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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES, CENTRAL DISTRICT

16 DOTCONNECTAFRICA TRUST,
17 Plaintiff,

18 v.

19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS, *et*
21 *al.*,
22 Defendants.

CASE NO. BC607494

Assigned to Hon. Howard L. Halm

ICANN'S REPLY IN SUPPORT OF
MOTION FOR SUMMARY
JUDGMENT

Date: August 9, 2017
Time: 8:30 a.m.
Dept: 53

Complaint Filed: January 20, 2016

RESERVATION ID: 170308201420

1 **INTRODUCTION**

2 ICANN’s Motion for Summary Judgment (“Motion”) is based on two independent and
3 straightforward grounds: (1) the New gTLD Applicant Guidebook’s Covenant Not To Sue
4 (“Covenant”) is enforceable and bars DCA’s lawsuit because DCA’s claims “arise out of or relate
5 to” the processing of its application for .AFRICA; and (2) DCA’s lawsuit is barred by the
6 doctrine of judicial estoppel given that DCA successfully argued that the IRP was DCA’s only
7 means to seek redress for ICANN’s actions as the Covenant barred DCA from filing a lawsuit,
8 but then reversed its position and filed this lawsuit.

9 In opposition to the Motion, DCA repeats the same arguments it made in its earlier
10 motions for preliminary injunction¹ (both of which it lost), including a deluge of sweeping,
11 outlandish, and unsupported accusations of collusion, conspiracy, and deceit against ICANN,
12 ZACR and the African Union Commission – essentially, everyone involved in the new gTLD
13 application process except DCA. DCA’s Opposition, however, ignores or often flat out
14 contradicts the undisputed factual history, DCA’s own admissions, and this Court’s prior rulings.
15 There truly are no disputed facts that should prevent the entry of summary judgment.

16 Cutting through the obfuscation, the undisputed facts are as follows. When DCA applied
17 for .AFRICA, DCA agreed, like all new gTLD applicants, to be bound by the Covenant. The
18 Covenant provides several alternative dispute resolution mechanisms and contains an absolute
19 promise not to file litigation against ICANN in any way related to the application. When its
20 application was first halted, DCA utilized two of these mechanisms, including initiating an
21 Independent Review Process (“IRP”), which lasted two years, involved extensive document
22 production, various filings, and culminated in a hearing before a three-member panel with live
23 witness testimony. DCA prevailed in that proceeding and – as DCA admitted in deposition –
24 ICANN fully implemented the Panel’s declaration by placing DCA’s application back into
25 processing. When DCA’s application later failed because DCA could not demonstrate that it had

26 ¹ Indeed, several sections of DCA’s opposition are literally copied and pasted from those papers.
27 See DCA’s Motion for Preliminary Injunction at 13-15; DCA’s Ex Parte Application for
28 Temporary Restraining Order at 9-12, 15; DCA’s Supplemental Memorandum of Points and
Authorities in Support of DCA’s Motion for a Preliminary Injunction (Filed as a TRO) at 1-4.

1 the required support or non-objection of 60% of African governments, DCA filed this lawsuit,
2 despite having argued to its advantage in the IRP that the IRP was its sole forum for redress
3 against ICANN.

4 This Court already has ruled twice, in conjunction with DCA's two motions for
5 preliminary injunction, that the Covenant appears enforceable, and, if so, then DCA's claims,
6 including its fraud claims, are likely barred. DCA offers nothing new in its Opposition to
7 augment its arguments. As a result, ICANN urges the Court to follow its prior rulings and to
8 enter summary judgment on all claims in DCA's First Amended Complaint ("FAC").

