

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 FOR THE COUNTY OF LOS ANGELES
3 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE
4
5 DOTCONNECTAFRICA TRUST,)
6 PLAINTIFF,)
7 VS.) NO. BC607494
8 INTERNET CORPORATION FOR)
9 ASSIGNED NAMES AND NUMBERS,)
ET AL.,)
DEFENDANTS.)
_____)

10 REPORTER'S TRANSCRIPT OF PROCEEDINGS
11 WEDNESDAY, AUGUST 9, 2017
12
13

14 APPEARANCES:

15 FOR PLAINTIFF: BROWN, NERI, SMITH & KHAN, LLP
16 BY: ETHAN J. BROWN, ESQ.
17 BY: SARA COLON, ESQ.
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LOS ANGELES, CALIFORNIA 90025

19 FOR DEFENDANT ICANN: JONES DAY
20 BY: JEFFREY A. LEVEE, ESQ.
21 BY: AMANDA PUSHINSKY, ESQ.
555 SOUTH FLOWER STREET
22 50TH FLOOR
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24 FOR INTERVENOR ZACR: KESSELMAN BRANTLY STOCKINGER, LLP
25 BY: DAVID W. KESSELMAN, ESQ.
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27
28 PAMELA L. MYERS, CSR NO. 12940
OFFICIAL REPORTER PRO TEMPORE

1 CASE NUMBER: BC607494
2 CASE NAME: DOTCONNECTAFRICA TRUST VS. ICANN
3 LOS ANGELES, CA WEDNESDAY, AUGUST 9, 2017
4 DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE
5 REPORTER: PAMELA L. MYERS, CSR NO. 12940
6 TIME: A.M. SESSION
7

8 APPEARANCES: AS HERETOFORE NOTED.
9

10 THE COURT: NEXT IS NUMBER 4 ON THE CALENDAR,
11 DOTCONNECTAFRICA TRUST VERSUS INTERNET CORPORATION FOR
12 ASSIGNED NAMES AND NUMBERS, CASE NUMBER BC607494.
13 PLEASE STATE YOUR APPEARANCES FOR THE RECORD.

14 MR. BROWN: GOOD MORNING, YOUR HONOR. ETHAN BROWN
15 AND SARA COLON FOR THE PLAINTIFF DOTCONNECTAFRICA.

16 MS. COLON: GOOD MORNING, YOUR HONOR.

17 MR. LAVEE: GOOD MORNING, YOUR HONOR. JEFF LAVEE
18 AND AMANDA PUSHINSKY FROM JONES DAY ON BEHALF OF
19 DEFENDANT ICANN.

20 MR. KESSELMAN: GOOD MORNING, YOUR HONOR. DAVID
21 KESSELMAN ON BEHALF OF INTERVENOR ZACR.

22 THE COURT: IT'S GOOD TO SEE ALL OF YOU AGAIN.

23 MR. LAVEE: THANK YOU, YOUR HONOR. NICE TO BE
24 SEEN AND SEE YOU.

25 THE COURT: I SEE YOU'RE ALL TAKING YOUR
26 RESPECTIVE POSITIONS. WE HAVE A COURT REPORTER FOR
27 TODAY'S PROCEEDINGS. THIS WOULD BE PAM MYERS. WELCOME
28 TO DEPARTMENT 53. COURT HAS SIGNED THE ORDER APPOINTING

1 YOU AS COURT REPORTER PRO TEM.

2 ALL RIGHT. THIS IS A MOTION FOR SUMMARY
3 JUDGMENT THAT WAS BROUGHT BY THE DEFENDANTS, AND THE
4 TENTATIVE RULING IS TO GRANT IN PART AND DENY IN PART,
5 AS IS EXPLAINED IN THE TENTATIVE RULING THAT WAS
6 PROVIDED. AND SO SINCE WE HAVE A LITTLE BIT OF EACH, I
7 GUESS I WILL -- LET'S START WITH COUNSEL FOR THE
8 PLAINTIFF ON THE PART THAT WAS GRANTED, AND THEN WE
9 CAN -- THEN WE CAN TALK ABOUT THE OTHER PART THAT WAS
10 DENIED.

