

1 Ethan J. Brown (SBN 218814)  
2 [ethan@bnsklaw.com](mailto:ethan@bnsklaw.com)  
3 Sara C. Colón (SBN 281514)  
4 [sara@bnsklaw.com](mailto:sara@bnsklaw.com)  
5 Rowennakete P. Barnes (SBN 302037)  
6 [kete@bnsklaw.com](mailto:kete@bnsklaw.com)

7 **BROWN NERI SMITH & KHAN LLP**  
8 11601 Wilshire Boulevard, Suite 2080  
9 Los Angeles, California 90025  
10 T: (310) 593-9890

11 *Attorneys for Plaintiff*  
12 DOTCONNECTAFRICA TRUST

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **COUNTY OF LOS ANGELES - CENTRAL**

15 DOTCONNECTAFRICA TRUST, a Mauritius  
16 charitable trust,

17 Plaintiff,

18 v.

19 INTERNET CORPORATION FOR  
20 ASSIGNED NAMES AND NUMBERS, *et al*,

21 Defendants.

Case No. BC607494

[Assigned to Hon. Robert B. Broadbelt, Dep't  
53]

**PLAINTIFF DOTAFRICACONNECT  
TRUST'S OBJECTION TO  
STATEMENT OF DECISION AND  
REQUEST FOR HEARING**

Complaint filed: January 20, 2016

Trial date: February 6, 2019

1       **I. INTRODUCTION**

2       In January 2016, Plaintiff DotConnectAfrica Trust (“DCA”) filed suit against Defendant  
3 Internet Corporation for Assigned Names and Numbers’ (“ICANN”). Although DCA had  
4 prevailed in an internal Review Process (“IRP”) proceeding with ICANN for improperly  
5 terminating DCA’s application for the top level domain name .africa, DCA alleged in its complaint  
6 that ICANN subsequently intentionally and pretextually denied DCA’s application for self-  
7 interested reasons to instead advance the application of DCA’s competitor ZACR. DCA alleged  
8 that ICANN retained DCA’s non-refundable \$185,000 application fee in the process, which DCA  
9 could only have been refunded if it forfeited any rights to .africa. ICANN responded that DCA had  
10 signed, as every applicant for a top level domain name was required to sign, a prospective waiver  
11 of all forms of redress, including resort to courts, for all conceivable wrongdoing by ICANN  
12 including fraud and intentional torts, other than use of ICANN’s own non-binding, internal dispute  
13 resolution processes.

14       After this Court rejected ICANN’s contention in its motion for summary judgment that that  
15 prospective waiver barred even prospective fraudulent and intentional acts, ICANN argued that  
16 DCA was nonetheless barred as a matter of law, under the doctrine of judicial estoppel, from  
17 proceeding in Court because, at the time of the IRP, and before any Court had ever considered the  
18 legal import and enforceability of the prospective waiver, DCA had accepted ICANN’s  
19 interpretation of the prospective waiver and assumed it to be correct for purposes of its arguments  
20 to the IRP panel. This Court has now tentatively adopted ICANN’s position on judicial estoppel,  
21 which if adopted as a final judgment of the Court, would bar DCA from ever presenting its case  
22 on the merits to any tribunal. If the Court rules that DCA should be judicially estopped, then  
23 ICANN is the party that will be gaining an unfair advantage in the present circumstances. DCA  
24 respectfully submits its objections to that tentative Proposed Statement of Decision.

25       Pursuant to Rule of Court 3.1590(g), DCA submits the following objections to the proposed  
26 statement of decision issued on 8/22/2019. DCA requests that the Court order a hearing on its  
27 objections pursuant to Rule of Court 3.1590(k).

