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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL

DOTCONNECTAFRICA TRUST, a Mauritius Charitable Trust,

Plaintiff,

v.

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

Defendant.

Case No.: BC607494

[*Assigned to Hon. Howard L. Halm, Dept. 53*]

PLAINTIFF DOTCONNECTAFRICA TRUST'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT ICANN'S MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

When Plaintiff DotConnectAfrica Trust ("DCA") applied to ICANN for the general top level domain ("gTLD") .Africa, DCA had no way of knowing that ICANN – the world's only purveyor of Internet top level domain names -- never intended to honor the promises it made in the gTLD application guidebook (the "Guidebook"). In reliance on ICANN's false promises to be fair and even-handed, DCA paid the $185,000 application fee, and attempted to meet the requirements for .Africa. Because ICANN required that all applicants acquiesce to a waiver of any right to sue ICANN (the "Prospective Release") before it would consider any application, ICANN believed that it was absolutely shielded from all lawsuits. It is not.

After ICANN received DCA's $185,000, ICANN's true intentions surfaced. ICANN, at every step of the process, favored DCA's only competitor, Intervenor ZA Central Registry, NPC ("ZACR"), attempted to grant ZACR the .Africa gTLD when DCA initiated review proceedings, and exhaustively argued to limit the review panel's authority, evidence submitted, and binding effect, all to DCA's detriment. ICANN now seeks to avoid liability for its wrongdoing through its Prospective Release which purports to waive "any and all claims" an applicant has against ICANN in processing gTLD applications, including fraud and intentional misconduct. ICANN's Prospective Release fails for the following reasons:

First, DCA alleged claims of fraud and intentional misconduct, but if the Prospective Release is enforced, DCA is denied all redress. There simply is no possible means of holding ICANN liable for its fraud or intentional misconduct through the redress ICANN provides. Therefore, the Prospective Release is void under Section 1668.

Second, even if there was redress provided through ICANN mechanisms, ICANN argued and argues that any decision made by the Independent Review Panel ("IRP") is merely advisory. Thus, ICANN chooses whether to follow an adverse decision against it. There is no real redress through ICANN; it is illusory.

Third, the Prospective Release is unconscionable. ICANN opened the drafting of the applicant Guidebook to public comment. ICANN's own governmental advisory subcommittee commented that it "cannot accept any exclusion of ICANN's legal liability for its decision and asks that [the Prospective Release]…be removed," among others' protests. ICANN made no changes, other than to reference its illusory redress procedures. ICANN permitted no one to

negotiate the inclusion of the Prospective Release. ICANN also reserved the right to alter the redress procedures after DCA paid its fee, and did change those procedures, to the surprise of DCA. This constitutes procedural unconscionability. The Prospective Release is substantively unconscionable because it requires an applicant, such as DCA, *but not ICANN*, to waive all redress in court. The process ICANN purports to provide is illusory and limited to addressing procedural irregularities not ICANN's fraud or intent to willfully favor one applicant to the detriment of others. In sum, the Release is procedurally and substantively unconscionable.

Fourth, the Prospective Release was fraudulently procured because ICANN failed to disclose, prior to application, the critical fact that ICANN has no obligation to follow the rulings of the IRP process it touted as a substitute for court redress. Applicants were misled into believing that ICANN's decisions were subject to meaningful review when they were not: ICANN can choose whether to adhere to IRP rulings. That is no fair substitute to court process.

Fifth, ICANN's judicial estoppel argument fails. ICANN now argues (for the first time) that DCA admitted the IRP was its only forum of redress. DCA only argued that *if* the Prospective Release was enforceable, the IRP had to be binding, otherwise applicants would have no redress against ICANN. DCA's position has always been that ICANN should not be judgment-proof, in whatever forum. Without inconsistent positions, judicial estoppel does not apply.

Finally, ICANN relies heavily on *Ruby Glenn v. ICANN* and analogizes those facts to these. However, no claims of fraud or intentional wrongdoing were alleged in *Ruby Glenn*. That critical distinction differentiates the case and confirms *Ruby Glen* does not apply here. The federal court reviewing the allegations in this case found ICANN's Prospective Release was likely void "as a matter of law", and this court should do the same.

II. STATEMENT OF FACTS

A. ICANN

ICANN is a California non-profit established by the U.S. government. ICANN is the only organization in the world that assigns rights to Generic Top-level Domains ("gTLDs") (Declaration of Sophia Bekele ("Bekele Decl."), ¶ 5, Ex. 1 at ¶ 4). It therefore yields monopolistic power and forces participants in the market for gTLDs to play by its rules. Nevertheless, ICANN's own Bylaws state that it shall not apply its standards inequitably or single out any particular party for disparate treatment. (DCA Separate Statement of Disputed Material Facts and Additional Undisputed Material Facts ("SUF") ¶ 50.) ICANN is supposed to be accountable to the Internet

community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. (*Id.*).

B. DCA and the Top-Level Domain Application

In March 2012, DCA applied to ICANN for the delegation of the .Africa top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"). (*Id.*, ¶ ¶ 1.) To apply for a gTLD, applicants were required to submit to the terms of the gTLD Applicant's Guidebook (the "Guidebook"). (*Id.*, ¶ 92). In consideration of ICANN's promises to abide by its own Bylaws, Articles of Incorporation, and the Guidebook DCA paid ICANN a $185,000.00 mandatory application fee. (Bekele Decl. ¶ 4.)