11 MR. BROWN: THANK YOU, YOUR HONOR.

12 LET ME JUST TAKE -- SORT OF BRIEFLY GO
13 THROUGH THE TENTATIVE ORDER. WE HAVE NO OBJECTION TO
14 THE COURT'S INTERPRETATION OF THE COVENANT NOT TO SUE,
15 AND IN ACCORDANCE WITH THAT, THE ANALYSIS UNDER 1668. I
16 MEAN, IF THE COURT'S -- AT LEAST AS I UNDERSTAND THE
17 TENTATIVE, IF THE COURT'S INTERPRETATION OF THE COVENANT
18 NOT TO SUE WERE TO CHANGE, THEN WE WOULD HAVE SOMETHING
19 TO SAY ABOUT THE 1668 ANALYSIS, BUT AS I READ THE ORDER,
20 I THINK WE EFFECTIVELY MOVED PAST THE 1668 ANALYSIS
21 BECAUSE OF THE WAY THE COVENANT NOT TO SUE IS READ. WE
22 VIEWED THE UNCONSCIONABILITY POINT IN MUCH THE SAME WAY.
23 TO THE EXTENT THAT THE COVENANT NOT TO SUE IS DEEMED NOT
24 TO COVER THE INTENTIONAL TORT OR WILLFUL INJURY PORTION
25 OF OUR CLAIMS, THEN WE WOULD SUBMIT ON THE TENTATIVE
26 WITH REGARD TO THE UNCONSCIONABILITY ANALYSIS. BUT
27 AGAIN, IF THE COURT WERE TO ALTER ITS INTERPRETATION,
28 THEN WE BELIEVE THAT THE -- THAT THE COVENANT NOT TO SUE

1 WOULD BE SUBSTANTIVELY UNCONSCIONABLE AS IT RELATES TO
2 THE APPLICATION TO THE INTENTIONAL TORTS OR TO THE
3 WILLFUL INJURY.

4 THE PART THAT I WANT TO FOCUS ON
5 PRINCIPALLY IS WITH RESPECT TO THE ARGUMENT IN OUR
6 PAPERS IN REGARD TO THE PROCUREMENT OF THE COVENANT NOT
7 TO SUE BY FRAUD. AT LEAST AS I READ THE TENTATIVE, I
8 DIDN'T SEE THAT ARGUMENT ADDRESSED. IT'S A FAIRLY
9 STRAIGHTFORWARD ARGUMENT. THE COVENANT NOT TO SUE
10 INDICATES THAT THERE'S A WAIVER OF CERTAIN CLAIMS, AND
11 IT MAKES REFERENCE TO THE AVAILABILITY OF VARIOUS
12 ACCOUNTABILITY MECHANISMS THAT ICANN HAS AS A SUBSTITUTE
13 FOR THE COURT PROCESS THAT IS WAIVED BY VIRTUE OF THE
14 COVENANT NOT TO SUE. BUT THE IMPORTANT THING IS IS THAT
15 ICANN IN THE GUIDEBOOK OR OTHERWISE DOESN'T -- DIDN'T
16 DISCLOSE TO APPLICANTS THAT IN FACT IT WOULD TAKE THE
17 POSITION THAT THOSE ACCOUNTABILITY MECHANISMS WEREN'T
18 BINDING, SO THOSE ACCOUNTABILITY MECHANISMS, IN OUR
19 VIEW, ARE REALLY SPECIOUS IN TERMS OF THEY DON'T PROVIDE
20 ANY GENUINE RELIEF. AND IN THAT -- BECAUSE OF THAT, WE
21 BELIEVE THAT THE COVENANT NOT TO SUE, THE AGREEMENT TO
22 ACCEPT THE COVENANT NOT TO SUE, IN WHATEVER SKILL
23 YOUR HONOR ULTIMATELY DETERMINES IT COVERS, WAS PROCURED
24 BY FRAUD BECAUSE APPLICANTS HAD NO WAY TO KNOW THAT THEY
25 COULD GO THROUGH THIS ENTIRE IRP PROCESS AND PREVAIL AND
26 GET TO THE END AND THEN FIND OUT THAT ICANN WASN'T GOING
27 TO ACCEPT THE RULING EVEN THOUGH THEY WON.

