles of  
11 Incorporation or Bylaws[.]"]; Ex. 4, p. 17, Art. IV, § 3.21 ["The declarations of the IRP Panel,  
12 and the Board's subsequent action on those declarations, are final and have precedential value."];  
13 Ex. 33, p. 61, ¶ 148.) The IRP Panel determined that its decisions were binding. (Ex. 18, p. 32,  
14 ¶ 131; Stip., Fact 34.) Finally, the IRP Panel exercised its authority by making a decision on the  
15 merits of the dispute regarding the ICANN Board's actions: "[T]he Panel declares that both the  
16 actions and inactions of the Board with respect to the application of DCA Trust relating to the  
17 .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN."  
18 (Ex. 33, p. 61, ¶ 148.)

19 DCA argues that, because the ICANN Board had to vote on the IRP Panel's  
20 recommendations, the IRP was not a quasi-judicial proceeding. The court disagrees. Whether  
21 ICANN's Board was required to vote to take action to implement the IRP Panel's  
22 recommendations does not change the fact that the IRP Panel's decision was binding on both  
23 parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.) Moreover, the fact that a vote by the Board may be  
24 required to effectuate organizational action does not undermine the quasi-judicial nature of the  
25 proceeding that led to that vote.

26 DCA also argues that, because the July 2015 ICANN Board Resolution contained  
27 additional resolutions about actions other than the recommendations specifically set forth in the  
28 IRP Panel's Final declaration, the ICANN Board did not treat the Final declaration as binding.

1 The court disagrees. The Board Resolution cannot change the fact that the IRP Panel’s decision  
2 was binding on the parties. (Ex. 18, p. 32, ¶ 131; Stip., Fact 34.) Moreover, the additional  
3 language in ICANN’s Resolution was not inconsistent with the IRP Panel’s Final Declaration.

4 The court therefore finds that the IRP was a quasi-judicial proceeding for purposes of  
5 applying the doctrine of judicial estoppel.

6 For the reasons set forth above, the court finds that both the first and second positions  
7 were taken by DCA in judicial or quasi-judicial proceedings.

8 **3. Third Factor: The Party Was Successful in Asserting the First Position**

9 The court finds that, as a result of DCA’s assertions that it could not sue ICANN because  
10 of the Covenant, the IRP Panel ruled in DCA’s favor on the seven issues discussed above: (1)  
11 DCA’s request for document discovery, (2) DCA’s request for extended briefing, (3) DCA’s  
12 request for live witness testimony at the IRP hearing, (4) DCA’s request for a *de novo* standard  
13 of review, (5) DCA’s request for a declaration that the IRP is binding, (6) DCA’s request for  
14 emergency interim relief, and (7) DCA’s request for an award of its costs in the IRP proceeding.  
15 The evidence demonstrates that, in ruling on these issues in DCA’s favor, the IRP Panel relied on  
16 and adopted DCA’s position that it could not sue ICANN because of the Covenant.

17 For example, in ruling that it had the power to interpret and determine IRP procedure, the  
18 IRP Panel stated: “The avenues of accountability for applicants that have disputes with ICANN  
19 do *not* include resort to the courts. Applications for gTLD delegations are governed by  
20 ICANN’s Guidebook, which provides that applicants waive all right to resort to the court:  
21 [quoting Covenant].” (Ex. 18, p. 10, ¶ 39.) The IRP Panel then stated: “Thus, assuming that the  
22 foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate  
23 ‘accountability’ remedy for applicants is the IRP.” (Ex. 18, p. 10, ¶ 40.) The Panel went on to  
24 conclude at the end of the document: “*Based on the foregoing* and the language and content of  
25 the IRP Procedure, the Panel issues the following procedural directions: (i) The Panel orders a  
26 reasonable documentary exchange . . . ; (ii) The Panel permits the Parties to benefit from  
27 additional filings and supplemental briefing going forward . . . .” (Ex. 18, p. 18, ¶ 130  
28 [emphasis added].) In the next paragraph, the Panel stated: “*Based on the foregoing* and the

1 language and content of the IRP Procedure, the Panel concludes that this Declaration and its  
2 future Declaration on the merits of this case are binding on the Parties.” (Ex. 18, p. 18, ¶ 131  
3 [emphasis added].)