The Guidebook contained the Prospective Release. (SUF ¶ 5.) The Prospective Release states that an applicant "releases ICANN…from any and all claims *by applicant* that arise out of, are based upon, or any are in any way related to, any action, or failure to act, by ICANN…in connection with ICANN's…review of this application." (*Id.* [emphasis added]) ICANN does not release the applicant from any claims. (*See generally id.*) During the drafting of the Guidebook, ICANN requested comments from the public. The public comments about the Prospective Release included:

- "ICANN has not justified the requirements that an applicant release ICANN from all claims and waive any rights to judicial action and review; this paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability"; (SUF ¶ 94)
- "Provision 6, release of claims against ICANN is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the part of ICANN"; (*Id.*)
- "If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open"; (*Id.* ¶ 95.)
- "The covenant not to challenge and waiver in Paragraph 6 **is overly broad, unreasonable, and should be revised in its entirety**." (*Id.* ¶96 emphasis added.)

But ICANN, using its monopolistic power, only changed the Prospective Release by adding language about the alternate "accountability mechanisms" including ICANN's Independent Review Process ("IRP"). (*Id.* ¶ 100.) ICANN's own governmental advisory committee - tasked with providing ICANN with "advice on issues of public policy" -- commented that it "cannot accept any exclusion of ICANN's legal liability for its decision and asks that [the Prospective

Release]…be removed." (*Id.* ¶ 93) While the revision to the Prospective Release makes reference to ICANN's IRP proceeding, it is materially misleading because it fails to disclose ICANN's position that IRP rulings are not binding on ICANN. (*Id.* ¶ 17.)

ICANN purports to provide applicants with an IRP as an alternative to court action to challenge ICANN's actions regarding gTLD applications. (*Id.*.) Although the Prospective Release provides that an applicant may utilize the IRP, the IRP can only review ICANN's procedural actions, not any substantive claims. (*Id.* ¶ 70.)

C. Requirements for Geographic TLDs

With respect to geographic gTLDs like .Africa, ICANN required that applicants obtain endorsements from 60% of the region's national governments, and have no more than one written statement of objection. (Bekele Decl. ¶ 15, Ex. 3 at § 2.2.1.4.2.) DCA obtained the endorsements of the African Union Commission ("AUC") and the United Nations Economic Commission for Africa (UNECA), among others. (SUF ¶ 38..) In April 2010, nearly a year later, the AUC wrote DCA and informed DCA that it had "reconsidered its approach in implementing the subject Internet Domain Name (.Africa) and no longer endorses individual initiatives in this matter[.]" (Bekele Decl. ¶ 18, Ex. 6.) Presumably, the AUC tried to withdraw its support of DCA because, in 2011, it attempted to obtain the rights to .Africa for itself, requesting that ICANN include .Africa in the List of Top-Level Reserved Names. (*See Id*., ¶ 21, Ex. 9.) ICANN denied the AUC's request to reserve .Africa, but assisted AUC in obtaining the .Africa delegation rights through a proxy - ZACR. (*Id.*) In exchange for the AUC's endorsement, ZACR agreed to allow the AUC to "retain all rights relating to the dotAfrica TLD." (SUF ¶ 79.)

D. The Geographic Names Panel and InterConnect Communications

Only after this litigation commenced did ICANN argue that DCA's application lacked merit because its AUC endorsement had been withdrawn. Not only did the August 2010 letter from the AUC fail to expressly withdraw the AUC's endorsement of DCA (Bekele Decl. ¶ 21, Ex. 9), but it lacked the signature of the AUC's chairman who signed the original endorsement letter. Further, Section 2.2.1.4.3 of the Guidebook states that a "government may withdraw its support for an application at a later time…*if the registry operator has deviated from the conditions*

of original support or non-objection." (emphasis added) (Bekele Decl. ¶ 6, Ex. 2 at § 2.2.1.4.3.) There were no conditions on the AUC or UNECA endorsements to DCA. (SUF ¶ 38.)8.) The letter was sent to ICANN at the same time it was sent to DCA, and ICANN continued to process DCA's application nonetheless – recognizing the continued validity of the endorsement. ICANN testified that it had not considered the AUC endorsement letter withdrawn in evaluating DCA's application; ICANN's only objection, was with respect to the fourth, and non-mandatory geographic names evaluation factor.[1] (Declaration of Sara C. Colón ("Colón Decl.")., Ex. H [Willet Transcript], pp.75:1-77:17.)

E. <u>The GAC</u>

ICANN has a Governmental Advisory Committee ("GAC") whose purpose, according to ICANN's Bylaws, is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments." (Bekele Decl. ¶ 5, Ex. 1, ¶ 101.) The AUC became a member of the GAC in 2012, through ICANN's guidance. (SUF ¶ 80.) Then, with ICANN's direction, the AUC employed the GAC as a vehicle to issue advice against DCA's application. (*Id*.) This effectively allowed the AUC to ensure that the rights to .Africa would be delegated to itself – through its proxy ZACR. (*Id*.) But the GAC's advice was arbitrary. (SUF ¶¶ 76-80 ("[ICANN's witness]… stated that the GAC made its decision without providing any rationale and primarily based on politics [.]")) ICANN rejected DCA's application based on that GAC advice. (*Id*..) ICANN refused to reconsider this decision. (Bekele Decl. ¶ 5, Ex. 1, ¶ 6; ¶ 12, Ex. 3, Art. 4 § 2.2.)