1           On February 6-8, 2019, this Court held a non-jury trial on the issue of ICANN’s  
2 affirmative defense of judicial estoppel. Post-trial briefs were submitted by DCA and ICANN on  
3 March 1, 2019. On August 22, 2019, the Court held a hearing on closing arguments, which was  
4 limited to brief comments. The Court issued its “Tentative Decision on Bifurcated Trial (Phase  
5 One) on Affirmative Defense of Judicial Estoppel” (the “Tentative”). The Tentative held that  
6 “DCA’s successfully taking the first position in the IRP proceeding and gaining significant  
7 advantages in that proceeding as a result thereof, and then taking the second position that is  
8 totally inconsistent in this lawsuit, presents egregious circumstances that would result in a  
9 miscarriage of justice if the court does not apply the doctrine of judicial estoppel to bar DCA  
10 from taking the second position in this lawsuit. The court therefore exercises its discretion to find  
11 in favor of ICANN, and against DCA, on ICANN’s affirmative defense of judicial estoppel and  
12 to bar DCA from bringing or maintaining its claims against ICANN in the FAC in this lawsuit.”  
13 The Tentative stated “[t]his tentative decision is the court’s proposed statement of decision,  
14 subject to a party’s objection under subdivision (g) of California Rules of Court, Rule 3.1590.”  
15 At the conclusion of the hearing, the Court signed and filed its tentative ruling (the “Proposed  
16 Statement of Decision”).

## 17     **II.   LEGAL STANDARD**

18           “The main purpose of an objection to a proposed statement of decision is not to reargue  
19 the merits, but to bring to the court’s attention inconsistencies between the court’s ruling and the  
20 document that is supposed to embody and explain that ruling.” *Heaps v. Heaps* (2004) 124  
21 Cal.App.4th 286, 292. “A subsidiary purpose for objections to a statement of decision is also to  
22 identify issues presented during the trial which are not addressed in the decision.” *Id.* “By filing  
23 specific objections to the court’s statement of decision a party pinpoints alleged deficiencies in  
24 the statement and allows the court to focus on the facts or issues the party contends were not  
25 resolved or whose resolution is ambiguous.” *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993)  
26 20 Cal.App.4th 1372, 1380. The objections must “focus the Court on a particular omission or  
27 ambiguity in the statement and provide the Court with... meaningful guidance as to how to  
28 correct each particular defect.” *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 498.

1 Under Cal. Rule of Court, Rule 3.1590(k), “[t]he court may order a hearing on proposals  
2 or objections to a proposed statement of decision or the proposed judgment.”

3 **III. OBJECTIONS**

4 DCA generally objects to the Proposed Statement of Decision on the grounds that the  
5 Court has not stated the factual and legal bases for its decision as to each principal issue at trial.

6 DCA specifically objects to the Proposed Statement of Decision as follows:

7 **Objection No. 1**

8 DCA objects to the Proposed Statement of Decision on the grounds that the Court failed  
9 to address how ICANN has met its burden of proof to show that the IRP could be a quasi-judicial  
10 forum if the IRP decision could not be enforced through a court order or other governmental  
11 actor. Specifically, the Proposed Statement of Decision does not address ICANN’s admission  
12 that DCA could not confirm or enforce the decision in court. (2/8/19 trial transcript at 346:9-25.)  
13 The Court held in the Proposed Statement of Decision that (1) the IRP Panel determined that its  
14 decisions were binding; (2) “[w]hether ICANN’s Board was required to vote to take action to  
15 implement the IRP Panel’s recommendations does not change the fact that the IRP Panel’s  
16 decision was binding on both parties;” (3) “[t]he Board Resolution cannot change the fact that  
17 the IRP Panel’s decision was binding on the parties;” and (4) the additional language in  
18 ICANN’s Resolution was not inconsistent with the IRP Panel’s Final Declaration. (Proposed  
19 Statement of Decision, 7:20-21).

20 The Proposed Statement of Decision fails to address how DCA could enforce the IRP  
21 Declaration and how the dismissal is consistent with the Proposed Statement of Decision’s  
22 determination that the IRP award is binding. The Proposed Statement of Decision also fails to  
23 address the effect of this Court’s August 9, 2017 dismissal of DCA’s attempt to confirm and  
24 enforce the IRP decision in this Court on the basis that it was barred by ICANN’s litigation  
25 waiver (*See* 8/17/2017 Order on ICANN’s Motion for Summary Judgment at 5). DCA’s claim  
26 for declaratory relief alleges that “ICANN has not processed DCA’s application in accordance  
27 with the IRP Declaration.” (FAC ¶ 129.)

