

1 Jeffrey A. LeVee (State Bar No. 125863)  
Erin L. Burke (State Bar No. 186660)  
2 Amanda Pushinsky (State Bar No. 267950)  
JONES DAY  
3 555 South Flower Street  
Fiftieth Floor  
4 Los Angeles, CA 90071.2300  
Telephone: +1.213.489.3939  
5 Facsimile: +1.213.243.2539  
Email: jlevee@JonesDay.com

6 Attorneys for Defendant  
7 INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**  
11

12 DOTCONNECTAFRICA TRUST,  
13 Plaintiff,  
14 v.  
15 INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS, *et*  
16 *al.*,  
17 Defendant.  
18  
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20

**CASE NO. BC607494**

Assigned to Hon. Howard L. Halm

**ICANN'S POST-TRIAL BRIEF  
(JUDICIAL ESTOPPEL BENCH  
TRIAL)**

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## INTRODUCTION

The doctrine of judicial estoppel was created to prevent litigants from manipulating the legal system by taking different positions: “[i]t seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite.” *Jackson v. Cty. of Los Angeles*, 60 Cal. App. 4th 171, 181 (1997) (citation omitted). While courts have discretion to apply the doctrine, numerous courts have applied the doctrine in circumstances *far less* egregious than here. Indeed, following the two-day trial, there is little doubt that, if DCA had taken its original position of “we cannot file a lawsuit against ICANN” in another court or in a formal arbitration, this Court would not hesitate to apply the doctrine here because there was no ambiguity in DCA’s statements – repeated in the IRP multiple times in multiple contexts, each time successfully – that it had waived its right to file a lawsuit against ICANN in any way related to DCA’s application for .AFRICA.

As the Court outlined in its tentative ruling on the second day of the trial, the question is whether the Court should decline to apply the doctrine of judicial estoppel due to the fact that the ICANN Board did not view the Independent Review Process (“IRP”) Panel’s declaration to be binding on ICANN. As set forth herein, ICANN believes that the Court *should* apply the doctrine of judicial estoppel, primarily for four reasons:

1. DCA’s statements to the IRP Panel involved strategic decisions argued for material purposes. DCA argued that it could not file a lawsuit against ICANN in order to persuade the IRP Panel to issue *seven* critical and substantive rulings, without which the Panel might have reached a different result on those rulings and/or on the merits. Indeed, as ICANN catalogs below, DCA argued multiple times that it could not file a lawsuit against ICANN, and DCA *prevailed each time* it made this argument. ICANN has not found a reported decision where the statements that formed the basis of the judicial estoppel were made so brazenly and so repeatedly as in this instance.
2. As the Court balances the equities, the unfairness to the courts and to ICANN of allowing DCA to proceed with this lawsuit is manifest: had DCA not repeatedly told the IRP Panel that it could never file a lawsuit against ICANN, the IRP Panel might

1 have reached a different outcome, and this lawsuit would never have been filed to  
2 address the events that occurred subsequent to the IRP that DCA now argues to be the  
3 basis for its remaining claims.

- 4 3. The IRP Panel ruled in DCA’s favor on the merits via a 63-page final declaration  
5 (“Final Declaration”), following an exhaustive twenty-month process that included  
6 discovery, extensive briefing, and a live hearing with opening statements, witness  
7 examination, and closing arguments. The process was truly quasi-judicial.
- 8 4. One week after the IRP Panel issued its Final Declaration (and contrary to the Court’s  
9 impression as indicated in its tentative), the ICANN Board granted *in full* the relief  
10 that was set forth in the IRP Panel’s Final Declaration. While the IRP Panel had  
11 determined that its declaration would be binding, there was no indication that the  
12 Board was required to address that issue (and the issue was not even contained in the  
13 Panel’s Final Declaration as the Panel had addressed it much earlier in the  
14 proceedings). And, in fact, the Board did not reach the question of whether the  
15 Panel’s declaration was binding on ICANN because it was not necessary to do so: the  
16 Board did not hesitate to award DCA the full extent of the relief that the IRP Panel had  
17 recommended (as demonstrated in the minutes of the Board meeting). For this reason,  
18 the question of whether the IRP Panel’s declaration was “legally binding” should be a  
19 non-issue on whether the IRP was a “quasi-judicial administrative proceeding” for  
20 judicial estoppel purposes because the ICANN Board adopted the Panel’s declaration  
21 as if it were binding.

22 ICANN urges the Court to exercise its discretion to find that this is the quintessential set  
23 of facts on which to apply the doctrine of judicial estoppel.

## 24 **FACTUAL BACKGROUND**

### 25 **Summary.**

26 When DCA applied for the .AFRICA generic top-level domain (“gTLD”) through  
27 ICANN’s New gTLD Program, DCA understood that, like all other applicants, it was agreeing to  
28 a Covenant Not To Sue (“Covenant”) contained in the New gTLD Applicant Guidebook

1 (“Guidebook”) that barred lawsuits against ICANN related in any way to DCA’s application.  
2 (Stipulated Fact 3, 4.) Indeed, DCA understood this better than the average applicant because its  
3 executive director, Sophia Bekele, was an active member of the ICANN community, had served  
4 as an advisor to the committee that developed the policy recommendations behind the New gTLD  
5 Program, and helped create the Guidebook itself, including commenting on multiple versions of  
6 the Guidebook that were published online for public feedback. (2/28/18 Trial Tr. at 43:1-45:14.)

7 DCA also understood that, because it was applying for a geographic name – a gTLD that  
8 represented a geographic area (in this case, the continent of Africa) – the Guidebook required  
9 DCA to demonstrate that it had the support or non-objection of 60% of the governments of the  
10 continent. DCA further understood that ICANN’s Governmental Advisory Committee (“GAC”),  
11 a body consisting of well over 150 international governments and organizations, was formed to  
12 consider and provide advice on the activities of ICANN and, with respect to new gTLDs, is  
13 permitted to provide advice relating to “applications that are identified by governments to be  
14 problematic, e.g., that potentially violate national law or raise sensitivities.” (Joint Tr. Ex. 2 at  
15 § 3.1.) And, in April 2013, the GAC issued a Communiqué to ICANN addressing over ten new  
16 gTLD applications, including DCA’s. In this Communiqué, the GAC issued “consensus advice”  
17 that DCA’s application should not proceed. (3/1/18 Trial Tr. at 23:5-12, 71:2-23.) When  
18 ICANN’s Board accepted the GAC advice and removed DCA’s application from the evaluation  
19 process, DCA initiated two of the alternative dispute resolution mechanisms available under  
20 ICANN’s Bylaws: DCA submitted a “Request for Reconsideration” to ICANN’s Board; and,  
21 when the Board denied that request, DCA filed an IRP.

22 During the course of the lengthy IRP, DCA repeatedly told the IRP Panel that it was  
23 unable to sue ICANN because of the clear language of the Covenant. DCA took this position in  
24 conjunction with *seven* different issues, namely its requests: (i) to seek interim relief; (ii) to  
25 obtain additional briefing; (iii) to be allowed additional document discovery; (iv) to compel live  
26 witness testimony; (v) to have the Panel issue a binding decision; (vi) to have the Panel apply a *de*  
27 *novo* standard of review; and (vii) to have the Panel award DCA its costs. *Every time* DCA told  
28 the IRP Panel that the Panel should rule on an issue in DCA’s favor because DCA could not file a

1 lawsuit against ICANN, the Panel ruled in DCA’s favor. (*See Exhibit A below.*)

2         The IRP Panel then conducted a live hearing, during which DCA repeatedly stated that it  
3 could not file a lawsuit against ICANN – once again, in an effort to encourage the Panel to rule in  
4 DCA’s favor on the ultimate merits. The IRP Panel then ruled in DCA’s favor on the merits, and  
5 the Panel declared that ICANN should return DCA’s application to processing and should pay  
6 DCA’s significant costs of the IRP. As ICANN witness Christine Willett confirmed during the  
7 trial, the ICANN Board then followed *every aspect* of the IRP Panel’s ruling, placing DCA’s  
8 application back into processing and paying DCA’s costs. (3/1/18 Trial Tr. at 79:21-23, 77:22-  
9 79:16.) Nevertheless, several months after the IRP, when DCA’s application ultimately did not  
10 pass the Geographic Names Review – because the independent panel hired by ICANN to evaluate  
11 geographic gTLD applications determined that DCA was unable to demonstrate that it had the  
12 support or non-objection of 60% of African governments – DCA sued ICANN in this Court in  
13 direct contravention of its numerous statements throughout the IRP.