Meanwhile, ZACR passed the initial evaluation and entered the contracting phase with ICANN. (*Id.*, ¶ 38, Ex. 24.) ZACR did not have sufficient country specific endorsements to meet the ICANN requirements for geographic gTLDs. (SUF ¶¶ 82 & 83.) Only five of the purported endorsement letters submitted by ZACR from African governments referenced ZACR by name. (*Id*..) ICANN also ghostwrote an endorsement for ZACR to submit to the AUC for its signature. (*Id*. ¶ 84.) ICANN's assistance to ZACR was pervasive, extraordinary and a willful effort to

[1] This factor is discretionary in that it is framed as a "should" while the other factors are framed as "must." Bekele Decl. ¶ 6, Ex, 2, Section 2.2.1.4.3.. Moreover, the purportedly missing information was readily inferred from the letter. SUF ¶ 38. This is compelling evidence that ICANN's rejection of DCA's application was pretextual and part of a deliberate attempt to favor ZACR.

subvert the even-handed way in which the delegation of gTLDs was supposed to work. SUF ¶¶ 63-65, 80-86. __.

F. The Independent Review Process

In October 2013, DCA successfully sought an IRP to review ICANN's processing of its application, including ICANN's handling of the GAC opinion. (Bekele Decl. ¶ 5, Ex. 1.) Significantly, the IRP's authority is solely limited to determining whether ICANN's Board's actions, conformed to its Bylaws and Articles of Incorporation. (SUF ¶ 70.)

During the IRP, ICANN took every possible step to limit the evidentiary review and IRP's power. (*Id*. ¶¶ 47 & 59.) First, after initiating an IRP with ICANN in October 2013, ICANN did nothing for more than a year. (*Id.* ¶¶ 60 & 61.) When DCA sought emergency relief from a provider appointed panel, because ICANN never attempted to convene a standing panel, ICANN then argued that only the standing panel could issue rulings, but provided no explanation why it had not begun forming one after more than 12 months-notice. (*Id*.) Second, ICANN repeatedly argued that any decision issued by the IRP was merely advisory.[2] (*Id.* ¶¶ 74 & 75.) In response, DCA argued that *if* the Prospective Release was valid, the IRP must be binding to afford applicants with redress. (*Id*. ¶ 122.) DCA's position throughout all proceedings, has been that ICANN should not be judgment proof and should be held accountable. (*Id.*) The Panel rejected ICANN's argument, holding, if the Prospective Release was binding, that:

> The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, and b) the IRP Process touted by ICANN as the 'ultimate guarantor' of ICANN accountability was only an advisory process, the benefit of which accrued to ICANN. (Bekele Decl. ¶ 5, Ex. 1 at ¶ 23 (¶ 115).)

ICANN also attempted to limit the IRP's review process and exclude any live testimony , limit any questioning of witnesses by the panel , limit cross-examination by the panel to written questions submitted to witnesses prior to the hearing. (*Id.* at ¶ 59 .) In pre-hearing argument during

[2] The issue of whether an IRP is binding was also brought up in a subsequent IRP, Dot Registry, LLC v. ICANN, where ICANN continued to argue that the ICANN Board had discretion whether to implement an IRP declaration. Colón Decl. ¶ 6, Ex. E.)

the IRP, ICANN stated that it "was not required to establish any internal corporate accountability mechanism but did so voluntarily…[and] DCA does not have any 'due process' rights with respect to the Independent Review process."[3] Thus, the assertion by ICANN that it participated in the IRP in good faith is dishonest.

DCA succeeded in the IRP, which held ICANN's actions in rejecting DCA's application were not in conformity with ICANN's Articles of Incorporation or Bylaws. Bekele Decl. ¶ 5, Ex. 1.

G. ICANN Ignores the IRP's Authority

Despite the initiation of the IRP, ICANN passed ZACR's application – *even signing a contract for the operation of .Africa with ZACR*. (*Id.*, ¶ 5, Ex. 1, ¶¶ 12–20.) The IRP panel, during emergency proceedings, found this improper and enjoined further issuance of .Africa to ZACR. (*Id.*) The IRP panel issued a final and thorough 63-page declaration in the matter on July 9, 2015. The panel found, *inter alia,* that: (1) if the Prospective Release was enforceable, that the IRP arbitration was binding. (SUF ¶ 125); (2) ICANN's actions and inactions with respect to DCA's application were inconsistent with ICANN's bylaws and articles of incorporation. (Bekele Decl. ¶ 5, Ex. 1, ¶ 109); and (3) ICANN should "continue to refrain from delegating the .Africa gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (*Id*., ¶ 5, Ex. 1, ¶ 133.) Although the panel noted that other actions and inactions of ICANN also likely violated ICANN's Bylaws and Articles of Incorporation, the Panel took no further action after the initial findings of wrongdoing. (*Id.*, ¶ 5, Ex. 1, ¶ 116.)

H. ICANN's Processing of DCA's Application After the IRP Declaration

ICANN did not act in accordance with the IRP's Final Declaration. (*Id*., ¶ 5, Ex. 1 ¶ 23.) Instead of allowing DCA's application to proceed through the *remainder* of the application process, ICANN forced DCA to be reevaluated in the geographic names evaluation phase. (*Id.*, ¶¶ 24–25, Ex. 12 & 13.) Although ICANN never challenged DCA's endorsements as insufficient prior to the IRP, and had already agreed to accept regional endorsements from the AUC and UNECA, ICANN now claimed that DCA's endorsements were insufficient as to a fourth, non-

[3] Colón Decl. ¶ 3, Ex. B.

mandatory factor set forth in the Guidebook – that the endorsement *should* demonstrate the endorser's understanding that the gTLD is being sought through ICANN, subject to ICANN's conditions. (Bekele Decl. ¶ 6, Ex. 2, § 2.2.1.4.3.)