28 SO IN THIS PARTICULAR CASE, WHAT HAPPENED

1 WAS THE APPLICANT WENT THROUGH THE IRP PROCESS, IT
2 PREVAILED IN THE IRP PROCESS, THE IRP PANEL ITSELF
3 DETERMINED THAT IT BELIEVED THAT THE AWARD WAS BINDING,
4 BUT THE AWARD ITSELF THEN GOES BACK TO THE ICANN BOARD,
5 AND THE ICANN BOARD HAS TO DECIDE -- GOT TO DECIDE
6 WHETHER IT WANTED TO ACCEPT THE RULING OR NOT. IN THIS
7 PARTICULAR CASE IT PURPORTED TO ACCEPT THE RULING. WE
8 HAVE A DISAGREEMENT ABOUT WHAT IT DID AFTER THAT,
9 WHETHER IT IMPLEMENTED IT EFFECTIVELY, BUT IT PURPORTED
10 TO ACCEPT THE AGREEMENT, BUT IT DIDN'T HAVE TO. IT WAS
11 OPTIONAL. AND SO THE -- WE'RE PUT IN A POSITION, AND IN
12 TERMS OF MAKING A DECISION WHETHER TO GO BACK THROUGH
13 THE IRP PROCESS A SECOND TIME, WE'RE AGAIN PUT IN THE
14 SAME POSITION WHERE MY CLIENT IS PRESUMABLY BEING ASKED
15 TO GO THROUGH THIS IRP PROCESS A SECOND TIME. IT'S
16 LONG, IT'S EXPENSIVE, AND YOU GET TO THE END, AND ICANN
17 GETS TO DECIDE WHETHER THEY WANT TO ACCEPT THE RULING OR
18 NOT. AND THAT'S NOT -- THAT'S NOT A SUBSTITUTE FOR A
19 REAL PROCESS.

20 AND CERTAINLY BEFORE AN APPLICANT IS ASKED
21 TO PAY \$185,000 APPLICATION FEE AND ASKED TO ACCEPT THE
22 WAIVER THAT'S PRESENTED TO IT IN MODULE SIX OF THE
23 GUIDEBOOK, THE APPLICANT SHOULD KNOW THAT THE
24 ALTERNATIVE MECHANISMS THAT ARE PROVIDED BY ICANN AREN'T
25 BINDING AND THEY COULD GO THROUGH THAT ENTIRE PROCESS
26 WITH AN INDEPENDENT PANEL. IN THIS PARTICULAR CASE
27 THERE WAS AN INDEPENDENT PANEL DRAWN FROM, YOU KNOW,
28 FORMER JUDGES AND THE LIKE LOCALLY. YOU COULD GO

1 THROUGH THE ENTIRE PROCESS AND IT COULD BE A LOSER. YOU
2 COULD STILL NOT GET ANY REMEDY AT ALL EVEN IF YOU
3 PREVAIL BEFORE THE PANEL. AND THE REASON I THINK THAT'S
4 IMPORTANT THAT THE FRAUDULENT PROCUREMENT ARGUMENT IS
5 IMPORTANT BECAUSE, YOU KNOW, UNLIKE THE 1668 ARGUMENT,
6 THAT ONE WOULD -- THAT ONE WOULD PRESERVE ALL OF MY
7 CLIENT'S CLAIMS, NOT JUST THE CLAIMS THAT RELATE TO
8 FRAUD AND WILLFUL INJURY AND SUCH THAT ARE RETAINED BY
9 YOUR HONOR'S ORDER. SO I WOULD ASK YOUR HONOR TO
10 RECONSIDER THAT PARTICULAR ARGUMENT TO DETERMINE WHETHER
11 THERE IS AT THE LEAST A ISSUE OF FACT AS TO WHETHER THE
12 MISSTATEMENT OR LACK OF STATEMENT IN THE MODULE SIX, THE
13 LACK OF ANY STATEMENT SAYING ICANN WOULD TAKE THE
14 POSITION ITS ALTERNATIVE ACCOUNTABILITY MECHANISMS WERE
15 ENFORCEABLE. THAT'S A MATERIAL OMISSION THAT RENDERS
16 THE GUIDEBOOK PROVISIONS PROCURED BY FRAUD. SO THAT'S
17 MY PITCH ON THAT PARTICULAR PIECE OF IT.