14         In its opening statement to this Court on February 28, 2018, DCA’s attorney, Mr. Brown,  
15 argued that DCA “won the IRP, but it didn’t really get the relief that it wanted.” (2/28/18 Trial  
16 Tr. at 31:8-9.) To be clear, DCA *did win* the IRP, and the ICANN Board *did adopt* the IRP  
17 Panel’s declaration *in full*, but DCA was not truly happy because the relief DCA *really* wanted  
18 was the right to operate .AFRICA without having to demonstrate (as required by the Guidebook)  
19 that it had the support of the countries of Africa (which DCA did not have). The IRP Panel was  
20 clear that it did *not* grant DCA the rights to .AFRICA, as Ms. Bekele conceded in her deposition  
21 and at trial, because the IRP Panel never determined that DCA should get to skip the Geographic  
22 Names Review. (2/28/18 Trial Tr. at 107:8-25.)

23         Rather, the IRP Panel declared that the Board’s acceptance of the GAC advice should be  
24 rescinded, and that DCA should have a chance to go through the remainder of the application  
25 process. DCA got that chance when the ICANN Board followed the IRP Panel’s ruling and  
26 placed DCA’s application back into processing. Then, when DCA’s application did not pass the  
27 Geographic Names Review (because DCA did not have the necessary support or non-objection of  
28 60% of the countries of Africa), rather than filing a second IRP (which DCA could have done, as



1 Ms. Willett confirmed (3/1/18 Trial Tr. at 88:24-89:4)), DCA filed this lawsuit, thereby  
2 repudiating its prior position that it could not file a lawsuit against ICANN in any way related to  
3 DCA's application.

4 **Chronology.**

5 For the Court's convenience, ICANN sets forth a timeline of the relevant events:

- 6 • **June 2011:** After six years of development, which included consultations with the  
7 ICANN community at every stage,<sup>1</sup> ICANN proceeds with the New gTLD  
8 Program. The New gTLD Program allows interested applicants to apply for the  
9 rights to operate generic top-level domain names. The Guidebook, which was  
10 created over a number of years in a collaborative, online process that was open to  
11 the public, sets forth the requirements for new gTLD applicants, as well as the  
12 evaluation rules and procedures. The application window opens in January 2012,  
13 and ICANN receives 1,930 applicants for new gTLDs. (3/1/18 Trial Tr. at 55:8-  
14 56:22, 57:28-59:28, 65:8-10.)
- 15 • **March - June 2012:** DCA and intervener ZA Central Registry ("ZACR")  
16 separately apply for the rights to .AFRICA. Over the next year and a half, DCA  
17 and ZACR's applications undergo evaluation. Both applications pass four of the  
18 evaluation phases (background screening, financial evaluation, technical  
19 evaluation, and a "DNS" evaluation that looks at how the gTLD will be operated  
20 by the applicant). (Stipulated Facts 1, 3; 3/1/18 Trial Tr. at 65:11-66:5, 67:20-22,  
21 69:21-28.)
- 22 • **April 2013:** The GAC addresses a total of ten gTLD applications and issues  
23 "consensus advice" to ICANN that two of the new gTLD applications should not  
24 proceed through the evaluation process. DCA's application is one of the two.  
25 Under the Guidebook, if the GAC issues consensus advice against an application,  
26

27 <sup>1</sup> As Ms. Willett testified, the ICANN community "is this very large set of volunteers who  
28 span from all areas of the world and they represent variety of interests, . . . intellectual property  
interests. It includes people with education backgrounds, and various public policy interests."  
(3/1/18 Trial Tr. at 55:24-56:8.)

1 it creates a “strong presumption” that the application should not proceed. At the  
2 time the GAC issued its consensus advice, the applications of DCA and ZACR  
3 were still undergoing the Geographic Names Review, which evaluates whether an  
4 applicant for a geographic gTLD such as .AFRICA has the required support or  
5 non-objection of 60% of relevant governmental authorities. (3/1/18 Trial Tr. at  
6 66:14-67:16; 72:5-10; Guidebook § 3.1 (Joint Tr. Ex. 2).)

- 7 • **June 2013**: ICANN’s Board accepts the GAC advice. DCA is informed that its  
8 application will no longer be evaluated, and the Geographic Names Review  
9 process of DCA’s application is stopped mid-stream. (ICANN Tr. Ex. 51 at p. 2;  
10 3/1/18 Trial Tr. at 23:5-20.)
- 11 • **June-July 2013**: DCA moves for reconsideration of the ICANN Board’s decision  
12 to accept the GAC consensus advice regarding DCA’s application. The Board  
13 denies DCA’s request. (2/28/18 Trial Tr. at 50:20-51:6.)
- 14 • **October 2013**: DCA initiates an IRP to address the ICANN Board’s decision to  
15 accept the GAC consensus advice regarding DCA’s application. (Stipulated Fact  
16 8.)
- 17 • **October 2013-May 2015**: ICANN and DCA engage in the IRP proceeding,  
18 culminating in a live two-day hearing in May 2015. (Stipulated Facts 10-15.)
- 19 • **July 9, 2015**: The IRP Panel issues a Final Declaration in DCA’s favor. The IRP  
20 Panel declares that: (1) DCA’s application should be returned to processing;  
21 (2) ICANN should refrain from delegating .AFRICA while DCA’s application  
22 completes processing; and (3) ICANN should pay the entirety of DCA’s IRP costs.  
23 (3/1/18 Trial Tr. at 75:24-76:8; Final Declaration ¶¶ 149, 150 (Joint Tr. Ex. 43).)
- 24 • **July 16, 2015**: The ICANN Board adopts the IRP Panel’s declaration in full and  
25 passes a resolution providing for ICANN to: (1) return DCA’s application to  
26 processing; (2) refrain from delegating the .AFRICA gTLD while DCA’s  
27 application completes processing; and (3) pay the entirety of DCA’s IRP costs.  
28 (3/1/18 Trial Tr. at 77:22-79:23.)