Instead of permitting an objective, and interference-free evaluation, ICANN allowed the AUC to contact the Geographic Names Panel and disrupt the processing of DCA's application following the IRP. (SUF ¶¶ 85-89.) ICANN sent DCA clarifying questions, to which DCA responded that it endorsements were sufficient. (Bekele Decl. ¶ 22, Ex. 10.) Instead of explaining why DCA's endorsements were insufficient in detail, ICANN sent a second set of verbatim clarifying questions, to DCA, the pretext ICANN used to deny DCA's application. (*Id.* ¶¶ 23-24, Exs. 11 & 12.) ICANN then rejected DCA's application after DCA reiterated that its endorsements were sufficient. (*Id.* ¶ 25, Ex. 13.) DCA then filed suit.

III. ARGUMENT

A. ICANN's Prospective Release is void and unenforceable.

1. *The Prospective Release violates Section 1668*

i. The IRP provides no substantive redress to applicants for claims of fraud, exempting ICANN from liability for fraud

ICANN has exempted itself from its own fraud because the IRP is limited to procedural claims, not substantive claims, and ICANN can never be held liable by for fraud. "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Civ. Code § 1668. "A party may not contract away from liability for *fraudulent or intentional acts* or for negligent violations of statutory law" *Manderville v. PCGS Grp., Inc.* (2007) 146 Cal.App.4th 1486, 1500 (italics in original, internal citation omitted.) Because ICANN only provides for procedural review of its actions, and not substantive fraud claims, the Prospective Release violates Section 1668.

ICANN argues that the Prospective Release is merely a limitation, rather than an exclusion of liability. But, ICANN's Bylaws limit the IRP's scope of review to "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws." (SUF 70.) The

redress provided by the IRP is limited to *procedural* aspects of ICANN's board's operations. (*Id.*) ICANN itself argued such at the IRP:

> "ICANN submits that: The IRP is a unique process available under ICANN's bylaws for [parties] that claim to have been materially or adversely affected by a decision or action of the ICANN board, but only to the extent that Board action was inconsistent with ICANN's Bylaws or Articles." (Bekele Decl. ¶ 5, Ex. 1 . ¶ 64.)

Fraud is a substantive claim, not a procedural claim. Because there is no authority for the IRP to hold ICANN liable for fraud, and because the Prospective Release allegedly prevents any redress through the courts, ICANN has essentially exempted itself from fraud. (SUF ¶¶ 66-75.)

"[A] party to a contract who has been guilty of *fraud in its inducement* cannot absolve himself…of the effects of his…fraud by any stipulation in the contract, either that no representations have been made, or that any right that might be grounded upon them is waived. Such a stipulation will be ignored, and parol evidence of misrepresentations will be admitted, for the reason that fraud renders the whole agreement voidable, including the waiver provision." *Manderville, supra* 146 Cal.App.4th at 1500-1501. "The plain language of section 1668 shows that its provisions apply to '[a]ll contracts' the object of which is to directly or indirectly exempt 'anyone' from responsibility for his or her 'own fraud.'" *Id.*; *see also Farnham v. Superior Court* (1997) ["contractual releases of future liability for fraud and other intentional wrongs are invariably invalidated" by Section 1668].

In *Blankenheim*, the defendant moved for summary judgment against the plaintiff's claim for negligent misrepresentation on the grounds that the hold-harmless agreements contained in PPMs and subscription agreements, barred plaintiff's claims. The *Blankenheim* court explained that, "a contract which exempts a party for liability for his own positive assertions, made in a manner not warranted by the information, which are untrue, is against the policy of the law." *Id.* at 1473. "[T]he hold-harmless agreements attempted to exempt [defendant] from all responsibility for its own misrepresentations. It follows that such an agreement is void as against the policy of the State of California." *Id.* The Court held that "whether plaintiff's allegations were true, of course, would be a question of fact for the jury to decide[]" in reversing the trial court's decision granting summary judgment. *Id; see also Continental Airlines, Inc. v. McDonnel Douglas Corp*

(1989) 216 Cal.App.3d 338, 402-03 [holding that a contractual provision waiving claims for negligence, did not include negligent misrepresentation and even if it did, the provision would be void under Section 1668].

Here, ICANN's Prospective Release bars "any and all claims" "that arise out of, are based upon, or any in any way related to, any action, or failure to act by ICANN." (SUF ¶ 5.) Since fraud is a claim, and the Prospective Release bars "any and all claims," it necessarily bars fraud. ICANN claims that its internal procedures, including the IRP, provide alternative redress but none of those procedures allow for substantive claims to be alleged against ICANN; Applicants can only make procedural challenges against all of ICANN's actions. (*Id.* ¶¶ 66-75.)