1 DCA further objects to the Proposed Statement of Decision on the grounds that it fails to  
2 address how the IRP ruling was binding merely because ICANN purported to adopt it, before the  
3 Court heard DCA’s evidence of whether ICANN’s implementation of the IRP ruling was  
4 consistent with the IRP’s terms and spirit. (2/7/19 trial transcript, at 209:4-210:7; 233:6-234:1.)  
5 DCA’s claims specifically sought to enforce the IRP ruling which it contends ICANN failed to  
6 follow (FAC ¶ 129), but in exercising its discretion, the Court disposed of DCA’s claims without  
7 permitting DCA to present evidence of whether the IRP ruling was *actually* followed, preventing  
8 the adjudication of triable issues of fact, as previously determined by this Court in its ruling on  
9 ICANN’s Motion for Summary Judgment.

10 **Objection No. 2**

11 DCA objects to the Proposed Statement of Decision on the grounds that the Court failed  
12 to address how ICANN has met its burden of proof to show that the IRP decision could be a  
13 binding decision when the ICANN board had unfettered discretion to reject the IRP’s decision or  
14 implement it in a way that was not faithful to the decision with no recourse to DCA. (2/8/19 trial  
15 transcript at 342:3-344:5; 345:24-27; 365:28-366:27; 414:26-415:2; 418:13:-27.) The Court held  
16 that “the fact that a vote by the Board may be required to effectuate organizational action does  
17 not undermine the quasi-judicial nature of the proceeding that led to that vote” (Proposed  
18 Statement of Decision, 7:14-16), but fails to explain how the IRP was quasi-judicial in nature if  
19 its decisions could be, in part or whole, ignored, rejected, or modified at the discretion of the  
20 ICANN Board. Specifically, the Proposed Statement of Decision fails to address that both  
21 ICANN witnesses at trial testified that ICANN did not consider the IRP to be binding after the  
22 DCA v. ICANN IRP, that ICANN amended its bylaws long after the DCA v. ICANN IRP to  
23 make the IRP binding, and that ICANN’s board did not fully adopt the IRP’s ruling, specifically  
24 omitting the portion about the IRP being binding. (2/8/19 trial transcript at 342:3-344:5; 365:28-  
25 366:27; 372:11-17; 414:26-415:2.) The Proposed Statement of Decision also fails to address how  
26 this is not an illusory form of redress and fails to state factually how DCA could enforce the IRP  
27 award if ICANN failed to adhere to it.



1 to protect against fraud on the courts. It has been said that because of its harsh consequences, the  
2 doctrine should be applied with caution and limited to egregious circumstances.” (Proposed  
3 Statement of Decision at 3:20 – 24). The Court’s Proposed Statement of Decision fails to  
4 address whether DCA’s conduct under these circumstances was “egregious” enough to warrant  
5 the application of judicial estoppel.

6 **Objection No. 5**

7 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
8 whether the Court’s exercise of discretion in applying judicial estoppel was fair to preclude DCA  
9 from having its day in court when the statements that it made (and that were the subject of  
10 judicial estoppel), merely parroted ICANN’s own positions, and bylaws, while the DCA v.  
11 ICANN IRP was the first IRP ever held in the new gTLD program, and while no court had ever  
12 decided whether ICANN’s waiver of court redress was enforceable. The Proposed Statement of  
13 Decision makes no findings as to the statements and positions of ICANN, and whether and how  
14 those statements and positions induced DCA into the mistaken positions and statements it made  
15 in the IRP. [Ex. 2, p. 334 ¶ 6; Ex. 16, at p. 4-5, ¶¶ 5-7; Ex. 18 at p. 7, ¶ 28 and 29, pp. 22-25, ¶¶  
16 90-96].

17 The Court’s Proposed Statement of Decision acknowledges that “[j]udicial estoppel is an  
18 equitable doctrine to protect against fraud on the courts. It has been said that because of its harsh  
19 consequences, the doctrine should be applied with caution and limited to egregious  
20 circumstances.” Proposed Statement of Decision at 3:20 – 24. The Court’s Proposed Statement  
21 of Decision fails to address whether DCA’s conduct under these circumstances was “egregious”  
22 enough to warrant the application of judicial estoppel.