- 1 • **July 2015**: ICANN returns DCA’s application to processing. DCA’s application  
2 is placed exactly where it had been in 2013 when the GAC had issued its advice –  
3 the Geographic Names Review. The independent company hired by ICANN to  
4 evaluate geographic gTLDs (including the .AFRICA applications), InterConnect  
5 Communications (“ICC”), resumes evaluation of DCA’s application and the letters  
6 that DCA submitted with its application for .AFRICA in 2012 that DCA claimed  
7 were letters of support. (3/1/18 Trial Tr. at 79:28-81:12.)
- 8 • **September 2015**: The ICC determines that DCA’s letters of support, which are  
9 from 2008 and 2009 (before the Guidebook was completed and years before  
10 DCA’s application was submitted) do not contain all the information necessary to  
11 conform to the Guidebook’s requirements. The ICC issues “Clarifying  
12 Questions,” indicating what is missing from the support letters and asking DCA to  
13 obtain new, conforming letters. (ZACR had been asked to do the same regarding  
14 its letters of support during ZACR’s Geographic Names Review in 2013). DCA  
15 refuses to submit new letters, taking the position that its 2008/2009 letters are  
16 sufficient despite the ICC’s explicit directive that such letters were insufficient.  
17 (2/28/18 Trial Tr. at 108:7-17; 3/1/18 Trial Tr. at 81:13-83:3.)
- 18 • **October 2015**: ICANN notifies DCA that it has failed the Geographic Names  
19 Review but offers to allow DCA to have “Extended Evaluation,” which DCA  
20 accepts. Because DCA has not submitted new letters, the ICC issues the same  
21 Clarifying Questions. DCA again refuses to submit updated letters. (2/28/18  
22 108:18-109:8; 3/1/18 Trial Tr. at 83:4-84:24.)
- 23 • **January 2016**: DCA files this lawsuit.
- 24 • **February 2016**: ICANN informs DCA that, because its application for .AFRICA  
25 did not pass Geographic Names Review, its application has failed.

## 26 ARGUMENT

27 ICANN believes the evidence at trial demonstrates that DCA’s conduct easily meets each  
28 of the elements of the doctrine of judicial estoppel. ICANN further believes that a balance of the

1 equities strongly favors application of the doctrine in this instance because of the nature of DCA's  
2 conduct. Additionally the fact that DCA prevailed in each of the seven situations in which DCA  
3 told the IRP Panel that it could not file a lawsuit against ICANN in any way related to DCA's  
4 application warrants application of judicial estoppel. Nobody can know whether the IRP Panel  
5 would have reached the same decision on those seven issues – or on the ultimate merits of DCA's  
6 claim – had DCA not told the Panel that it was unable to file the lawsuit over which this Court  
7 now presides.

8           Following the close of the evidence, the Court issued a tentative opinion that voiced two  
9 concerns regarding the application of the doctrine in this case: (1) that courts should apply the  
10 doctrine of judicial estoppel cautiously; and (2) that one element of judicial estoppel – whether  
11 DCA took its first position in a “quasi-judicial administrative proceeding” – was not met. On the  
12 second issue, the Court expressed concern that the IRP Panel's Final Declaration was not binding  
13 and that ICANN did not follow the Panel's Final Declaration, although in fact the ICANN Board  
14 *did* adopt the IRP Panel's declaration in full. (3/1/18 Trial Tr. at 137:15-139:3.)

15           This brief will focus on the Court's two concerns and will also address the remaining  
16 elements of judicial estoppel.

17 **I. DCA'S CONDUCT IS THE QUINTESSENTIAL EXAMPLE OF WHY THE**  
18 **JUDICIAL ESTOPPEL DOCTRINE EXISTS AND SHOULD BE APPLIED.**

19 **A. The Purpose Of The Judicial Estoppel Doctrine Is To Prevent Parties**  
20 **From Manipulating The Judicial System By Changing Positions To**  
21 **Gain An Unfair Advantage.**

22           DCA has continually asserted that the purpose of the judicial estoppel doctrine is to  
23 prevent inconsistent outcomes. (2/28/18 Trial Tr. at 32:23-33:17; DCA's Trial Brief at 4.)  
24 DCA's characterization is misleadingly narrow and tries to create a requirement where none  
25 exists.<sup>2</sup>

26 <sup>2</sup> The case DCA cites for this proposition, *Jogani v. Jogani*, does not support it. Rather,  
27 that case emphasizes the importance of the *success* factor – whether the court or tribunal in the  
28 earlier proceeding adopted or accepted the prior position as true – because “judicial acceptance of  
an inconsistent position in a later proceeding would create the perception that either the first or  
the second court was misled,” and because “[i]f a party's initial position was never accepted by a  
court or agency, then it is difficult to see how a later change manifests an intent to play fast and  
loose with the courts.” *Jogani v. Jogani*, 141 Cal. App. 4th 158, 171 (2006), as modified on  
denial of reh'g (July 27, 2006) (internal citations omitted). The court in *Jogani* does not state that  
the purpose of judicial estoppel is to prevent an “actual inconsistent outcome,” as DCA suggests.

1 The doctrine of judicial estoppel was created to prevent parties from “gaining an  
2 advantage by taking one position, and then seeking a second advantage by taking an incompatible  
3 position.” *AP-Colton LLC v. Ohaeri*, 240 Cal. App. 4th 500, 507 (2015). “The doctrine’s dual  
4 goals are to maintain the integrity of the judicial system and to protect parties from opponents’  
5 unfair strategies.” *Id.* The doctrine “prevent[s] the use of intentional self-contradiction as a  
6 means of obtaining unfair advantage in a forum provided for suitors seeking justice.” *Michelson*  
7 *v. Camp*, 72 Cal. App. 4th 955, 970 (1999) (alteration in original) (citation omitted).

8 “Courts apply the doctrine to prevent internal inconsistency, preclude litigants from  
9 playing ‘fast and loose’ with the courts, and prohibit ‘parties from deliberately changing positions  
10 according to exigencies of the moment.’” *People ex rel. Sneddon v. Torch Energy Servs., Inc.*,  
11 102 Cal. App. 4th 181, 189 (2002) (citations omitted), as modified (Oct. 4, 2002). “It seems  
12 **patently wrong** to allow a person to abuse the judicial process by first [advocating] one position,  
13 and later, if it becomes beneficial, to assert the opposite.” *Bd. of Pilot Commissioners for the*  
14 *Bays of San Francisco, San Pablo & Suisun v. Superior Court*, 218 Cal. App. 4th 577, 590–91  
15 (2013) (emphasis added) (citations omitted).

16 **B. DCA’s Conduct Is Exactly What The Doctrine Aims To Prevent.**

17 As the below Exhibit A demonstrates, throughout the IRP, DCA told the IRP Panel that it  
18 could not sue ICANN. DCA’s statements to this effect were without qualification or caveat.  
19 DCA repeated this mantra multiple times in an effort to persuade the IRP Panel to make rulings  
20 that supported DCA’s positions and were in each instance contrary to ICANN’s positions.  
21 DCA’s arguments persuaded the IRP Panel to rule in DCA’s favor **every time** (indeed, the IRP  
22 See DCA’s Trial Brief at 4 (arguing that there is no risk of inconsistent outcomes because the IRP  
23 Panel made determinations regarding the binding nature of the IRP and the GAC advice, while  
24 DCA’s remaining causes of action do not require this Court to rule on either of those issues).  
25 Moreover, as *Jogani* recognizes, it is not even necessary to satisfy the success factor (and have  
26 the risk of inconsistent outcomes) for judicial estoppel to apply. *Jogani*, 141 Cal. App. 4th at  
27 181 (noting that the success factor was not met in *Thomas v. Gordon*, 85 Cal. App. 4th 113, 118–  
28 19 (2000) (prior bankruptcy proceeding) or *Drain v. Betz Laboratories, Inc.*, 69 Cal. App. 4th  
950, 957–58 (1999) (prior workers’ compensation proceeding)); *see also Jackson*, 60 Cal. App.  
4th at 183, n.8 (“Full, truthful disclosures in judicial or administrative proceedings are important  
in and of themselves. Regardless of whether the motive was pure or the effects of the falsehood  
inconsequential, we must expect honesty and frankness in all judicial and administrative  
proceedings from parties that choose to bring lawsuits in our courts.”).