18 WITH REGARD TO THE REMAINDER OF THE ORDER,
19 AGAIN, AS I -- AS I UNDERSTAND THE COURT'S RULING, I
20 THINK WE'RE EFFECTIVELY TAKEN OUT OF THE JUDICIAL
21 ESTOPPEL ISSUE. THE TENTATIVE STANDS, AS CURRENTLY
22 WRITTEN, I THINK JUDICIAL ESTOPPEL SORT OF GOES AWAY.
23 BECAUSE THE ARGUMENT, I THINK, IS THAT MY CLIENT TOOK
24 THE POSITION THAT THE COVENANT NOT TO SUE WAS
25 ENFORCEABLE IN ONE PROCEEDING AND UNENFORCEABLE IN
26 ANOTHER. WE DISAGREE WITH ALL OF THAT FOR A BUNCH OF
27 REASONS WE CAN TALK ABOUT LATER IF WE GET TO IT, BUT IN
28 THIS PARTICULAR CONTEXT, YOUR HONOR, I THINK IS -- MY

1 UNDERSTANDING OF THE RULING IS IS THAT THE COVENANT NOT
2 TO SUE SIMPLY DOESN'T COVER CERTAIN OF THE CLAIMS BUT
3 THAT IT'S OTHERWISE ENFORCEABLE. IN THAT PARTICULAR
4 CONTEXT, I DON'T THINK THERE'S ANY INCONSISTENCY IN MY
5 CLIENT'S POSITION ANYWAY. THAT WASHES OUT. SO I THINK
6 THE JUDICIAL ESTOPPEL ARGUMENT EFFECTIVELY BECOMES
7 IRRELEVANT AT THIS STAGE.

8 THEN, FINALLY, WITH RESPECT TO THE FRAUD OR
9 WILLFUL INJURY PIECE, WE AGREE WITH YOUR HONOR'S
10 DETERMINATION ON THAT POINT. I JUST WANT TO MAKE THE
11 POINT THAT THE -- THE STIPULATION THAT THE PARTIES
12 ENTERED INTO WAS REALLY ABOUT ENFORCEABILITY OF THE
13 COVENANT NOT TO SUE, AND SO EVEN THOUGH WE DID COME OUT
14 FAVORABLY IN REGARD TO YOUR RULING IN SECTION D, I THINK
15 AT SOME LEVEL IT WOULD BE PREMATURE TO REALLY REVISIT
16 THAT AT THIS STAGE BECAUSE THAT REALLY WASN'T THE FOCUS
17 OF THIS ROUND OF SUMMARY JUDGMENT. THIS ROUND OF
18 SUMMARY JUDGMENT WAS REALLY ABOUT WHETHER THE COVENANT
19 NOT TO SUE WAS ENFORCEABLE AT ALL, NOT WHETHER ANY
20 CLAIMS THAT SURVIVED THAT COVENANT WERE ADEQUATELY
21 PRESENTED. SO I JUST WANT TO SAY THAT.