23 **Objection No. 6**

24 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
25 whether the Court’s exercise of its discretion in applying judicial estoppel was fair, in that  
26 DCA’s statements were made in regard to an assumed premise - that the waiver of judicial  
27 remedies was enforceable – that was never expressly ruled upon. (2/8/19 trial transcript at  
28 218:14-219:2; Ex. 33 at p.22, ¶ 73.) The Court cited to the very language of the IRP ruling that

1 was based only on an assumption, rather than an express holding: “Thus, assuming that the  
2 foregoing waiver of any and all judicial remedies in valid and enforceable, the ultimate  
3 ‘accountability’ remedy for applicants is the IRP.” (Proposed Statement of Decision, 8:14-16.)  
4 The Court’s Proposed Statement of Decision acknowledges that “[j]udicial estoppel is an  
5 equitable doctrine to protect against fraud on the courts. It has been said that because of its harsh  
6 consequences, the doctrine should be applied with caution and limited to egregious  
7 circumstances.” (Proposed Statement of Decision at 3:20 – 24). The Court’s Proposed  
8 Statement of Decision fails to address whether DCA’s conduct under these circumstances was  
9 “egregious” enough to warrant the application of judicial estoppel.

10 **Objection No. 7**

11 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
12 whether the Court’s exercise of discretion in applying judicial estoppel was fair, in that it  
13 precludes DCA from having its day in Court, when the claims DCA brings here could not be  
14 brought in the IRP, and thus DCA is entirely precluded from any redress for ICANN’s unlawful  
15 conduct, rendering ICANN judgment-proof. (2/7/19 trial transcript at 219:3-221:14.)

16 **Objection No. 8**

17 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
18 whether the Court’s exercise of discretion in applying judicial estoppel was fair, because where  
19 the Court found “that DCA’s successfully taking the first position in the IRP proceeding and  
20 gaining significant advantages in that proceeding as a result thereof,” the Court fails to explain  
21 how DCA obtaining the right during the IRP to exchange documents, present live testimony, and  
22 other procedural aspects for the IRP, constituted an advantage when ICANN was afforded the  
23 same relief. (Proposed Statement of Decision at 11:12 – 11:14). The Court also fails to address  
24 the fact that DCA made numerous other arguments in support of its positions, including that  
25 these were basic rights that DCA was entitled to pursuant to the arbitration rules the IRP panel  
26 was following. The Court’s Proposed Statement of Decision acknowledges that “[j]udicial  
27 estoppel is an equitable doctrine to protect against fraud on the courts. It has been said that  
28 because of its harsh consequences, the doctrine should be applied with caution and limited to



1 egregious circumstances.” (Proposed Statement of Decision at 3:20 – 24). The Court’s  
2 Proposed Statement of Decision fails to address whether DCA’s conduct under these  
3 circumstances was “egregious” enough to warrant the application of judicial estoppel.

4 **Objection No. 9**

5 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
6 whether the Court’s exercise of discretion in applying judicial estoppel was fair, in that the Court  
7 fails to explain how DCA obtaining the right to exchange documents, present live testimony, and  
8 other procedural aspects for the IRP, constituted “egregious circumstances” when DCA sought to  
9 obtain complete redress for unlawful conduct committed by ICANN. The IRP ruled in DCA’s  
10 favor, demonstrating that ICANN’s conduct was unlawful (Ex. 33 at pp. 61-62, ¶¶ 148-150) and  
11 the Court fails to explain how obtaining procedures that were provided to both parties (Ex. 33 at  
12 p.13, ¶ 44) is an “egregious circumstance.”