1 Panel quoted DCA's position that it could not sue ICANN in some of the Panel's rulings).

2  
3  
4 **EXHIBIT A**

| <b>DCA's Statement</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>Purpose of Argument</b>                                                                                        | <b>Panel's Ruling</b>                                                                                                                                                                                                           | <b>ICANN's Action</b>                                                                                                                                         |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>5 "DCA has a right to be heard in a meaningful way in the <b>only proceeding available to review the ICANN Board's decisions.</b>"</p> <p>8 Request for Emergency Arbitrator and Interim Measures of Protection ¶ 29 (Joint Tr. Ex. 12 at p. 18)</p>                                                                                                                                                                                                                 | <p>6 To obtain requested emergency relief (precluding ICANN from delegating .AFRICA during IRP).</p>              | <p>7 The Panel granted DCA's request for emergency relief.</p> <p>Final Declaration ¶ 19 (Joint Tr. Ex. 43 at p. 4)</p>                                                                                                         | <p>ICANN refrained from delegating .AFRICA during the IRP.</p>                                                                                                |
| <p>11 "[T]he Panel should be guided by the cardinal principal set out in the ICDR Arbitration Rules that each party be given a full and fair opportunity to be heard; a principle that must also be viewed in the context of the fact that <b>these proceedings will be the first and last opportunity that DCA Trust will have to have its rights determined by an independent body.</b>"</p> <p>19 April 20, 2014 Letter to IRP Panel (Joint Tr. Ex. 115 at p. 3)</p> | <p>12 To obtain extensive document discovery from ICANN.</p>                                                      | <p>13 The Panel ordered that the parties would exchange document requests and produce documents in response.</p> <p>14 14 August 2014 Declaration on Procedure ¶ 60 (Joint Tr. Ex. 21 at p. 15)</p>                             | <p>15 ICANN exchanged document requests, and produced hundreds of documents in response to DCA's requests.</p>                                                |
| <p>21 "It is also critical to understand that <b>ICANN created the IRP as an alternative to allowing disputes to be resolved by courts.</b> By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge</p>                                                                                       | <p>22 To have the IRP include additional and extended briefing and live witness testimony at the IRP hearing.</p> | <p>23 The Panel ordered the parties to submit additional briefing and have witnesses appear for testimony at the IRP hearing.</p> <p>24 14 August 2014 Declaration on Procedure ¶¶ 71, 130 (Joint Tr. Ex. 21 at pp. 17, 32)</p> | <p>25 ICANN submitted additional briefing, and ICANN produced two witnesses at the IRP hearing, who testified live and were subject to cross examination.</p> |

| DCA's Statement                                                                                                                                                                                                                                                                                                                                                                                                                        | Purpose of Argument                                                                  | Panel's Ruling                                                                                                                                            | ICANN's Action                                                                                                                                                                                        |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>ICANN's decision on DCA's application in court. <b>For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available.</b>"</p> <p>May 5, 2014 Submission on Procedures ¶ 22 (Joint Tr. Ex. 17 at p. 14)</p>                                                                                                                                                                                     |                                                                                      |                                                                                                                                                           |                                                                                                                                                                                                       |
| <p><b>"...[A]s a condition of applying for a gTLD, DCA unilaterally surrendered all of its rights to challenge ICANN in court or any other forum outside of the accountability mechanisms in ICANN's Bylaws. As a result, the IRP is the sole forum in which DCA can seek independent, third-party review of the actions of ICANN's Board of Directors."</b></p> <p>May 29, 2014 Letter to IRP Panel (Joint Tr. Ex. 20 at pp. 2-3)</p> | <p>To have the IRP Panel rule that its decision would be binding on the parties.</p> | <p>The Panel held that its decision would be binding on the parties.</p> <p>14 August 2014 Declaration on Procedure ¶ 131 (Joint Tr. Ex. 21 at p. 32)</p> | <p>ICANN followed the Panel's Final Declaration in every respect.</p> <p>16 July 2015 ICANN Board Resolution (Joint Tr. Ex. 144); 3/1/18 Trial Tr. at 79:21-23); <i>See also</i> Section D below.</p> |
| <p><b>"This is the only opportunity that a claimant has for independent and impartial review of ICANN's conduct, the only opportunity."</b></p> <p>22 May 2015 IRP Tr. at 22:16-23:3 (Joint Tr. Ex. 45)</p> <p><b>"We cannot take you to Court. We cannot take you to arbitration. We can't take you anywhere. We can't sue you for anything."</b></p>                                                                                 | <p>To have the IRP Panel apply a <i>de novo</i> standard of review.</p>              | <p>The Panel held that it would apply a <i>de novo</i> standard of review.</p> <p>IRP Final Declaration ¶ 76 (Joint Tr. Ex. 43 at p. 22)</p>              | <p>N/A</p>                                                                                                                                                                                            |

| DCA's Statement                                                                                                                                                | Purpose of Argument                                                               | Panel's Ruling                                                                                                                           | ICANN's Action                                                                 |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| 23 May 2015 IRP Transcript at 507:24-208:5 (Joint Tr. Ex. 46 at p. 30)                                                                                         |                                                                                   |                                                                                                                                          |                                                                                |
| The IRP is "the only independent accountability mechanism available to parties such as DCA."<br><br>1 July 2015 Submission on Costs (Joint Tr. Ex. 41 at p. 3) | To have the IRP Panel rule that ICANN should pay the entirety of DCA's IRP costs. | The Panel declared that ICANN should pay the entirety of DCA's IRP costs.<br><br>IRP Final Declaration ¶ 150 (Joint Tr. Ex. 43 at p. 62) | ICANN paid the entirety of DCA's IRP costs.<br><br>3/1/18 Trial Tr. at 79:9-16 |

DCA's repeated assertions that it could not sue ICANN literally shaped the scope of the IRP, and undoubtedly had a direct impact on its outcome. There is no way to know how the IRP Panel would have ruled on these issues – or if DCA would even have won the IRP – had DCA not argued to the IRP Panel that the IRP was DCA's one and only hope for redress against ICANN because DCA "cannot take [ICANN] to Court."

Time and time again, DCA successfully asserted in the IRP that it could not sue ICANN in order to convince the IRP Panel to rule in DCA's favor on multiple issues during the course of the IRP, to win the IRP in its entirety, and to get DCA's application placed back into processing. Then, a mere six months later (when it became clear that DCA's application for .AFRICA would ultimately not succeed for failure to meet the Guidebook's requirement for governmental support or non-objection), DCA filed this lawsuit, thereby repudiating its prior position that it could not sue ICANN in any way related to its application. It is hard to imagine a more blatant self-serving about-face than this.

**C. Judicial Estoppel Has Been Applied In Far Less Egregious Cases.**

This Court is correct that courts exercise caution when applying the doctrine of judicial estoppel. Courts *do* apply the doctrine, however, and they have done so to prevent parties from changing their position in situations where the party's conduct was far less extreme than here.

For example, in *AP-Colton LLC*, the court applied judicial estoppel to prevent defendants from changing a position they stated just a few times, on the narrow issue of whether the case was "limited" or "unlimited" in terms of the court's jurisdiction. 240 Cal. App. 4th at 504. After



1 being served with a complaint stating that the action was a limited civil action, defendants filed a  
2 cross-complaint for damages in excess of \$25,000 and reclassified the action as unlimited. *Id.*  
3 Thereafter, plaintiff amended its complaint also to seek damages in excess of \$25,000, but neither  
4 party paid the required reclassification fee. *Id.* After the trial court found for plaintiff and  
5 awarded damages in excess of \$25,000, defendants appealed, arguing that the trial court could not  
6 award such damages because, absent payment of the reclassification fee, the case was still a  
7 limited action. *Id.* The court of appeal applied judicial estoppel against defendants based on  
8 three representations that defendants made that the case was unlimited: (1) defendants' cross-  
9 complaint denoted the action as unlimited; (2) defendants checked a box for "unlimited" on a  
10 Case Management Statement; and (3) defendants' notice of appeal stated "unlimited civil case."  
11 *Id.* at 505, 508. The court reasoned that defendants, whose initial position that the case was an  
12 unlimited civil action that "would have allowed them to *recover* damages in excess of \$25,000,"  
13 could not thereafter change their position "to avoid having to *pay* damages in excess of \$25,000."  
14 *Id.* at 507 (emphasis in original).