22 THE COURT: THANK YOU.

23 COUNSEL?

24 MR. LAVEE: THANK YOU, YOUR HONOR.

25 I HAVE A SMALL HANDFUL OF EXHIBITS FOR THE
26 COURT TO REVIEW IF THAT'S OKAY.

27 THE COURT: OKAY.

28 MR. LAVEE: THANK YOU.

1 WE, OF COURSE, HAVE REVIEWED THE TENTATIVE,
2 AND WHAT I'D LIKE TO DO THIS MORNING IS FOCUS MY
3 ARGUMENT ON THE ISSUES OF JUDICIAL ESTOPPEL, WHICH IS
4 WHERE I'M GOING TO START, AND THEN ALSO THE ISSUE OF
5 WHETHER THE COVENANT COVERS CLAIMS SOUNDING IN FRAUD.
6 THE JUDICIAL ESTOPPEL ARGUMENT IS VERY STRAIGHTFORWARD.
7 IT'S BASED ON THE FACT THAT DCA ARGUED TO THE
8 THREE-MEMBER INDEPENDENT REVIEW PANEL THAT BECAUSE OF
9 THE VERY EXISTENCE OF THE COVENANT, AND BECAUSE THE
10 COVENANT WAS LAWFUL, DCA WAS NOT PERMITTED TO FILE A
11 LAWSUIT AGAINST ICANN. AND THUS THE IRP PANEL'S RULING
12 SHOULD BE BINDING. THE IRP PANEL -- I'M GOING TO TAKE
13 YOU THROUGH THIS -- AGREED WITH DCA A HUNDRED PERCENT
14 AND DETERMINED, BASED ON DCA'S ARGUMENT, THAT ITS RULING
15 WOULD BE BINDING. THE PANEL ISSUED A FINAL DECISION IN
16 DCA'S FAVOR, AND ICANN FULLY IMPLEMENTED THE DECISION.
17 INDEED DCA HAS ACKNOWLEDGED THAT ICANN FULLY IMPLEMENTED
18 THE DECISION. AND YET, LESS THAN A YEAR AFTER THE PANEL
19 ISSUED ITS DECISION, DCA DID EXACTLY WHAT IT TOLD THE
20 PANEL IT COULDN'T DO, IT FILED A LAWSUIT.

21 SO THE COURT'S TENTATIVE LAYS OUT THE FIVE
22 ELEMENTS OF JUDICIAL ESTOPPEL. I'M NOT GOING TO REPEAT
23 THEM, BUT I'VE PREPARED EXHIBITS I'M GOING TO TAKE THE
24 COURT THROUGH TO SHOW -- BECAUSE I THINK THERE'S ONE
25 DOCUMENT IN PARTICULAR THAT THE COURT MIGHT HAVE MISSED
26 THAT EXPLAINS WHY JUDICIAL ESTOPPEL APPLIES.

27 SO, LOOKING AT THE TABS, TAB ONE IS THE
28 COMPLAINT, AND I'M GOING TO COME BACK TO THE COMPLAINT

1 IN A MOMENT. AND TAB TWO IS THE COPY OF THE COVENANT,
2 AND I KNOW THE COURT HAS SEEN THE COVENANT MANY TIMES.
3 I'M GOING TO COME BACK TO THAT. WHAT I'D ASK THE COURT
4 TO DO IS GO TO TAB THREE. THIS IS EXHIBIT F TO MY
5 DECLARATION, AND IT IS ENTITLED "DCA'S RESPONSE TO THE
6 PANEL'S QUESTIONS ON PROCEDURAL ISSUES." THIS IS A
7 PLEADING WRITTEN BY DCA'S COUNSEL, WEIL GOTSHAL, AND THE
8 PANEL HAD ISSUED A BUNCH OF QUESTIONS ON PROCEDURAL
9 MATTERS, AND THIS IS THE BRIEF THAT DCA FILED.

10 SO I GAVE YOU THE TABLE OF CONTENTS. AND
11 THEN IF YOU WOULD TURN TO THE PAGE, IT'S PAGE 2 OF THE
12 BRIEF, NOT THE SECOND PAGE, BUT IT'S THE PAGE THAT'S
13 MARKED AT THE BOTTOM "PAGE 2." YOU SEE IT, YOUR HONOR?