9 **ARGUMENT**

10 **I. THIS COURT ALREADY HAS RULED THAT THE COVENANT NOT TO SUE,
11 IF ENFORCEABLE, BARS ALL OF DCA'S CLAIMS, INCLUDING ITS FRAUD
12 CLAIMS.**

13 DCA filed two motions for preliminary injunction seeking to halt the delegation of the
14 .AFRICA generic top-level domain ("gTLD") to ZACR. DCA's first motion was based on its
15 ninth cause of action for declaratory relief. (LeVee Decl. ¶ 14.)² The Court denied that motion
16 based on "the reasoning expressed in the oral and written arguments of defense counsel," which
17 included ICANN's argument that DCA's claim was barred by the Covenant. (LeVee Decl. ¶ 14,
18 15, Ex. J.) DCA then filed a second motion for preliminary injunction based on its second cause
19 of action for intentional misrepresentation and its fifth cause of action for violation of California's
20 Unfair Competition law. (LeVee Decl. ¶ 16.) On February 3, 2017 the Court denied DCA's
21 second motion as well, holding in part: "For the reasons set forth in the Ruby Glen order, it
22 appears that the Covenant is enforceable. If the Covenant is enforceable, DCA's claims against
23 ICANN for fraud and unfair business practices are likely to be barred." (LeVee Decl. Ex. K.)

24 **II. DCA'S OPPOSITION FAILS TO PRESENT ANY ARGUMENT OR EVIDENCE
25 THAT COMPELS A DIFFERENT RESULT.**

26 DCA does not seriously contest that, if enforceable, the Covenant would bar all claims in
27 DCA's FAC, including its fraud claims, because they "arise out of, are based upon, or are in any

28 ² All references to the LeVee Declaration and attached exhibits refer to the Declaration of Jeffrey A. LeVee filed in support of ICANN's Motion for Summary Judgment.

1 way related to” any action or failure to act by ICANN in connection with its processing and
2 decision to approve or not approve DCA’s application for .AFRICA.³ (SUF ¶ 5.)⁴ Rather, DCA
3 argues that the Covenant is unenforceable because it violates California Code of Civil Procedure
4 section 1668, is unconscionable, and was procured by fraud. These are the same arguments DCA
5 made, and the Court rejected, in DCA’s two motions for preliminary injunction.

6 **A. Section 1668 Does Not Apply To The Covenant.**

7 Section 1668 invalidates only those clauses that seek to “exempt anyone from
8 responsibility for his own fraud, or willful injury to the person or property of another.” Cal. Civ.
9 Code § 1668. As detailed in ICANN’s Motion, the Covenant explicitly provides for the use of
10 alternative dispute resolution mechanisms, including the IRP, through which new gTLD
11 applicants can seek redress against ICANN. The Covenant thus does not exempt ICANN from
12 responsibility, and section 1668 does not apply.

13 DCA asserts that the IRP can only address “procedural” issues (a term DCA does not
14 define), and has no ability to address “substantive” claims such as fraud. (DCA’s Opposition to
15 ICANN’s MSJ (“Opp’n”) at 8-10.) DCA’s basis for this assertion appears to be that the IRP is
16 limited to adjudicating claims that ICANN’s Board violated its Bylaws. But IRPs are not the
17 only dispute resolution mechanism available to new gTLD applicants.⁵ More importantly, DCA
18 cites no basis for its assertion that an alleged violation of ICANN’s Bylaws cannot be based in
19 fraud that can be addressed by way of an IRP. Indeed, DCA’s fraud claims are not based on what
20 some unknown person at ICANN stated to a DCA representative, but instead are rooted in

21 _____
22 ³ As ICANN detailed in its Motion, all of DCA’s claims, regardless of how styled, boil down to
23 claims regarding the processing of its application for .AFRICA. Mot. at 14-15. DCA does not
24 respond to or contest this point, except for a blanket statement that DCA’s claims “arise out of
25 misrepresentations that ICANN made before it began processing DCA’s application,” formulated
26 in an unsuccessful attempt to distinguish *Ruby Glen*. Opp’n at 16. However, a plain reading of
27 DCA’s FAC belies this unsupported statement. To the extent DCA refers to its fraud in the
28 inducement argument, that claim has been refuted by DCA’s own admissions and the undisputed
facts of this case, as established in section II.B, below.

⁴ All references to the Statement of Undisputed Facts (“SUF”) refer to the SUF filed in support of
ICANN’s Motion for Summary Judgment.

⁵ For example, applicants can request reconsideration of any action or inaction by the ICANN
staff or Board, referred to as a Reconsideration Request. (SUF ¶ 26.)