DCA has sufficiently presented a prima facie case for fraud to survive enforcement of the Prospective Release. To prove its claim, DCA must show (1) misrepresentation; (2) knowledge of falsity; (3) intent to defraud, i.e. to induce reliance; (4) justifiable reliance; and (5) resulting damage. *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 683; Civil Code § 1709. ICANN made the following misrepresentations: (1) that DCA's application would be reviewed in accordance with ICANN's Articles of Incorporation, Bylaws, and the Guidebook; (2) that the IRP was an accountability mechanism that ensured DCA due process in the event of a dispute with ICANN; (3) that ICANN would participate in good faith in the IRP; and (4) that all applicants would be subject to the same agreement, rules and procedures. (*Id*. ¶¶ 111 & 112.) ICANN further misrepresented in its Bylaws and Articles of Incorporation that: (1) it would make decisions by applying documented policies, with integrity and fairness; (2) it would operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness; (3) it would be accountable to the Internet community for operating in a manner that is consistent with its Bylaws; and (4) it would carry out its activities in conformity with relevant principles of international law and application of international conventions and local law. (*Id*.) These statements proved false when (1) ICANN intentionally rejected DCA's application without reason, in order to grant the .Africa gTLD to ZACR (*Id*. ¶¶ 77 & 78), and when ICANN refused to recognize a binding effect of the IRP (*Id*. ¶ 24.). ICANN must have intended to defraud applicants, because no applicant would have applied had it known that ICANN would subject it to

disparate treatment and deny it redress. DCA was justified in relying upon ICANN's promises, because it had no reason to believe that ICANN was lying. *See Robinson Helicopter Co., Inc. v. Dana Corp*. (2004) 34 Cal.App.4th 979, 993 ["A party to a contract cannot rationally calculate the possibility that the other party will deliberately misrepresent terms critical to that contract."] Finally, DCA was harmed because it did not receive the fair, unbiased processing of its application that it was promised. Accordingly, DCA has presented a prima facie case for fraud and the Prospective Release must be held void and unenforceable.

Moreover, ICANN refuses to recognize any binding effect of the IRP's decisions. (SUF ¶ 24.) ICANN argued during the IRP that the decisions are not binding. (*Id.*) Although it lost that argument during DCA's IRP, ICANN continued to argue in subsequent IRPs that ICANN's Board could choose whether to accept an IRP decision. (Colón Decl. ¶ 6, Ex. E.) Thus, at most, an applicant is provided with an illusory one-sided form of redress. (*Id.* ¶ 2, Ex. A.).

ii. The Prospective Release is void because it also attempts to exempt ICANN from intentional misconduct

Additionally, because the Prospective Release precludes substantive review, it also bars "willful injury" that had been suffered by DCA Trust, violating Section 1668. The IRP Panel had agreed that ICANN Board actions caused DCA Trust to suffer harms and injuries which ICANN had failed to sufficiently redress after the conclusion of the IRP and continued to engage in intentional wrongful conduct thereafter by rejecting DCA's application on a pretext. See *Infra* at II.G. "[Section 1668] made it clear a party could not contract away liability for his fraudulent or intentional acts[.]" *Baker Pac. Corp. v. Suttles* (1990) 220 Cal.App.3d 1148, 1151-1154 [holding that an agreement that released "for from and against any and all liability" and "any and all claims of every nature" "clearly includes a release from liability for fraud and intentional actions and…on its face violates…section 1668."] "ICANN intended to deny DCA's application on any pretext. (SUF ¶¶ 76-89, FAC ¶ 59.) Again, in the federal proceeding, Judge Klausner held that "ICANN fails to recognize that the alleged conduct giving rise to this claim is intentional. Specifically,

DCA alleges that ICANN intended to deny DCA's application after the IRP proceeding under any pretext and without a legitimate reason." (Colón Decl. ¶ 2, Ex. A.).[4]

ICANN argues that a "pretextual" outcome does "not assert a 'willful injury within the meaning of Section 1668." (ICANN MSJ at 17:1-4. But that is exactly what a pre-textual denial is. DCA has alleged that ICANN willfully concealed its true intention of denying DCA's application to fulfill its predetermined decision to award the gTLD to ZACR. That is willful injury. ICANN did not merely deny DCA's application - it intentionally and wrongfully refused to follow its Articles of Incorporation and Bylaws in doing so. (SUF ¶¶ 76-89.)

Under established California law, as in *Maderville* and *Blakenheim*, it is improper to grant summary judgment on the grounds of an exculpatory clause where fraud or intentional wrongs are alleged. Accordingly, DCA respectfully requests this Court adhere to those decisions, and deny ICANN's MSJ.

2. *The Prospective Release Favors ICANN and is Unconscionable*

The Prospective Release is both procedurally and substantively unconscionable. Where a court finds a "contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may so limit the application of any unconscionable clause to avoid any unconscionable result." Civ. Code § 1670.5(a); *Armendariz v. Foundation Health Psychcare Srvs., Inc.* (2000) 24 Cal.4th 83, 114. "[U]nconscionability has both a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results." "[Both] need not be present" for a finding of unconscionability. *Armendariz, supra,* 24 Cal.4th at 114-115. "[T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id.* Here, the provision is both procedurally and substantively unconscionable.

i. The Prospective Release Was Not Negotiated

[4] DCA's tenth cause of action for declaratory relief arises under ICANN's intentionally wrongful conduct to deny DCA's application in favor of ZACR's.

ICANN did not allow any negotiation of the Prospective Release because it rejected all comments that stated the Prospective Release should be revised – even those by its own GAC. '"Procedural' unconscionability may result from 'oppression' (an inequality of bargaining power curtailing real negotiation and an absence of meaningful choice) or 'surprise' (the assertion of hidden and unexpected contractual provisions)." *Cal. Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 213. Here, ICANN's freedom to reject any and all comments indicates a clear lack of equal bargaining power. *See Infra* at II.B. __. Indeed, the Guidebook itself states that applicants must agree to all the terms and conditions "without modification." (SUF ¶ 5.) Without "real negotiation" or "meaningful choice," and no alternative market for gTLDs, the provision is procedurally unconscionable. *See Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1320 ["Oppression refers not only to an absence of power to negotiate the terms of a contract, but also the absence of reasonable market alternatives."]