14 THE COURT: YES. PAGE 2.

15 MR. LAVEE: YES. SO I HIGHLIGHTED THE TITLE OF
16 ARGUMENT C THAT DCA MADE WHICH SAYS, "AS THE SOLE
17 PROCESS THROUGH WHICH DCA CAN PURSUE ITS CLAIMS AGAINST
18 ICANN, THE IRP MUST BE CAPABLE OF PROVIDING A FINAL AND
19 BINDING DECISION IN THE MATTER." AND SO I WANT TO BE
20 CLEAR. THIS HEADING IS VERY DEFINITIVE. IT DOESN'T SAY
21 IF THE COVENANT IS LAWFUL, THEN OTHER THINGS HAPPEN. IT
22 SAYS THE COVENANT IS LAWFUL, AND THEREFORE, THE IRP
23 DECISION MUST BE BINDING. AND IT CONTINUES SAYING THAT.
24 SO IF YOU LOOK AT PARAGRAPH 5, WHICH I HIGHLIGHTED, THEY
25 TALK ABOUT THE GUIDEBOOK AND MODULE SIX, AND THEN
26 THEY -- THE QUOTE FROM THE COVENANT, AND THEN WHEN YOU
27 TURN THE PAGE, AT THE END OF THAT PARAGRAPH, IT SAYS,
28 "IN EXCHANGE FOR WAIVING THE SIGNIFICANT LEGAL RIGHTS,

1 SECTION SIX OF MODULE SIX GRANTS THE APPLICANTS THE
2 RIGHT TO CHALLENGE" -- I'M ON THE TOP OF PAGE 3 -- "THE
3 RIGHT TO CHALLENGE A DECISION OF ICANN THROUGH THE
4 ACCOUNTABILITY MECHANISMS SET FORTH IN ICANN'S BYLAWS."
5 THEN IN PARAGRAPH 6 IT BEGINS "AS A RESULT, THE IRP IS
6 THE SOLE FORUM IN WHICH AN APPLICANT FOR A NEW GTLD CAN
7 SEEK INDEPENDENT THIRD-PARTY REVIEW OF BOARD ACTIONS."

8 AND THEN I HIGHLIGHTED AT THE BOTTOM OF THE
9 PAGE, "WHERE CALIFORNIA COURTS HAVE CONSIDERED AND
10 UPHELD BROAD LITIGATION WAIVERS, THE ALTERNATIVE TO
11 COURT LITIGATION PROVIDED BY THE PARTIES' CONTRACT IS
12 INEVITABLY A BINDING DISPUTE RESOLUTION MECHANISM, THUS
13 IN ORDER FOR THIS IRP TO BE UNCONSCIONABLE, IT MUST BE
14 BINDING."

15 SO LET'S BE CLEAR THAT DCA'S
16 CHARACTERIZATION OF ITS POSITION IN OPPOSING THE SUMMARY
17 JUDGMENT MOTION IS JUST WRONG. THERE'S NO FACT ISSUE
18 HERE. THIS IS THE BRIEF IN WHICH DCA TOLD THE IRP PANEL
19 THE COVENANT IS BINDING, AND AS A RESULT, THERE ARE
20 CONSEQUENCES THAT FLOW. SO WE HAVE UNDOUBTEDLY TWO
21 COMPLETELY DIFFERENT AND INCONSISTENT POSITIONS. THEY
22 WALKED INTO THE IRP, AND THEY SAID THE COVENANT IS
23 LAWFUL, THE COVENANT IS BINDING, AND THEREFORE, WE CAN'T
24 SUE ICANN, AND SO YOUR DECISION MUST BE BINDING. AND
25 YET A YEAR LATER THEY SUE ICANN. THAT'S AS INCONSISTENT
26 A POSITION AS I CAN LITERALLY IMAGINE.

27 ARGUING, AS THEY DO, THAT THEY TOLD THE
28 PANEL, WELL, WE'RE NOT SURE IF THE COVENANT IS LAWFUL,

1 BUT IF IT IS, THEN OTHER THINGS FLOW, THAT'S NOT HOW
2 THEY ARGUED IT IN THIS BRIEF. THIS IS THE BRIEF IN
3 WHICH THEY ARGUED IT. SO GOING BACK, I'M GOING TO ASK
4 YOU TO SKIP FOR A MOMENT TAB FOUR. WE'LL COME BACK TO
5 THAT. GO INSTEAD TO TAB FIVE.