15 In *Padron v. Watchtower Bible and Tract Society of New York, Inc.*, the court applied  
16 judicial estoppel where a party made inconsistent statements regarding just one issue – whether  
17 the superior court could award monetary sanctions. 16 Cal. App. 5th 1246, 1264 (2017). To  
18 avoid terminating sanctions resulting from discovery violations, defendant argued that monetary  
19 sanctions were more appropriate. *Id.* at 1249, 1264. But in a later proceeding, defendant argued  
20 that the court did not have the authority to award such sanctions. *Id.* at 1264. In light of the  
21 inconsistent statements, the court held, "[w]e cannot contemplate a more apt circumstance in  
22 which to apply judicial estoppel." *Id.*; see also *Wulfe v. Valero Refining Co.-California*, 641 F.  
23 App'x 758, 761 (9th Cir. 2016) (applying judicial estoppel where party's inconsistent statements  
24 concerned only whether arbitrator had the authority to decide whether classwide arbitration was  
25 available); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 998 (9th Cir.  
26 2012) (applying judicial estoppel where party's inconsistent statements concerned the one issue  
27 of decedent's place of domicile at her death).

28 DCA's behavior far surpasses, in both quality and quantity, the conduct of the estopped

1 parties in these cases. As detailed above, DCA affirmatively stated in *seven* different contexts  
2 that it could not file a lawsuit against ICANN, that it “could not sue ICANN for anything.” DCA  
3 took this position to advocate for a wide array of issues (interim relief, additional briefing,  
4 document exchange, live witness testimony, binding nature of the IRP, *de novo* standard of  
5 review, payment of costs) and through a number of different means (briefs, letters to the IRP  
6 Panel, opening statement, closing argument). These circumstances are far more egregious than a  
7 mere checked box on a Case Management Statement or a position taken on a single issue.

8 DCA used its position that it could not sue ICANN in order to succeed on multiple  
9 arguments during the IRP and to win the IRP outright. Yet, DCA reversed its position when it  
10 later could not meet the requirements to become the operator of the geographic gTLD .AFRICA.  
11 When DCA won the IRP, DCA’s application was placed back into processing (exactly as the IRP  
12 Panel directed), and DCA was given numerous opportunities to demonstrate that it had the  
13 required support or non-objection of 60% of the governments of Africa (opportunities that DCA  
14 declined to take). When DCA realized that it was not going to get what it ultimately wanted – to  
15 become the operator of the .AFRICA gTLD – DCA filed this lawsuit. Preventing this type of  
16 capricious reversal whenever it suits a party’s interest is the epitome of why the doctrine of  
17 judicial estoppel was created.

18 **D. The IRP Truly Was A Quasi-Judicial Administrative Proceeding.**

19 The second concern that the Court identified was that the IRP does not qualify as a quasi-  
20 judicial administrative proceeding because ICANN did not follow the IRP Panel’s ruling. In its  
21 tentative, the Court acknowledged that the IRP had all the “hallmarks” and characteristics of a  
22 quasi-judicial administrative proceeding, including excellent jurists on the IRP Panel, witnesses  
23 and testimony, briefing, and a lot of rules and other formalities. (3/1/18 Trial Tr. at 138:12-16.)  
24 The Court, however, expressed concern that the IRP may nonetheless not meet the definition of a  
25 quasi-judicial administrative proceeding because, even though the IRP Panel ruled that its  
26 decision would be binding, “ultimately the decision was different...by the ICANN Board” and  
27 that “the final result was not the final result.” (3/1/18 Trial Tr. at 138:8-21.)

28 ICANN respectfully submits that the Court misunderstood the evidence presented at the

1 trial, which demonstrated quite clearly that the ICANN Board followed the IRP Panel’s ruling *in*  
 2 *every respect*. Indeed, a side-by-side comparison of the IRP Panel’s Final Declaration, the  
 3 ICANN Board’s resolution to follow the IRP Panel’s Final Declaration, and ICANN’s actions  
 4 following the resolution demonstrate that ICANN followed the Final Declaration in its entirety:

| IRP Panel’s Declaration<br>(Joint Tr. Ex. 43, ¶¶ 149-150)                                                    | ICANN Board Resolution<br>(Joint Tr. Ex. 144)                                                      | ICANN’s Action                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------|
| ICANN should continue to refrain from delegating .AFRICA to ZACR while DCA’s application is being processed. | To continue to refrain from delegating .AFRICA to ZACR while DCA’s application is being processed. | ICANN continued to refrain from delegating .AFRICA to ZACR while DCA’s application was being processed.                                  |
| ICANN should place DCA’s application back into processing.                                                   | To place DCA’s application back into processing.                                                   | ICANN placed DCA’s application back into processing (Geographic Names Review) – the exact place the application had been before the IRP. |
| ICANN should pay DCA’s IRP costs.                                                                            | To pay DCA’s IRP costs.                                                                            | ICANN paid DCA’s IRP costs.                                                                                                              |

14 In fact, a plain reading of the ICANN Board’s July 16, 2015 resolution shows that it  
 15 mirrors the Final Declaration in *every* respect (*compare* Joint Tr. Ex. 43 ¶¶ 149-150 *with* Joint Tr.  
 16 Ex. 144), as Ms. Willett confirmed in her testimony. (3/1/18 Trial Tr. at 77:22-79:23.) Further,  
 17 DCA has admitted that ICANN followed each aspect of the IRP Panel’s ruling: (i) it is  
 18 undisputed that ICANN did not delegate .AFRICA to ZACR while DCA’s application was being  
 19 processed following the IRP<sup>3</sup>; (ii) DCA admits that its application had not completed Geographic  
 20 Names Review at the time the GAC advice was accepted and admits that, following the IRP,  
 21 ICANN placed DCA’s application back into Geographic Names Review for evaluation (2/28/18  
 22 Trial Tr. at 49:12-28; 3/1/18 Trial Tr. at 11:7-10); and (iii) DCA admits that ICANN paid DCA’s  
 23 IRP costs. (2/28/18 Trial Tr. 104:20-25.)

24 In an effort to confuse the Court, DCA has asserted on multiple occasions – including  
 25 during this trial – that ICANN did not follow the IRP Panel’s Final Declaration, and instead  
 26 “fashion[ed] the remedy” “to [its] own liking.” (2/28/18 Trial Tr. at 150:14-17, 184:27-28; 3/1/18

27 <sup>3</sup> .AFRICA was delegated to ZACR only after this Court (in February 2017) denied  
 28 DCA’s attempt to obtain a preliminary injunction preventing ICANN from delegating the gTLD  
 to ZACR. *See* 2/3/17 Order re Plaintiff’s Motion for Preliminary Injunction.

1 Trial Tr. at 9:17-26; 25:1-18.) *This is 100% false*, and DCA has not cited to a single piece of  
2 evidence to support this assertion. While it remains unclear what DCA is referencing when it  
3 claims that “ICANN fashioned its own remedy,” it may be that DCA is arguing that its  
4 application ultimately failed because it did not pass Geographic Names Review, but this has  
5 nothing to do with the IRP Panel’s ruling. As Ms. Bekele admitted, the IRP Panel did *not* declare  
6 that DCA’s application could proceed without having to pass the Geographic Names Review.  
7 (2/28/18 Trial Tr. at 107:8-25.) To the contrary, the IRP Panel noted that DCA had asked the IRP  
8 Panel to declare that DCA’s application be deemed to have passed the Geographic Names Review  
9 or that DCA be given 18 additional months to try to obtain additional letters of support in order to  
10 pass the Geographic Names Review; but the Panel declined to grant either of these requests. (*See*  
11 *Final Declaration* ¶¶ 119, 150 (Joint Tr. Ex. 43).)