Additionally, ICANN reserved the right to alter the rules of the IRP after applicants paid the $185,000 application fee and did so. (SUF ¶ 90.) Thus, contrary to ICANN's argument that DCA could not have been surprised, because ICANN changed the rules of the IRP after DCA submitted its application, DCA was surprised to discover that ICANN claimed the IRP was not binding, and actually provided no redress. (SUF ¶ 24.)

ICANN argues that there could be no procedural unconscionability because DCA is a sophisticated party, citing to *Appalachian Ins. Co. v. McDonnel Douglas Corp*. 214 Cal.App.3d 1, 26-27 (1989). But sophistication does not defeat unconscionability. *See Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1543 [finding an employment contract where a sophisticated business man gave up all rights to pursue remedies in court, while the employer retained all court remedies, to be one-sided, unconscionable, and unenforceable.] Accordingly, the Prospective Release is procedurally unconscionable.

ii. The Prospective Release is one-sided, precludes ICANN's liability, and is substantively unconscionable

For substantive unconscionability, court focus on whether the provision is "'overly harsh' or 'one-sided' results." *Armendariz, supra*, 24 Cal.4th at 114. "An agreement may lack 'a

modicum of bilaterality' and therefore be unconscionable if the agreement requires 'arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party.'" *Higgins v. Superior Court* (2006) 140 Cal.App.4th 1238, 1253.

Here, the Prospective Release is entirely one-sided because it requires DCA to waive all remedies in a court, but does not require the same of ICANN. (SUF ¶¶ 24 & 106.) ICANN even admitted in its response to the comments on the Prospective Release that the provision was one-sided: "the release simply limits the recourses available ***to one of the contracting parties***." (SUF ¶ 110.) ICANN confuses the argument and states that DCA's one-sided claim is "demonstrably untrue" because DCA employed the IRP. (ICANN MSJ at 18:25-19:3.) The question is whether DCA is precluded from the courts while ICANN is not, not whether DCA has alternate redress. The Prospective Release itself demonstrates this in that it states that "**Applicant** hereby releases ICANN…from any and all claims ***by applicant***…" (SUF ¶ 24[emphasis added].) The Prospective Release does not bar any claims by ICANN. (*Id*. ¶¶ 24 and 110.) The Prospective Release is one-sided and substantively unconscionable. *See Higgins, supra*, 140 Cal.App.4th at 1254 [holding a one-sided arbitration agreement of "any and all disputes" substantive unconscionable]; *O'Hare v. Municipal Resource Consultants* (2003) 107 Cal.App.4th 267, 282 [same].

Here, an applicant like DCA is only permitted to challenge ICANN's procedural actions, in the IRP, pursuant to ICANN's IRP rules, through which ICANN attempts to limit evidence, testimony, and hearings). (*Id*. ¶¶ 59 & 70.) DCA is required to employ the ICANN-favorable IRP for any limited redress. ICANN, conversely, is neither limited in the type of relief, nor the forum. (*Id.* ¶ 24.) ICANN is permitted to bring any cause of action, in any forum, including a court of law.

Because the Prospective Release only limits DCA's redress through the courts and not ICANNs, it is a one-sided provision, and substantively unconscionable.

iii. The one-sidedness of the Prospective Release is not justified

ICANN's desire to avoid being sued is not a "justification" under California law to prevent a finding of unconscionability. "'A one-sided arbitration agreement that imposes arbitration on the weaker party while providing a choice of forums for the stronger party is unfair and unconscionable 'without at least some reasonable justification for such one-sidedness based on

'business realities.'"" *Flores v. Transamerica HomeFirst, Inc.* (2001) 93 Cal.App.4th 846, 855 (internal citations omitted). ICANN's assertion of preventing itself from being sued is not a "business reality" that justifies the one-sided (procedural-review only) arbitration agreement. To the extent that ICANN is concerned over costs of frivolous lawsuits, a fee-shifting provision in the Guidebook would have remedied that. ICANN has nearly $500 million in assets – including $136 million from new gTLD auctions this year – plenty of resources to defend itself. (SUF ¶ 104.) Accordingly, ICANN has no justification and the Prospective Release is unconscionable.

3. *The Prospective Release was Procured by Fraud*

The Prospective Release is also unenforceable because it was procured by fraud: ICANN asserted that it provided redress to applicants through the IRP, when in fact the IRP is illusory redress. ICANN lied in stating that redress was available and had that been known, DCA would not have "accepted" the Prospective Release. (SUF ¶ 115.) "Fraud in the inducement…occurs when 'the promisor knows what he is signing but his consent is induced by fraud, mutual assent is present and a contract is formed, which, by reason of the fraud, is voidable[.]" *Rosenthal v. Great Western Fin. Securities, Grp.* (1996) 14 Cal.4th 394, 415. DCA has presented a prima facie case for fraud as stated in Section III.A. above. Those misrepresentations, especially that the IRP provided actual redress, establish that the Prospective Release was procured by fraud. The Prospective Release should be voided.