4 The IRP Panel repeated the same language about applicants that have disputes with  
5 ICANN not having resort to the courts because of the Covenant when it granted DCA’s request  
6 to have witnesses appear and give live testimony at the IRP hearing (Ex. 32, pp. 5-6, 9, ¶¶ 15, 37  
7 [“Based on the above, the Panel requires all three witnesses in the IRP to be physically present at  
8 the hearing . . .” (emphasis added)]), and when it concluded that it would apply a *de novo*  
9 standard of review in the IRP proceeding and awarded DCA its costs in the IRP, as DCA had  
10 requested (Ex. 33, pp. 22, 62, ¶¶ 72, 73, 76, 150).

11 The court therefore finds that DCA was successful in asserting in the IRP proceeding the  
12 first position that, because of the Covenant, it could not sue ICANN.

13 **4. Fourth Factor: The Two Positions Are Totally Inconsistent**

14 The court finds that the two positions taken by DCA are totally inconsistent. As ICANN  
15 asserts in its closing argument brief: “DCA’s lawsuit against ICANN is totally and logically  
16 inconsistent with DCA’s first position that it could not sue ICANN. . . . DCA’s repeated  
17 arguments that it cannot sue ICANN in any way related to its application, followed by DCA’s  
18 lawsuit against ICANN specifically related to its application, are two positions that are  
19 irreconcilable and mutually exclusive.” (ICANN’s Post-Trial Brief (Judicial Estoppel Bench  
20 Trial), filed March 1, 2019, p. 21:8-14.) The court agrees with ICANN’s analysis on this issue.

21 **5. Fifth Factor: The First Position Was Not Taken as a Result of Ignorance,  
22 Fraud, or Mistake**

23 The court finds that the first position (that DCA could not sue ICANN in court for acts or  
24 omissions with respect to DCA’s application because of the Covenant) was not taken by DCA as  
25 a result of ignorance, fraud, or mistake.

26 First, as set forth above in the court’s discussion of the first factor, the evidence  
27 establishes that DCA made at least seven separate statements to the IRP Panel taking the position  
28 that, because of the Covenant, DCA could not sue ICANN in court in any way related to DCA’s

1 application. Thus, the first position was not taken by DCA in an isolated or off-the-cuff remark  
2 by DCA or its attorneys made out of ignorance or mistake, but instead in repeated statements  
3 made at different times throughout the IRP procedure as a consistent strategic position adopted  
4 by DCA to support its requests that the IRP Panel rule in its favor on seven separate issues.  
5 There is no indication from the evidence presented that DCA took the first position as a result of  
6 ignorance, fraud, or mistake. (*See Blix Street Records, Inc. v. Cassidy, supra*, 191 Cal.App.4<sup>th</sup> at  
7 p. 47 [“There is no indication that [plaintiff] took the first position – that the contract was  
8 enforceable – as a result of ignorance, fraud, or mistake.”]; *Bucar v. Ahmad* (2016) 244  
9 Cal.App.4<sup>th</sup> 175, 188 [“Appellants made no showing that their stipulation to arbitrate, with  
10 knowledge and consent of their former attorney, was the result of fraud, ignorance, or  
11 mistake.”].)

12 Second, DCA argues that it “was ignorant or mistaken as to the scope of the litigation  
13 waiver.” (Plaintiff DCA’s Closing Trial Brief, filed March 1, 2019, p. 12:7-8.) But “[t]he law is  
14 clear that legal advice and ignorance of the law are not defenses to judicial estoppel.” (*Galín v.*  
15 *Internal Revenue Service* (D. Conn. 2008) 563 F. Supp.2d 332, 341; *see also Carr v. Beverly*  
16 *Health Care & Rehab. Servs., Inc.* (N.D. Cal. Nov. 5, 2013) No. C-12-2980 EMC, 2013 WL  
17 5946364, at \*6 [for purposes of judicial estoppel, “‘ignorance of the law is no excuse.’  
18 Particularly where, as here, [plaintiff] was represented by counsel . . .”].) Moreover, the  
19 evidence establishes that DCA’s CEO, Sophia Bekele, submitted a public comment from DCA’s  
20 email address to ICANN on Module 6 of the gTLD Applicant Guidebook in 2009 – three years  
21 before DCA submitted its application – in which she noted that the Covenant might be  
22 unenforceable: “In many legal jurisdictions forgoing the right to sue or challenge another party  
23 (in this case ICANN on application issues) is illegal in itself. . . . [¶] Not sure if enforceable.”  
24 (Ex. 60; February 6, 2019 Reporter’s Transcript of Proceedings, p. 73:18; February 7, 2019  
25 Reporter’s Transcript of Proceedings, pp. 236:28-237:24, 238:26-243:21.)