12 As previously explained, no determination had been made in the summer of 2013  
13 regarding whether DCA’s application had passed the Geographic Names Review when ICANN’s  
14 Board accepted the GAC advice and halted processing of the application, or at the time DCA  
15 initiated the IRP. Thus, when the IRP Panel issued its Final Declaration in July 2015 in DCA’s  
16 favor, the Panel declared that ICANN should return DCA’s application to where it was before  
17 ICANN accepted the GAC advice – back “into processing.” The Panel did not make any  
18 determination as to whether DCA’s application should ultimately pass or fail Geographic Names  
19 Review, much less whether DCA should be awarded the rights to the gTLD.

20 When DCA’s application was placed back into processing following the IRP, the ICC  
21 resumed its evaluation of the letters that DCA submitted with its application and that DCA  
22 claimed showed the necessary governmental support. (3/1/18 Trial Tr. at 81:6-12.) Like the  
23 letters ZACR had submitted with its original application, DCA’s letters of support did not  
24 conform to Guidebook requirements. (*See* 2/28/18 Trial Tr. at 108:13-28; 3/1/18 Trial Tr. at  
25 81:13-28.) Also like ZACR, Clarifying Questions were issued to DCA explaining what was  
26 deficient about the support letters, and DCA was given an opportunity to obtain new or updated  
27 letters. (2/28/18 Trial Tr. at 108:7-11, 18-28; 3/1/18 Trial Tr. at 81:13-28.) Unlike ZACR (which  
28 obtained updated documentation of support), DCA did not even try to obtain new letters to

1 demonstrate existing support from the African governments, but instead insisted that its original  
2 letters (from 2008 and 2009, before the Guidebook’s requirements had even been finalized, and  
3 three years before DCA’s application was even submitted) should be considered sufficient.  
4 (2/28/18 Trial Tr. at 108:13-17, 109:1-8; 3/1/18 Trial Tr. at 82:14-22, 84:15-24.) DCA was given  
5 every opportunity to provide the required documentation, but it refused to do so. (2/28/18 Trial  
6 Tr. at 108:7-109:8; 3/1/18 Trial Tr. at 81:13-84:24.) As a result, six months after the IRP ended,  
7 the ICC determined that DCA’s application did not pass the Geographic Names Review. In no  
8 way was that determination related to ICANN not following the IRP Panel’s Final Declaration.  
9 (2/28/18 Trial Tr. at 109:9-12; 3/1/18 Trial Tr. at 60:5-7, 81:13-84:24, 87:28-88:1.)

10 Moreover, even if ICANN had not followed the IRP Panel’s ruling – or, alternatively,  
11 even if the IRP Panel had not ruled that its Final Declaration would be binding on the parties – the  
12 IRP would *still* qualify as a quasi-judicial administrative proceeding. An adversarial proceeding  
13 resulting in a “binding” decision is not necessary for the application of judicial estoppel, or for a  
14 proceeding to be considered quasi-judicial by California courts. For example, courts have found  
15 the following proceedings to meet the definition of a quasi-judicial administrative proceeding:

- 16 • Application for a project permit – *People ex rel. Sneddon*, 102 Cal. App. 4th at  
17 189–90 (“We exercise our discretion and apply judicial estoppel to prevent  
18 [Defendant] from escaping a long-established commitment to comply with the  
19 County’s regulations. To do otherwise would reward inequitable conduct and  
20 ‘cynical gamesmanship.’”).
- 21 • Proceeding before Equal Employment Opportunity Commission (“EEOC”) and  
22 before the South Carolina Human Affairs Commission (“SCHAC”) – *Scott v. Land*  
23 *Span Motor, Inc.*, 781 F. Supp. 1115 (D.S.C. 1991).<sup>4</sup>
- 24 • Hearing before an officer appointed by a hospital district – *Ascherman v.*  
25 *Natanson*, 23 Cal. App. 3d 861 (1972).<sup>5</sup>

24 <sup>4</sup> “The doctrine [of judicial estoppel] is applicable regardless of whether the prior position  
25 was taken in a judicial or a quasi-judicial proceeding . . . since ‘[t]he truth is no less important to  
26 an administrative body acting in a quasi-judicial capacity than it is to a court of law.’” *Id.* at 1119  
27 (citations omitted). The court, however, held that judicial estoppel did not apply on grounds other  
28 than whether the EEOC and SCHAC constituted a quasi-judicial administrative proceeding. *Id.* at  
1120.

<sup>5</sup> The court considered whether the hearing before an officer appointed by a hospital  
district constituted a quasi-judicial administrative proceeding. Although the case did not involve  
the doctrine of judicial estoppel, the analysis is illustrative: “[t]he primary factors which

- 1           • Proceeding before Law School Honor Code Committee – *Singh v. Tong*, No. 06-64  
2           AA, 2006 WL 3063495 (D. Or. Oct. 25, 2006).<sup>6</sup>

3           As this Court acknowledged in its tentative, the IRP contained all the other “hallmarks” of  
4 a quasi-judicial administrative proceeding: it was a ferociously litigated proceeding, governed by  
5 the International Arbitration Rules and presided over by a distinguished independent three-  
6 member panel; it involved extensive briefing, document production, live witness testimony, and a  
7 live hearing; and the IRP Panel issued multiple rulings and declarations that provided structure to  
8 the nearly two-year long proceeding. The court decisions noted above make clear that the IRP  
9 would qualify as a quasi-judicial administrative proceeding even if ICANN had not followed the  
10 IRP Panel’s Final Declaration and even if the issue of whether the ruling was “binding” was  
11 never raised. Either way, and especially since ICANN *did* follow the Panel’s Final Declaration,  
12 the question of whether the IRP was a quasi-judicial proceeding for purposes of judicial estoppel  
13 should be resolved in ICANN’s favor.

14       **II. THE OTHER ELEMENTS OF JUDICIAL ESTOPPEL ARE EASILY MET.**

15           ICANN also take the opportunity to note briefly how the evidence presented at trial shows  
16 that every other element of judicial estoppel is met in this case.

17       **A. DCA Took Two Totally Inconsistent Positions.**

18           As detailed above, DCA repeatedly told the IRP Panel that, because of the Covenant,  
19 DCA was unable to sue ICANN. DCA’s statements were without qualification or limitation, and  
20 at no time did DCA state to the Panel that the inability to file a lawsuit against ICANN applied  
21 only to certain types of claims. (2/28/18 Trial Tr. at 67:25-68:5.) Yet, six months after the IRP  
22 concluded and ICANN took all of the actions that the IRP Panel said it should take, when DCA’s

23 determine the nature of the proceedings are: (1) whether the administrative body is vested with  
24 discretion based upon investigation and consideration of evidentiary facts, (2) whether it is  
25 entitled to hold hearings and decide the issue by the application of rules of law to the ascertained  
26 facts, and more importantly (3) whether its power affects the personal or property rights of private  
27 persons.” *Id.* at 866.

28           <sup>6</sup> The court considered whether the Law School Honor Code Committee constituted a  
quasi-judicial administrative proceeding in a different context. The court reasoned, “[a] judicial  
or quasi-judicial function is one that involves or requires an adjudicatory process. A typical  
adjudicatory process results in a decision, applies pre-existing criteria to concrete facts and is  
directed at a closely circumscribed factual situation or a relatively small number of persons.” *Id.*  
at \*2 (citation omitted).