1 ICANN’s alleged failure to act in conformity with its Bylaws. (See Opp’n at 10:18-19.) For
2 example, DCA’s second cause of action for intentional misrepresentation is based on DCA’s
3 allegation that “ICANN represented to Plaintiff that Plaintiff’s application for .AFRICA would be
4 reviewed in accordance with ICANN’s Bylaws, Articles of Incorporation, and the new gTLD
5 [rules and procedures].” (SUF ¶ 9.) DCA’s fourth cause of action for fraud and conspiracy to
6 commit fraud is similarly based on the allegation that, in lieu of fairly and objectively reviewing
7 DCA’s application in accordance with its Bylaws, ICANN conspired to “improperly deny[]
8 Plaintiff’s application” and accepted a competing application for .AFRICA. (SUF ¶ 10.)

9 Moreover, the cases DCA cites are inapposite. For example, DCA cites *Blankenheim v. E.*
10 *F. Hutton & Co.*, 217 Cal. App. 3d 1463 (1990), for the proposition that a release that attempts to
11 hold a defendant harmless from responsibility for its own misrepresentations is void as against the
12 policy of the State of California. (Opp’n at 9.) But the release in question in *Blankenheim* was a
13 “hold-harmless” agreement that absolved the defendant of any liability for any harm to the
14 plaintiff resulting from the transaction. That is a far cry from this case, where the Covenant
15 provides multiple alternative dispute resolutions through which applicants can bring claims
16 against ICANN, including through an IRP or a Reconsideration Request – which, as described
17 above, could have provided a means to adjudicate any of the claims raised in this case.⁶

18 The alleged misrepresentations at the heart of DCA’s fraud claims are the promises of
19 fairness and transparency contained in ICANN’s Bylaws. (See Opp’n at 10.) When DCA’s
20 application was denied a second time due to DCA’s inability to provide proper letters of support
21 or non-objection to meet a required criterion in the application process, DCA could have again
22 initiated one or more alternative dispute mechanisms, including an IRP against ICANN for its
23 denial of DCA’s application. Through a second IRP, DCA could have asserted its allegations that
24 ICANN fraudulently misrepresented its intention to fairly analyze DCA’s application, or
25 conspired with ZACR to deny DCA’s application and award .AFRICA to ZACR. DCA chose

26 ⁶ DCA also argues (Opp’n at 9:9) that Section 1668 applies here because of “fraud in the
27 inducement”; however, DCA has conceded that it was fully aware of the Covenant when it
28 submitted its application to ICANN, and that DCA’s “fraud” claims relate to ICANN’s
subsequent processing of DCA’s application.

1 instead to violate the Covenant and file this lawsuit. (SUF ¶ 34.)

2 **B. DCA’s Claim That The Covenant Was Procured By Fraud Is Contradicted**
3 **By Undisputed Facts And Its Own Admission.**

4 DCA argues (for the third time) that the Covenant was procured by fraud because ICANN
5 misrepresented the nature of IRPs, that the IRP it won was “illusory” and one-sided, and that
6 ICANN did not participate in the IRP in good faith. (Opp’n at 7, 15.) As ICANN previously
7 established to this Court, and as confirmed by the IRP Panel’s 63-page declaration, nothing could
8 be further from the truth. Indeed, what lacks good faith is DCA’s argument to this Court.

9 The IRP was a vigorously contested proceeding that took two years, during which time
10 ICANN fully participated, producing extensive documents, drafting numerous responsive briefs
11 and supporting declarations, and putting forth witnesses to testify under oath during a live
12 hearing. (SUF ¶ 31.) While ICANN did ask the Panel to move more quickly and not to permit
13 live witnesses to testify, the Panel rejected ICANN’s requests. *Id.* At the end of this long
14 process, DCA won. *Id.* The IRP Panel delared DCA the prevailing party, and ordered ICANN to
15 pay DCA’s share of the IRP fees. (Bekele Decl. Ex. 1, ¶ 150.) ICANN then placed DCA’s
16 application back into processing, which DCA admitted in deposition fully complied with the IRP
17 Panel’s final declaration. (SUF ¶ 38.)⁷ In short, there literally is no basis to find that ICANN
18 misrepresented the nature of the IRP and, thus, no basis to find any fraud that might render the
19 Covenant unenforceable.