4. *Ruby Glenn is neither binding, nor applicable*

No claims for fraud were alleged in *Ruby Glenn*, and therefore it is inapposite and unpersuasive. As the court in *Skrbina v. Fleming Companies* ((1996) 45 Cal.App.4th 1353, 1366-1367) stated (and as incompletely cited by ICANN): "a written release extinguishes any obligation covered by the release's terms, **provided it has not been obtained by fraud**, deception, misrepresentation, duress, or undue influence." *Id.* (emphasis added.) DCA has alleged claims of fraud, so as *Skrbina* holds, the written release is not enforceable.

ICANN argues that *Ruby Glenn, LLC v. ICANN* ("*Ruby Glenn*") (No. CV 16-5505 PA (ASx), 2016 U.S. Dist. LEXIS 163710) controls. (ICANN MSJ at 14:6-15:10.) First, a federal district court decision is not binding. *Tanguilig v. Bloomingdale's Inc.* (2016) 5 Cal.App.5th 665,

n.3. To the extent ICANN argues the decision is persuasive, the plaintiff in *Ruby Glenn* did not allege claims for fraud. (LeVee Decl. Ex. L.) DCA's claims for fraud do not "arise out of or are based upon, or are in any way related to" ICANN's processing of DCA's application, but rather arise out of the misrepresentations that ICANN made before it began processing DCA's application; DCA had not yet applied for the gTLD when the misrepresentations were made and therefore the fraud occurred prior to DCA's application. (SUF ¶ 51.) *See Infra* section III.A..

The Court in *Ruby Glenn* applied the Prospective Release because the plaintiff brought claims for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, unfair competition (B&P § 17200), and declaratory relief. (LeVee Decl. Ex. L.) No claims for fraud were alleged, and thus the Prospective Release applied. *Ruby Glenn* is not this case, and should be relied upon.[5].

B. <u>The First Amended Complaint is not barred by judicial estoppel</u>

To establish judicial estoppel, the moving party must show "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Jackson v. Cty. of L.A.*, 60 Cal. App. 4th 171, 183 (1997). ICANN does not prove these elements.

1. DCA's positions are not totally inconsistent

Judicial estoppel applies only against a party that has taken positions …that are "totally inconsistent." *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171, 183 (1997). The party must have taken positions that are so irreconcilable that "one necessarily excludes the other." *Prilliman v. United Air Lines, Inc.*, 53 Cal. App. 4th 935, 962–963 (1997). This element is a "very high threshold" and a "rigorous standard." *Bell v. Wells Fargo Bank, N.A.*, 62 Cal. App. 4th 1382, 1387 (1998). If the litigant can explain how the positions are consistent, generally the court will

[5] ICANN also cites *Commercial Connect v. ICANN* (No. 3:16CV-00012-JHM, 2016 U.S. Dist. LEXIS 8550) but fails to mention that the corporate plaintiff withdrew days before the hearing on ICANN's Motion to Dismiss, was unrepresented, made no argument, and was ruled against. That case should not serve as precedent.

not apply judicial estoppel. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 798 (1998). ICANN has not shown that DCA's positions warrant judicial estoppel.

ICANN portrays DCA as "clearly inconsistent" because it previously argued that the IRP was the "sole forum" to seek "independent, third party review of ICANN's actions." *See* ICANN MSJ at 20:23-24. This cursory, three sentence analysis misses the very high threshold to prove "inconsistency." DCA's positions are not totally inconsistent because 1. they are not so irreconcilable that one necessarily excludes the other, and 2. DCA's initial position was made in a completely different context than the current litigation.

First, DCA's positions do not exclude one another. DCA *never* took the position that the waiver was valid or enforceable. The thrust of DCA's argument was that *if* the waiver was valid, the IRP must "provide a final and binding resolution of disputes between ICANN and persons affected by its decisions." (SUF ¶ 122). The IRP's final declaration reflects that fact by stating that "*assuming* that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate 'accountability' remedy for an applicant is the IRP." (SUF ¶ 12[emphasis added].) DCA's argument remains that it is wrong for ICANN to be "effectively judgment-proof," (*Id.* ¶ 122), and that DCA should be allowed to seek "final and binding" adjudication against ICANN. *Id.* However, as ICANN consistently maintained that the IRP proceedings were not binding, (SUF ¶ 124), DCA maintains, as it always has, that it is still entitled to binding remedies for its injuries.

In contrast, ICANN contends that the IRP rulings are 1. the only recourse for claimants, and 2. completely non-binding if ICANN disagrees with them. ICANN refuses to admit that the IRP is anything more than an "internal accountability mechanism" and that ICANN "retains full authority to accept or the declaration of all IRP Panels. . . ." *Id.* (Colón Decl. ¶ 6, Ex. E.) Furthermore, even though the IRP ruled that its decisions were binding, ICANN's position remains the same: "IRP declarations are not binding." (SUF ¶ 124.) As the IRP Final Declaration noted, Congress would not have permitted ICANN to require applicants to waive legal redress, if the IRP was not binding on ICANN. (Bekele Decl. ¶ 5, Ex. 1 ¶ 23, (¶115) (emphasis original). Therefore, the fact that historically ICANN treated the IRP as an advisory process bolsters the invalidity of

the Prospective Release and undercuts judicial estoppel. Further, DCA's position has remained that ICANN should not be "judgment-proof." (SUF ¶ 122.)

Second, even if the Court were to find that DCA's positions wholly inconsistent, the statements do not establish judicial estoppel because they were not made within the current context of a lawsuit for fraud and willful injury. Generally, litigants are not judicially estopped from changing their positions when the circumstances surrounding the litigation have also changed. *See Miller v. Bank of Am.*, 213 Cal. App. 4th 1, 10 (2013).