1 application for .AFRICA failed due to DCA’s inability to demonstrate the required governmental  
2 support, DCA reversed itself and sued ICANN. These polar opposite positions are “clearly  
3 inconsistent” such that “one necessarily excludes the other.” *Jackson*, 60 Cal. App. 4th at 182  
4 (citations omitted).

5 **B. DCA Succeeded In Taking Its First Position.**

6 As also detailed above, DCA told the IRP Panel that it was unable to sue ICANN in order  
7 to achieve a number of different results. The IRP Panel ruled in DCA’s favor each and every  
8 time. *People ex rel. Sneddon*, 102 Cal. App. 4th at 189 (“The party invoking judicial estoppel  
9 must show that ... the position was adopted by the first tribunal in some manner such as by  
10 rendering a favorable judgment.”) As a result, this factor likewise is easily met.<sup>7</sup>

11 **C. Neither Of DCA’s Positions Was Taken As A Result Of Ignorance,  
12 Fraud, Or Mistake.**

13 DCA made attempts during the trial to imply that DCA should not be accountable for  
14 repeatedly and unequivocally telling the IRP Panel that it was unable to sue ICANN because  
15 Ms. Bekele is not an attorney. (See 2/28/18 Trial Tr. at 23:25-28, 3/1/18 Trial Tr. at 19:10-21.)  
16 But Ms. Bekele is not an “ignorant plaintiff.” She has a bachelor’s degree in business analysis  
17 and information systems, and a master’s in business administration and management and  
18 information systems. (2/28/18 Trial Tr. at 42:1-7.) She has been actively involved in the ICANN  
19 community since 2005, including serving as an advisor to ICANN’s Generic Names Supporting  
20 Organization (the organization that developed the policy recommendations behind the New gTLD  
21 Program (2/28/18 Trial Tr. at 43:1-22; 3/1/18 Trial Tr. at 56:18-22), and she was an active  
22 participant in the development of the Guidebook containing the Covenant. (2/28/18 Trial Tr. at  
23 44:23-26.)

24 Further, whether Ms. Bekele is an attorney is irrelevant to the judicial estoppel inquiry  
25 because she was represented by one during the IRP and it was her attorney, Mr. Arif Ali, that

26 <sup>7</sup> DCA’s argument that it did not ultimately succeed in securing the right to operate  
27 the .AFRICA gTLD (and therefore it did not “win”) is a red herring. As explained above, DCA  
28 was successful on each of the seven issues for which it argued that it could not sue ICANN, and  
the Panel never ruled that DCA should be granted the rights to .AFRICA. That DCA ultimately  
could not garner the required support or non-objection from the local governments is irrelevant to  
the judicial estoppel inquiry.

1 made these statements. At no time did Ms. Bekele indicate to her attorney or the IRP Panel that  
2 she disagreed with her attorney's statements regarding the Guidebook or DCA's inability to sue  
3 ICANN.<sup>8</sup> (2/28/18 Trial Tr. at 57:15-28.)

4 DCA also tried to imply that Mr. Ali's (alleged) lack of familiarity with California law  
5 excuses his statements, an argument that likewise has no merit. Mr. Ali did not testify in the trial,  
6 and thus DCA did not demonstrate any lack of knowledge of California law on his part or on the  
7 part of his team. Further, DCA's IRP pleadings are replete with citations to California law.  
8 Indeed, DCA's attorneys devoted five pages of a pleading to an argument that the IRP must be  
9 binding in order for the Covenant not to be unconscionable – *under California law*. (See Joint  
10 Tr. Ex. 18 at pp. 5-10.) To imply that Mr. Ali's Washington, D.C. bar status somehow absolves  
11 DCA of responsibility for repeatedly telling the IRP Panel that the Covenant bars lawsuits against  
12 ICANN is beyond disingenuous. As the Court pointed out, one need not to be a California  
13 attorney to research California law.<sup>9</sup> (3/1/18 Trial Tr. at 48:15-17.)

14 DCA also argued that DCA's reversal of position should be excused because DCA was  
15 not aware during the IRP that ICANN would not view the IRP as binding. (See 2/28/18 Trial Tr.  
16 at 148:28-149:5.) The evidence proves this argument to be false. Prior to the DCA IRP, ICANN  
17 had participated in only one IRP, and that panel had ruled that its declaration was *not* binding.  
18 (Joint Tr. Ex. 20 at p. 3.) In fact, Mr. Ali – who DCA chose as its lawyer during this IRP because  
19 of his experience dealing with ICANN and the IRP procedure – was the claimant's attorney in  
20 that prior IRP. (2/28/18 Trial Tr. at 54:12-20; 3/1/18 Trial Tr. at 90:18-21.) Further, DCA was  
21 put on notice by *at least* early 2014 that ICANN did not view this particular IRP as binding, yet  
22 DCA continued to tell the IRP Panel (including with emphatic statements at the May 2015  
23 hearing) that it was unable to sue ICANN, without caveat. At no time did DCA qualify its  
24 statement to say, "DCA cannot sue ICANN in court unless ICANN fails to follow the IRP Panel's

25 <sup>8</sup> There was one occasion during the IRP where Ms. Bekele *did* disagree with her  
26 attorneys regarding what relief DCA intended to seek. Ms. Bekele and her attorneys had  
27 submitted two different requests for relief, and the IRP Panel had to order DCA to prepare a  
consolidated request. (2/28/18 Trial Tr. at 55:20-56:8.) Ms. Bekele testified that this was the only  
time she disagreed with any statements of her attorneys. (2/28/18 Trial Tr. at 57:15-28.)

28 <sup>9</sup> Further, Mr. Ali was part of an international law firm that has maintained a California  
office since 1991. (3/1/18 Trial Tr. at 45:18-47:15.)



1 decision,” or “DCA cannot sue ICANN unless ICANN does not treat the IRP Panel’s decision as  
2 binding.”<sup>10</sup>

3 Moreover, DCA did not sue ICANN when it “first learned” that ICANN did not view the  
4 IRP Panel’s Final Declaration as binding. In 2015, the IRP Panel issued its Final Declaration, and  
5 the ICANN Board published its resolution specifying how ICANN intended to follow the  
6 Declaration; DCA did not sue ICANN. DCA’s application was then placed back into the  
7 Geographic Names Review to complete processing; DCA did not sue ICANN. DCA’s  
8 application spent a total of six months in Geographic Names Review, during which time DCA  
9 was given two separate opportunities to meet the Guidebook’s governmental support or non-  
10 objection requirement. It was only at the *end* of these six months, when it became clear that  
11 DCA’s application was not going to pass Geographic Names Review due to insufficient  
12 governmental support, that DCA decided it was able to sue ICANN after all.

13 DCA’s conduct easily meets every element of California’s judicial estoppel doctrine.  
14 Indeed, the conduct classically exemplifies a self-serving manipulation of the legal system the  
15 doctrine was designed to preclude.

16 **III. IN THE ALTERNATIVE, DCA SHOULD BE PRECLUDED FROM**  
17 **ASSERTING CLAIMS RAISED DURING THE IRP.**

18 If the Court is inclined to deny the application of judicial estoppel to dismiss DCA’s First  
19 Amended Complaint (“FAC”), ICANN requests, in the alternative, that DCA be precluded from  
20 pursuing in this Court the same claims that were raised and considered in the IRP. The Court  
21 undoubtedly has the equitable power to hold that DCA should be judicially estopped from re-  
22 litigating all of the claims that it already litigated in front of the IRP Panel, whether or not that

23 \_\_\_\_\_  
24 <sup>10</sup> DCA also argued that, at the time of the IRP, it was not aware of this Court’s ruling  
25 allowing its fraud claims to proceed. This argument also fails. First, DCA brought both fraud  
26 and non-fraud claims in this lawsuit. Second, as previously noted, in all the time it used its initial  
27 position that DCA could not sue ICANN in its arguments to the IRP Panel, DCA never once  
28 qualified its statements by referencing the potential unenforceability of the Covenant, nor did  
DCA ever indicate that it intended to challenge the enforceability of the Covenant. Third, and  
most importantly, this Court’s ruling would only excuse DCA’s about-face if DCA had reversed  
its position *as a result of the Court’s ruling*. But it did not. DCA reversed its position based on  
nothing more than its own desire to obtain the rights to operate .AFRICA. DCA cannot attempt  
to use this Court’s ruling to excuse its behavior.