6 TAB FIVE IS EXHIBIT G TO MY DECLARATION.
7 IF YOU TURN TO THE PAGE NUMBERED 5, YOU'LL SEE THAT THE
8 PANEL IDENTIFIES THREE ISSUES THAT IT IS -- HAS ASKED
9 THE PARTIES TO BRIEF, AND THE THIRD ISSUE WHICH I
10 HIGHLIGHTED IS THE PANEL'S DECISION CONCERNING THE IRP
11 PROCEDURE IN ITS FUTURE DECLARATION ON THE MERITS IN
12 THIS PROCEEDING BINDING. SO THAT'S THE QUESTION THAT
13 IT -- THAT THE PARTIES -- THAT THE PANEL HAD ASKED THE
14 PARTIES TO ADDRESS.

15 AND THEN IF YOU TURN TO PAGE 10 OF THEIR
16 DECISION, PARAGRAPH 39, THEY RULE -- THIS IS THE PANEL'S
17 RULING: "THE AVENUES OF ACCOUNTABILITY FOR APPLICANTS
18 THAT HAVE DISPUTES WITH ICANN DO NOT INCLUDE RESORT TO
19 THE COURTS." SO THE PANEL HAS DETERMINED, FOLLOWING
20 DCA'S ARGUMENT, THAT THE COVENANT DOES NOT PERMIT DCA TO
21 FILE A LAWSUIT. AND SO THEN IF YOU TURN THE PAGE, AND
22 ACTUALLY JUST GO TO PAGE 32 OF THE DECISION,
23 PARAGRAPH 131, WHAT THE PANEL SAYS IS "BASED ON THE
24 FOREGOING AND THE LANGUAGE AND THE CONTENT OF THE IRP
25 PROCEDURE, THE PANEL CONCLUDES THAT THIS DECLARATION AND
26 ITS FUTURE DECLARATION ON THE MERITS OF THE CASE ARE
27 BINDING ON THE PARTY." AND THEN IF YOU TURN THE PAGE,
28 YOU'LL SEE SIGNATURES OF THE THREE MEMBERS OF THE PANEL,

1 INCLUDING TWO JUDGES, INCLUDING JUDGE NEIL PRIOR TO THE
2 TIME HE PASSED.

3 SO WE HAVE TWO INCONSISTENT POSITIONS, AND
4 WE HAVE THE FIRST POSITION HAVING BEEN ADOPTED BY THE
5 PANEL, SO THE PANEL AGREED.

6 SO IF YOU RETURN TO THE FIVE ELEMENTS OF
7 JUDICIAL ESTOPPEL, WHICH I'D LIKE TO DISCUSS VERY
8 BRIEFLY, THE FIRST ELEMENT IS, ARE THERE DIFFERENT
9 POSITIONS? AND THE ANSWER CLEARLY IS YES. THERE IS NO
10 WAY TO READ THE BRIEF THAT I JUST SHOWED YOU AT TAB
11 THREE AS HEDGING ON WHETHER THE COVENANT IS OR IS NOT
12 LAWFUL. IT'S AN AFFIRMATIVE REPRESENTATION THE COVENANT
13 IS LAWFUL IN ORDER TO INDUCE THE PANEL TO ISSUE A
14 BINDING DECISION.

15 SECOND ELEMENT OF JUDICIAL ESTOPPEL IS
16 WHETHER THE BRIEF WAS WRITTEN IN A QUASI-JUDICIAL
17 PROCEEDING. CLEARLY IT WAS. WE HAD A PROCEEDING THAT
18 INCLUDED TWO YEARS, AN EXTRAORDINARY AMOUNT OF BRIEFING,
19 DOCUMENT PRODUCTION, AND THEN A TWO-DAY LIVE HEARING AT
20 WHICH THE PARTIES PRODUCED FOR TESTIMONY THREE LIVE
21 WITNESSES. ICANN OBJECTED, TO BE CLEAR, TO SOME OF THIS
22 PROCESS, BUT THE PANEL ORDERED ALL OF THIS, AND ICANN
23 FULLY COMPLIED. SO IT -- IT'S VERY CLEAR THAT THIS WAS
24 A QUASI-JUDICIAL PROCEEDING THAT WOULD FALL WITHIN THE
25 ELEMENTS OF JUDICIAL ESTOPPEL.