20 **C. The Covenant Is Not Unconscionable.**

21 Again repeating arguments this Court has twice rejected, DCA argues that the Covenant is
22 unenforceable because it limits DCA’s ability to seek redress while absolving ICANN of
23 wrongdoing. This is demonstrably untrue. The Covenant specifically permits gTLD applicants to

24 ⁷ Remarkably, despite having admitted in deposition that ICANN followed the IRP Panel’s ruling,
25 DCA states in its Opposition that “ICANN did not act in accordance with the IRP’s Final
26 Declaration” because “[i]nstead of allowing DCA’s application to proceed through the *remainder*
27 of the application process, ICANN forced DCA to be reevaluated in the geographic names phase.”
28 Opp’n at 7 (emphasis in original). This directly contradicts DCA’s sworn deposition testimony.
To the extent DCA seeks to undermine the validity of the IRP by pointing to ICANN’s argument
on whether the IRP should be binding, it is irrelevant because ICANN fully implemented the IRP
Panel’s declaration, thus conforming to DCA’s expectations regarding the efficacy of the IRP
proceeding.

1 utilize various alternative resolution mechanisms in the event of any dispute with ICANN, which
2 DCA itself utilized these mechanisms, including the IRP, and won. (SUF ¶¶ 29, 31, 33.). Any
3 claim that the Covenant absolves ICANN of wrongdoing while failing to provide applicants with
4 any form of redress is directly contradicted by the actual (and undisputed) facts.⁸

5 DCA also makes the bizarre argument that the Covenant is procedurally unconscionable
6 because it was not negotiated – as “evidenced” by ICANN’s failure to revise the Covenant in
7 response to public feedback during the multi-year drafting process. (Opp’n at 13 (stating that
8 “ICANN’s freedom to reject any and all comments indicates a clear lack of bargaining power.”).)
9 Whether ICANN modified the Covenant in response to public comments does not speak to
10 whether the Covenant is procedurally unconscionable. Bargaining power in the context of
11 contract formation refers to the relative power of the negotiating parties – not of one contracting
12 party to the (non-contracting) public. Nevertheless, DCA later concedes that ICANN did revise
13 the Covenant in response to public feedback. (Opp’n at 3-4.) Moreover, lack of negotiation in
14 itself does not constitute procedural unconscionability. *See Ruby Glen, LLC v. Internet Corp.*,
15 2016 WL 6966329, at *4-5 (C.D. Cal. Nov. 28, 2016) (“showing a contract is one of adhesion
16 does not always establish procedural unconscionability..., the nature of the relationship between
17 ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application
18 process, and the fact that the Application Guidebook ‘is the implementation of [ICANN] Board-
19 approved consensus policy concerning the introduction of new gTLDs, and has been revised
20 extensively via public comment and consultation over a two-year period,’ militates against a
21 conclusion that the covenant not to sue is procedurally unconscionable.”) DCA cites no authority

22
23
24 ⁸ DCA’s attempt to argue that the Covenant is substantively unconscionable because only an
25 applicant is prevented from filing a lawsuit is equally unavailing, as the court in *Ruby Glen* held
26 when it considered and rejected this exact argument. *See Ruby Glen*, 2016 WL 6966329, at *5.
27 The case DCA itself relies on states that an agreement being one-sided is not, in itself, enough to
28 find unconscionability. *Higgins v. Superior Court*, 140 Cal. App. 1238, 1249 (2006). Moreover,
Higgins is entirely distinguishable: petitioners were young (some children) and unsophisticated
individuals, whose parents had recently died; on the day of the contract signing, defendants met
with petitioners’ legal guardian alone to discuss the contract, and the guardian later instructed
petitioners to flip through and sign. *Id.*

1 to the contrary.⁹

2 Lastly, although DCA repeats its assertion that the Covenant is not justified, it presents no
3 evidence to contradict ICANN’s stated justification for the Covenant, which was affirmed by the
4 *Ruby Glen* court: absent such a Covenant, ICANN – whose new gTLD program resulted in over
5 1,900 applications – could have been overwhelmed with frivolous lawsuits from applicants
6 unhappy with the results of ICANN’s application process, rendering ICANN incapable of
7 executing the New gTLD Program. This is far from a mere “desire not to be sued,” as DCA
8 attempts to characterize it, but rather a real potential result that could “derail the entire system
9 developed by ICANN to process applications for gTLDs.” *Ruby Glen*, 2016 WL 6966329, at *5.