13 **Objection No. 10**

14 DCA objects to the Proposed Statement of Decision on the grounds that it fails to address  
15 how ICANN has met its burden of proof in showing that DCA’s statements were totally  
16 inconsistent, when they were based on an issue the IRP made no express ruling on. DCA’s  
17 statements regarding the binding nature of the IRP were on the assumption that the waiver of  
18 court relief and covenant not to sue were enforceable: “Thus, assuming that the foregoing waiver  
19 of any and all judicial remedies is valid and enforceable, the ultimate ‘accountability’ remedy for  
20 applicants is the IRP.” (2/8/19 trial transcript at 218:14-219:2; Ex. 33 at p.22, ¶ 73; Proposed  
21 Statement of Decision, 8:14-16.) The Court’s Proposed Statement of Decision merely states that  
22 “DCA’s lawsuit against ICANN is totally and logically inconsistent with DCA’s first position  
23 that it could not sue ICANN...DCA’s repeated arguments that it cannot sue ICANN in any way  
24 related to its application, followed by DCA’s lawsuit against ICANN specifically related to its  
25 application, are two positions that are irreconcilable and mutually exclusive.” (Proposed  
26 Statement of Decision at 9:7-13.) The Court has failed to explain how DCA’s statements could  
27 be totally inconsistent when the IRP’s rulings were based on assumption as opposed to an actual  
28 factual finding or legal determination.



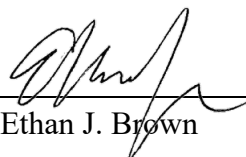
1 Decision holds that “the Court finds that DCA’s successfully taking the first position in the IRP  
2 proceeding and gaining significant advantages in that proceeding as a result thereof, and then  
3 taking the second position that is totally inconsistent in this lawsuit, presents egregious  
4 circumstances that would result in a miscarriage of justice if the court does not apply the doctrine  
5 of judicial estoppel to bar DCA from taking the second position in this lawsuit.” (Proposed  
6 Statement of Decision at p. 11:12-16.) Accordingly, the Court did not address how DCA has  
7 gained a second advantage from its position in this lawsuit.

8 **IV. CONCLUSION**

9 For the foregoing reasons, DCA objects to the Proposed Statement of Decision. DCA  
10 respectfully requests the Court reconsider its Proposed Statement of Decision according to  
11 DCA’s objections or set a hearing on the matter.

12  
13 Dated: September 6, 2019

**BROWN NERI SMITH & KHAN, LLP**

14  
15 By:  \_\_\_\_\_  
16 Ethan J. Brown

17 *Attorneys for Plaintiff*  
18 *DotConnectAfrica Trust*

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in Los Angeles County, California. I am over the age of 18 and not a  
4 party to this action; my business address is 11601 Wilshire Blvd., Suite 2080, Los Angeles,  
5 California 90025. On the date below, I caused the foregoing,

- 6 • **PLAINTIFF DOTAFRICACONNECT TRUST'S OBJECTION TO STATEMENT OF  
7 DECISION AND REQUEST FOR HEARING**

8 to be served to the following addresses:

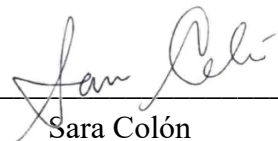
9 Jeffrey LeVee  
10 Erin Burke  
11 Kelly Ozurovich  
12 Erna Mamikonyan  
13 JONES DAY  
14 555 S. Flower Street, 50th Floor  
15 Los Angeles, CA 90071  
16 jlevee@JonesDay.com  
17 eburke@jonesday.com  
18 kozurovich@jonesday.com  
19 emamikonyan@jonesday.com  
20 *Attorneys for Defendant Internet  
21 Corporation for Assigned Names  
22 and Numbers*

Dave Kesselman  
Amy Brantly  
KESSELMAN BRANTLY STROCKINGER LLP  
1230 Rosencrans Avenue, Suite 400  
Manhattan Beach, CA 90266  
dkesselman@kbslaw.com  
abrantly@kbslaw.com  
*Attorneys for  
ZA Central Registry*

19 X **BY ELECTRONIC MAIL:** I caused such document(s) to be electronically  
20 mailed in PDF format as an e-mail attachment to each addressee for the above-  
21 entitled case. The transmission was complete and confirmed. A copy of the  
22 transmittal e-mail will be maintained with the original document(s) in our office.

22 I am aware that on motion of the party served, service is presumed invalid if postal  
23 cancellation date or postage meter date is more than one day after date of deposit for mailing an  
24 affidavit.

24 I declare under penalty of perjury under the laws of the State of California that the above  
25 is true and correct. Executed on September 6, 2019, at Los Angeles, California.

26  
27 By:   
28 Sara Colón