1 Panel made formal findings on the various claims.<sup>11</sup> Such a determination would allow DCA to  
2 litigate the claims that arise out of events that post-date the IRP Panel’s Final Declaration.

3 In fact, DCA’s counsel repeatedly asserted that the conduct at issue in this lawsuit is  
4 ICANN’s denial of DCA’s application *following* the IRP: “The fundamental decision at issue in  
5 the IRP was ICANN’s acceptance of the GAC advice and shutting down of my client’s  
6 application. The fundamental dissension at issue that is at stake in this case is whether ICANN’s  
7 decision to flunk my client on Geographic Names Review was appropriate.” (2/28/18 Trial Tr. at  
8 30:1-6.) In order to give credit to these statements, the Court should, at a minimum, hold that  
9 DCA is judicially estopped from litigating any claims other than those that post-date the IRP and  
10 directly relate to DCA’s identification of the “fundamental issue that is at stake in this case.”  
11 This would streamline the trial considerably,<sup>12</sup> and give partial effect to the doctrine of judicial  
12 estoppel so as to preclude DCA from re-litigating claims that DCA presented to the IRP Panel in  
13 the context that it could not sue ICANN regarding those claims.

14 Ms. Bekele testified at length that DCA had raised the following issues in the IRP, and  
15 that these *exact same issues* formed the basis for critical allegations in DCA’s FAC:

- 16 • The African Union Commission (“AUC”) tried to reserve .AFRICA for itself  
17 (2/28/18 Trial Tr. at 113:2-12).
- 18 • ICANN and the AUC conspired to improperly obtain .AFRICA through a third  
19 party, ZACR, in violation of the New gTLD Program guidelines (2/28/18 Trial Tr.  
20 at 116:7-117:5).
- 21 • ICANN breached its agreement with DCA to review DCA’s application in  
22 accordance with ICANN’s Bylaws, Articles of Incorporation, and the New gTLD  
23 Program rules and procedures, by improperly advising and conspiring with the  
24 AUC on how to defeat any application other than its own (via its proxy, ZACR)  
(2/28/18 Trial Tr. at 117:6-118:10).
- The AUC joined the GAC on the advice of ICANN, but its status as a voting

25 <sup>11</sup> “Trial courts have broad equitable power to fashion any appropriate remedies.” *Shapiro*  
26 *v. Sutherland*, 64 Cal. App. 4th 1534, 1552 (1998); *see also Toscano v. Greene Music*, 124 Cal.  
App. 4th 685, 693 (2004) (when considering doctrines “equitable in nature,” courts “should have  
broad judicial discretion to fashion remedies in the interests of justice”).

27 <sup>12</sup> The vast majority of the claims underlying the remaining causes of action in DCA’s  
28 FAC – and all of the claims underlying DCA’s fourth cause of action for conspiracy to commit  
fraud – were already litigated in the IRP.

1 member is improper because it has no regulatory authority over its members  
2 (2/28/18 Trial Tr. at 118:11-119:7).

- 3 • ICANN allowed the GAC to be used as a vehicle for the issuance of advice against  
4 DCA's application by the AUC, ensuring that the rights to .AFRICA would be  
5 delegated to ZACR (2/28/18 Trial Tr. at 119:8-120:4).
- 6 • ICANN never intended to treat applicants equally but instead chose applicants  
7 based on its own wishes and in exchange for political favors (2/28/18 Trial Tr. at  
8 120:5-121:11).
- 9 • ICANN conspired with the AUC and ZACR by assisting the AUC and ZACR to  
10 improperly deny DCA's application (2/28/18 Trial Tr. at 122:15-123:17; 125:19-  
11 130:10).
- 12 • ICANN worked to make sure ZACR, and not DCA, would pass Geographic  
13 Names Review, including by drafting one of ZACR's endorsement letters (2/28/18  
14 Trial Tr. at 130:21-132:2).
- 15 • ZACR made multiple misrepresentations to ICANN in its application for  
16 .AFRICA (2/28/18 Trial Tr. at 134:14-135:9).
- 17 • ZACR should have filed a community application, not a standard application  
18 (2/28/18 Trial Tr. at 133:17-134:13).
- 19 • DCA complained about ZACR's fraudulent application for .AFRICA, but ICANN  
20 refused to take any action (2/28/18 Trial Tr. at 135:10-136:13).
- 21 • The AUC and ZACR have a contract that assigns all intellectual property rights to  
22 .AFRICA to the AUC, which is not allowed under the Guidebook (2/28/18 Trial  
23 Tr. at 136:14-137:14).
- 24 • ICANN allowed ZACR to assign all intellectual property rights to the AUC, in  
25 violation of the Guidebook, in exchange for political support (2/28/18 Trial Tr. at  
26 137:15-27).
- 27 • There were conflicts of interest with three of ICANN's Board members in regards  
28 to the .AFRICA applications (2/28/18 Trial Tr. at 138:13-139:11).
- ICANN defrauded DCA by failing to act in accordance with its Articles of  
Incorporation and the Guidebook (2/28/18 Trial Tr. at 139:12-140:25).
- ICANN had no intention of following its Bylaws, Articles of Incorporation, or the  
rules outlined in the gTLD Applicant Guidebook (2/28/18 Trial Tr. at 140:26-  
141:9, 22-24).
- ICANN had no intention of participating in the IRP Process in good faith and at all  
times believed it would do whatever it wanted (2/28/18 Trial Tr. at 141:10-24).

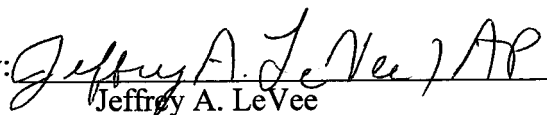
1 The only claims *not* raised in both the FAC and the IRP are those that relate to ICANN's  
2 post-IRP conduct, specifically the processing of DCA's application following the IRP, and  
3 ICANN's ultimate denial of the application following DCA's failure to meet the requirements of  
4 the Geographic Names Review. If there is to be a second trial in this case, the Court should use  
5 its equitable powers to limit the second trial to this post-IRP conduct so as to give effect to the  
6 doctrine of judicial estoppel, to prevent DCA from pursuing a lawsuit on the issues that DCA  
7 already presented to the IRP Panel, and also to give credence to DCA's argument in the judicial  
8 estoppel trial that the post-IRP conduct is the true issue in this lawsuit. This result would give  
9 DCA its "day in court" on the "fundamental issue" that DCA believes this case is all about, and  
10 would avoid re-litigating all of the other issues that DCA litigated before the IRP Panel.

11 **IV. CONCLUSION**

12 For the foregoing reasons, ICANN respectfully requests that the Court apply the doctrine  
13 of judicial estoppel to prevent DCA from proceeding with this lawsuit. In the alternative, ICANN  
14 requests that the Court preclude DCA from raising the same claims it raised during the IRP.

15 Dated: March 19, 2018

Jones Day

17 By:  AP  
18 Jeffrey A. LeVee

19 Attorneys for Defendant  
20 INTERNET CORPORATION FOR  
21 ASSIGNED NAMES AND NUMBERS

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