10 **III. DCA’S LAWSUIT IS BARRED BY THE DOCTRINE OF JUDICIAL ESTOPPEL.**

11 **A. DCA Adopted Two Totally Inconsistent Positions To Further Its Immediate
12 Interests.**

13 During the course of the IRP (and before the final IRP hearing), DCA argued that the IRP
14 Panel’s decision must be binding because, as a result of the Covenant, the IRP was DCA’s sole
15 forum to redress its claims against ICANN. (SUF ¶¶ 41-42.) The Panel agreed and declared that
16 its declaration would be binding on the parties. (SUF ¶ 46.) DCA went on to win the IRP, and
17 ICANN returned DCA’s application to processing in accordance with the Panel’s declaration.
18 (SUF ¶¶ 31, 33.) But when DCA’s application was denied once more because DCA was unable
19 to demonstrate that its application had the required support or non-objection of 60% of African
20 governments, DCA filed the lawsuit that it told the IRP Panel it was legally incapable of filing
21 because of the Covenant.

22 It would be hard to find two positions that are more contradictory. DCA attempts to work
23 around the polarity of its positions by arguing that its initial position was that if the Covenant was

24 ⁹ DCA’s new (and unsubstantiated) argument that it was “surprised” by changes to the IRP
25 Supplementary Procedures made after it agreed to the Covenant is equally unavailing. The vast
26 majority of the IRP Supplementary Procedures that DCA cites were already contained in the
27 Bylaws at the time of DCA’s application. Any minor adjustments were procedural and did not
28 affect the scope of an applicant’s ability to seek redress against ICANN. For example, additions
included the following: “Evidence will not be included when calculating the page limit” and
“Copies of the DECLARATION shall be communicated to the parties by the ICDR.” (*See* Colon
Decl., Ex. F.)

1 valid, the IRP must provide a binding resolution of disputes. (Opp'n at 17.) But DCA's actual
2 argument to the IRP Panel was that the Covenant would be unconscionable unless the Panel's
3 decision was binding (thereby, it should be noted, effectively arguing that if the IRP's decision
4 were to bind the parties, the Covenant would not be unconscionable). (LeVee Decl. Ex. F). DCA
5 never wavered in its argument that the IRP declaration must be final and binding on the parties
6 because the IRP truly was DCA's sole forum for redress as a result of the Covenant. *Id.*¹⁰

7 DCA next argues that, even if its positions were inconsistent, they were taken in different
8 "contexts." (Opp'n at 18:3-7.) But the point of the doctrine of judicial estoppel is to protect the
9 judicial process by preventing litigants from taking one position to achieve a certain end, and then
10 later taking a contradictory position to achieve a different end. The procedural circumstances of
11 each proceeding are immaterial. *See Int'l Engine Parts, Inc. v. Feddersen & Co.*, 64 Cal. App.
12 4th 345, 353–55 (1998) (finding judicial estoppel where first proceeding was bankruptcy
13 reorganization proceeding and second was malpractice suit).¹¹

14 **B. DCA Was Successful In Asserting Its First Position.**

15 During the IRP, DCA strenuously argued that the IRP was its sole forum to seek redress
16 against ICANN. DCA made this argument in order to convince the IRP Panel that its declaration
17 should be binding. The IRP Panel adopted DCA's argument, finding that its declaration would be
18

19 ¹⁰ DCA also argues that the two positions are not inconsistent because it has always maintained
20 that ICANN should not be "judgment proof." (Opp'n at 18.) DCA's argument is akin to a person
21 stating "I am a vegetarian, therefore I should have first pick of the vegetables," then later stating
22 "I am a carnivore who can only eat beef, so I should get that last steak"; and then attempting to
23 explain the reversal in position by arguing "my position was the same all along: I need to eat."
24 Whether DCA has always wanted ICANN held accountable, or whether DCA has questioned the
25 enforceability of the Covenant, has no bearing on DCA's self-serving reversal of its position on
26 whether it is permitted to file a lawsuit against ICANN.