The IRP panel focused entirely on whether ICANN followed its own Bylaws *and the IRP panel did not analyze whether the waiver was enforceable* (SUF ¶ 126); this litigation focuses on whether ICANN is liable for its actions for fraud and other theories. Therefore, like in *Miller*, DCA should not be held to a position taken in a completely different context of litigation.

2. DCA did not succeed in its first position

ICANN must also prove DCA "was successful in asserting [its] first position. . . ." Defendant claims that this second element is met because "the IRP Panel accepted DCA's position [that the IRP was binding] as true and adopted it in finding in DCA's favor." (ICANN'S MSJ, 21:13-14). However, as ICANN admits in its Declarations, "the question of whether the Panels declaration was or was not legally binding *became a moot issue* once ICANN's Board elected to adopt all of the DCA IRP Panel's recommendations. . . ." (LeVee Decl., Ex. D, ¶ 10) (emphasis added). Since ICANN completely disregarded the IRP's ruling that its decisions are binding, and continues to claim that they are not the issue remains. *See* (Levee's Decl., Ex. D, ¶ 9). It cannot be said that DCA actually succeeded in proving the IRP should be binding because, as seen in the claims and actions of ICANN, ICANN refuses to treat IRP decisions as binding on it. Finally, the IRP ruling assumed that *if* the Prospective Release was valid, the IRP had to be binding. That very issue is being decided through this motion.

3. ICANN does not recognize the IRP as a true "quasi-judicial proceeding"

ICANN cannot establish the IRP as a "quasi-judicial proceeding." While there is no clear definition of what qualifies as "quasi-judicial," courts usually require that the proceeding have the "the formal hallmarks of a judicial proceeding. . . ." *Tri-Dam v. Schediwy,* No. 1:11-CV-01141-

AWI, 2014 WL 897337, at *6 (E.D. Cal. Mar. 7, 2014). Furthermore, in determining whether to apply estoppel, "courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings." *Vandenberg v. Superior Court*, 21 Cal. 4th 815, 829 (1999); *see also Sanderson v. Niemann*, 17 Cal. 2d 563, 573–575 (1941).

ICANN attempts to establish the IRP as a "quasi-judicial proceeding." However, the declarations attached to its brief show that ICANN argued the opposite before the IRP:

> "[This] proceeding is not an arbitration. . . . . Indeed, the word 'arbitration' does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or the declaration of all IRP Panels […] "

(LeVee Decl., Ex. G, ¶ 28). ICANN, again, is simply changing its position whenever it suits ICANN. That ICANN "has consistently argued that IRP declarations are not binding," (LeVee Decl., Ex. D, ¶ 10), indicates that it does not recognize the IRP as a true "quasi-judicial proceeding," but, instead as a mere "internal accountability mechanism." (*Id.*, Ex. G, ¶ 28). While it is true that DCA argued the IRP was an arbitration, even the quote from DCA's argument used in Defendant's brief cuts against this element. DCA previously claimed the IRP should be treated as an arbitration because it would have "a binding decision" on the parties. However, "ICANN has never represented that IRPs are binding." (LeVee Decl., Ex. D, ¶ 9). If the IRP is not binding, it lacks a crucial characteristic of an arbitration, and, therefore, is not a quasi-judicial proceeding.

4. DCA's purported position change was not fraudulent nor made in bad faith

"Case law indicates that the point of this element is to ensure that the bar of judicial estoppel operates only to prevent bad faith or intentional wrongdoing resulting in a miscarriage of justice." *Lee v. W. Kern Water Dist.*, 5 Cal. App. 5th 606, 630 (2016). Therefore, to establish the doctrine "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, as opposed to having made a mistake born of misunderstanding, ignorance of legal procedures, lack of adequate legal advice, or some other innocent cause." *Id.* at 630-31. In *Lee*, a court affirmed the denial of judicial estoppel because the opposing party had offered "nothing to support the fifth element—that Lee's first position was not taken as a result of ignorance, fraud, or mistake." *Id.* at 631.

ICANN confuses this element, stating that it is met because there "is no evidence that . . . these positions were taken as a result of ignorance or mistake." ICANN MSJ at 23:8-9. However, the absence of evidence absolving DCA is not what is required. Instead, as seen in *Lee*, the law places the burden of proof on the Defendant to establish evidence that DCA has acted fraudulently. But ICANN has no evidence that DCA ever argued that the waiver was binding or enforceable and ICANN offers no evidence that DCA has acted fraudulently with regard to its position on the topic. As stated previously, DCA has actually been completely consistent in its positions. However, even if it is established that DCA has been totally inconsistent, that is not sufficient to show that there has been bad faith. *See Kelsey v. Waste Management of Alameda County*, 76 C.A.4th 590, 598, 90 C.R.2d 510 (1999) (rejecting judicial estoppel, despite inconsistency because defendant failed to show that plaintiff's failure to list claim was intentional and not result of ignorance); *Cloud v. Northrop Grumman Corp.*, 67 Cal. App. 4th 995, 1018 (1998) (rejecting judicial estoppel, despite inconsistency because defendant did not establish bad faith intent). Because Defendant has failed to show any additional evidence of bad faith or fraudulent actions on the part of DCA, this element is not satisfied, which is sufficient in itself to reject the application of judicial estoppel.

IV. CONCLUSION

For the foregoing reasons, DCA respectfully requests that the Court deny ICANN's motion for summary judgment, or in the alternative, summary adjudication.

Dated: July 26, 2017

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