26 Third, DCA also argues that its first position was taken as a result of ignorance or  
27 mistake because, at the time DCA took that position in the IRP proceeding, DCA was not aware  
28 that the court (Judge Halm) in this lawsuit would later find that the Covenant did not bar claims

1 for fraud or willful injury to property. But, as ICANN argues in its closing argument brief:  
2 “Whether DCA was unaware that a subsequent court might find the Covenant unenforceable as  
3 to certain types of claims is irrelevant to judicial estoppel, as *Blix* makes clear. *See Blix*, 191 Cal.  
4 App. 4<sup>th</sup> at 49-51. In *Blix*, the parties represented to the court that they had reached a settlement,  
5 and based on that representation, the court dismissed the case. *Id.* One of the parties thereafter  
6 retained new counsel, who claimed the settlement was unenforceable. *Id.* The court of appeal  
7 held that, even though the settlement was possibly unenforceable as a matter of law, the party  
8 was judicially estopped from denying the settlement’s enforceability because the party had  
9 represented to the trial court that the case had settled, resulting in the trial court dismissing the  
10 case. *Id.* At 51. Thus, DCA did not need to be correct that the Covenant barred lawsuits against  
11 ICANN in order for it to be estopped from taking an opposite position at a later date.”

12 (ICANN’s Post-Trial Brief (Judicial Estoppel Bench Trial), filed March 1, 2019, pp. 17:17-18:7.)

13 The court agrees with ICANN’s analysis of this issue.

14 Finally, the fact that DCA’s statements made in support of the first position in the IRP  
15 proceeding were made by DCA’s attorneys also does not establish ignorance or mistake on the  
16 part of DCA. As set forth above, “[j]udicial estoppel may be based on a position taken by a  
17 party or party’s counsel.” (*Blix Street Records, Inc. v. Cassidy, supra*, 191 Cal.App.4<sup>th</sup> at p. 48.)

18 **CONCLUSION**

19 For the reasons set forth above, the court finds that DCA’s successfully taking the first  
20 position in the IRP proceeding and gaining significant advantages in that proceeding as a result  
21 thereof, and then taking the second position that its totally inconsistent in this lawsuit, presents  
22 egregious circumstances that would result in a miscarriage of justice if the court does not apply  
23 the doctrine of judicial estoppel to bar DCA from taking the second position in this lawsuit. The  
24 court therefore exercises its discretion to find in favor of ICANN, and against DCA, on  
25 ICANN’s affirmative defense of judicial estoppel and to bar DCA from bringing or maintaining  
26 its claims against ICANN alleged in the FAC in this lawsuit.

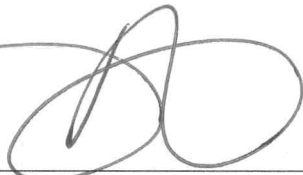


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The court directs the clerk to give notice of this ruling.

IT IS SO ORDERED.

DATED: October 3, 2019



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Robert B. Broadbelt III  
Judge of the Superior Court

1 **PROOF OF SERVICE**

2 I, Diane Sanchez, declare:

3 I am a citizen of the United States and employed in Los Angeles County, California. I am  
4 over the age of eighteen years and not a party to the within-entitled action. My business address  
5 is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071.2300. On October 10,  
6 2019, I served a copy of the within document(s):

7 **NOTICE OF ENTRY OF FINAL JUDGMENT**

- 8  by placing the document(s) listed above in a sealed envelope with postage thereon  
9 fully prepaid, in the United States mail at Los Angeles, California addressed as set  
10 forth below.
- 11  by placing the document(s) listed above in a sealed Federal Express envelope and  
12 affixing a pre-paid air bill, and causing the envelope to be delivered to a Delivery  
13 Service agent for delivery.
- 14  by causing to be personally delivered the document(s) listed above to the person(s)  
15 at the address(es) set forth below as noted
- 16  by transmitting via e-mail or electronic transmission the document(s) listed above  
17 to the person(s) at the e-mail address(es) set forth below.

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28 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 October 10, 2019, at Los Angeles, California.

  
Diane Sanchez