27 ¹¹ DCA cites one case, *Miller v. Bank of Am.*, 213 Cal. App. 4th 1 (2013), to support its theory
28 that a "change in circumstance" allows a litigant to reverse itself without consequence. In *Miller*,
the court held that the bank's oral arguments, made in the Court of Appeal and Supreme Court,
did not judicially estop the bank from arguing differently in opposing class certification on
remand. *Id.* at 10. Nowhere in the case does the court say that judicial estoppel does not apply
when the circumstances surrounding the litigation have changed. Rather, the basis of that ruling
was that neither the Court of Appeal nor the Supreme Court adopted the bank's counsel's
misstatement or accepted it as true. *Id.* Accordingly, the prior statements "cannot fairly be said
to represent the Bank's 'position' in the earlier litigation," and there was "no reason to believe its
counsel's misstatements had anything to do with the Bank's victory." *Id.*

1 binding on the parties. Despite what by any measure would be described as a successful
2 outcome, DCA confusingly argues that this element of the judicial estoppel inquiry is not met
3 because ICANN voluntarily “elected” to follow the IRP Panel’s final decision, thereby somehow
4 mooted the Panel’s ruling. DCA’s argument is nonsensical. First, the Panel ruled in DCA’s
5 favor on this issue over a year before ICANN “elected” to follow the Panel’s final declaration.
6 (SUF ¶ 33.) Second, no matter how ICANN’s actions following the IRP Panel’s decision are
7 described, this does not change the fact that the Panel ruled in DCA’s favor – DCA was
8 successful in asserting its position because the Panel ruled that its decisions would be binding
9 based on DCA’s argument. Third, ICANN did not contravene the Panel’s declaration, as DCA
10 has conceded.

11 **C. The IRP Is A Quasi-Judicial Proceeding.**

12 As described in ICANN’s Motion, the IRP bore all the hallmarks of a formal judicial
13 proceeding, and as such qualifies as a quasi-judicial proceeding for purposes of judicial estoppel.
14 *Tri-Dam v. Schediwy*, No. 1:11-CV-01141-AWI, 2014 WL 897337, at *6 (E.D. Cal. Mar. 7,
15 2014). DCA’s only argument in response appears to be that the IRP is not a quasi-judicial
16 proceeding because ICANN did not think the Panel’s declaration should be binding. However,
17 for purposes of judicial estoppel what matters is the actual nature of the proceeding in question,
18 not what the parties argued it should be. *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829
19 (1999) (“courts consider the judicial nature of the prior forum”). As DCA itself agreed, the IRP
20 proceeding bore the “formal hallmarks” of a judicial proceeding: it was a structured proceeding
21 in which the parties submitted briefs and exchanged discovery; witnesses testified under oath; a
22 neutral panel, which found that its final decision should be binding on the parties, presided over
23 the proceedings; and, following its issuance, both parties acted in accordance with that panel’s
24 declaration. (SUF ¶ 47.) What either party argued the proceeding should be is irrelevant.

25 **D. DCA Did Not Act Out Of Ignorance Or Mistake.**

26 The last factor of judicial estoppel is that the party’s reversal of position was not the result
27 of “ignorance, fraud, or mistake.” *Jackson*, 60 Cal. App. 4th at 183. DCA completely misstates
28 this element, stating that “the burden of proof is on [ICANN] to establish evidence that DCA has

1 acted fraudulently[.]” by reversing its position. (Opp’n at 20.) Contrary to DCA’s assertion, this
2 judicial estoppel factor is satisfied once the moving party establishes that the party to be estopped
3 did not act due to ignorance, fraud or mistake. *See Int’l Engine Parts, Inc.*, 64 Cal. App. 4th at
4 353. None of the cases cited by DCA supports DCA’s attempt to fabricate a burden to establish
5 fraudulent intent.¹² DCA, a sophisticated entity acting with the assistance of legal counsel,
6 drafted and filed a pleading arguing that the IRP was its sole forum of redress against ICANN,
7 and won that argument. There is no evidence that DCA was confused or mistaken about anything
8 that would negate the final element of judicial estoppel. When DCA wanted the IRP Panel to rule
9 that its decision would be binding, it argued that the IRP presented its only opportunity to bring
10 claims against ICANN. When DCA’s IRP victory, which was fully respected by ICANN, did not
11 result in DCA obtaining the rights to operate .AFRICA, DCA reversed its position and filed this
12 lawsuit. This is precisely the sort of gamesmanship the equitable doctrine of judicial estoppel
13 aims to prevent.

14 CONCLUSION

15 For the reasons stated in its Motion and this Reply, ICANN respectfully requests that this
16 Court grant ICANN’s motion for summary judgment as to the entirety of DCA’s FAC.

17
18 ¹² In *Lee v. W. Kern Water Dist.*, the main case DCA cites in support of its argument, the court
19 denied judicial estoppel because defendants forfeited the defense by failing to raise it until after
20 the jury returned its verdict (not, as DCA claims, because defendants failed to establish sufficient
21 evidence of fraudulent intent). 5 Cal. App. 5th 606, 631 (2016), *review denied* (Feb. 15, 2017).
22 To the extent the *Lee* court discusses the last factor of judicial estoppel at all, it notes that the
23 plaintiff’s initial position was taken by signing worker’s compensation documents containing a
24 stipulation that the injury arose out of and in the course of her employment; because she may not
25 have known about or understood the stipulation, she may have made “a mistake born of
26 misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other
27 innocent cause....”. *Id.* (citations omitted). DCA actually misquotes the *Lee* case as stating that
28 “there must be some basis in the record for a finding that a party engaged in a deliberate scheme
to mislead and gain unfair advantage”; the actual quote is “there is no basis in the record for a
finding that Lee engaged in a deliberate scheme to mislead and gain unfair advantage.” *Id.*
Contrary to what DCA claims, there is no affirmative burden of demonstrating fraudulent intent.
The other cases cited by DCA similarly fail to support DCA’s attempt to create this nonexistent
burden. *See Kelsey v. Waste Mgmt. of Alameda Cty.*, 76 Cal. App. 4th 590, 599–600 (1999)
(denying judicial estoppel because defendant provided no evidence negating plaintiff’s assertion
that he acted out of ignorance and mistake); *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th
995, 1018–1022 (1998) (denying judicial estoppel *only* because issue was not appropriate for a
motion for judgment on the pleadings and stating *nowhere* the “defendant did not establish bad
faith,” as DCA alleges).

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Dated: August 4, 2016

JONES DAY

By:  Jeffrey A. LeVe

Attorneys for Defendant INTERNET CORP.
FOR ASSIGNED NAMES AND NUMBERS

NAI-1502906746v6

1 **PROOF OF SERVICE**

2 I, Grace M. Directo, 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 August 4,
6 2017, I served a copy of the within document(s):

7 **ICANN'S REPLY IN SUPPORT OF MOTION FOR SUMMARY
8 JUDGMENT**

- 9 by transmitting via facsimile the document(s) listed above to the fax number(s) set
10 forth below on this date before 5:00 p.m.
- 11 by placing the document(s) listed above in a sealed envelope with postage thereon
12 fully prepaid, in the United States mail at Los Angeles, California addressed as set
13 forth below.
- 14 by placing the document(s) listed above in a sealed _____ envelope and
15 affixing a pre-paid air bill, and causing the envelope to be delivered to a
16 agent for delivery.
- 17 by personally delivering the document(s) listed above to the person(s) at the
18 address(es) set forth below.
- 19 by transmitting via e-mail or electronic transmission the document(s) listed above
20 to the person(s) at the e-mail address(es) set forth below.

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VIA EMAIL ONLY

VIA PERSONAL SERVICE


I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on

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motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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 August 4, 2017, at Los Angeles, California.



Grace M. Directo