26 THE THIRD ELEMENT OF JUDICIAL ESTOPPEL IS
27 WHETHER THE PLAINTIFF WON AT THE FIRST GO-ROUND, WHICH
28 THEY DID.

1 THE FOURTH ELEMENT IS WHETHER THE TWO
2 POSITIONS ARE INCONSISTENT. I'VE ALREADY ARGUED IT. I
3 WON'T BELABOR THE POINT, BUT AS I SAID, I JUST DON'T
4 THINK THERE IS A WAY TO RECONCILE THE FILING OF THIS
5 LAWSUIT WITH WHAT DCA TOLD THE PANEL, WHICH WAS WE ARE
6 LEGALLY INCAPABLE BECAUSE OF THE COVENANT OF FILING A
7 LAWSUIT.

8 THE COURT: LET ME JUST ASK YOU AT THIS POINT --

9 MR. LAVEE: SURE.

10 THE COURT: -- THE QUESTION OF WHETHER THE FRAUD
11 CLAIMS WERE JUDICIALLY ESTOPPED AND BAR THE CAUSES OF
12 ACTION OF THE FRAUD CLAIMS, WAS THAT DISCUSSED AT ALL IN
13 THE MATERIALS THAT YOU PROVIDED?

14 MR. LAVEE: THERE WAS -- BECAUSE THERE WAS NO
15 LAWSUIT, THE PANEL OBVIOUSLY COULDN'T KNOW WHAT CLAIMS
16 WOULD BE FRAUD. WHAT I INTEND TO DO IN A MOMENT WHEN I
17 GET TO THE FRAUD ISSUE IS TAKE YOUR HONOR THROUGH THE
18 COMPLAINT, NOT MY CHARACTERIZATION OF THE COMPLAINT BUT
19 THE ACTUAL COMPLAINT. THE SO-CALLED FRAUD CLAIMS ARE
20 SIMPLY CLAIMS THAT ICANN DID NOT FOLLOW ITS GUIDEBOOK
21 AND DID NOT FOLLOW ITS BYLAWS AND DIDN'T FOLLOW ITS
22 ARTICLES. THEY'RE NOT REAL FRAUD CLAIMS, YOUR HONOR.
23 THEY'RE DENOTED AS FRAUD CLAIMS, BUT THEY ARE NO
24 DIFFERENT THAN CONTRACT CLAIMS. THEY'RE THE SAME. AND
25 SO IF A PARTY COULD SAY, "WELL, ICANN DIDN'T FOLLOW ITS
26 GUIDEBOOK, AND WE TAKE THE GUIDEBOOK AS A
27 REPRESENTATION, AND WE RELIED ON THE GUIDEBOOK, AND
28 ICANN BREACHED THE GUIDEBOOK, AND I DON'T WANT TO CALL

1 IT A CONTRACT CLAIM, I JUST WANT TO CALL IT A FRAUD
2 CLAIM," THAT WOULD DEFEAT THE ENTIRE PURPOSE OF THE
3 COVENANT. YOU'D BE ABLE TO ALWAYS SIDE-STEP THE
4 COVENANT BECAUSE YOU'D ALWAYS BE ABLE TO SAY, WELL, THIS
5 IS A CLAIM RELATING TO ICANN'S BYLAWS, BUT I'M GOING TO
6 INTERPRET IT AS FRAUD. THERE'S NO ALLEGATION IN THE
7 COMPLAINT, NO TESTIMONY IN THE CASE THAT SOMEBODY
8 ACTUALLY WENT TO DCA AND SAID, "THIS IS HOW YOU SHOULD
9 INTERPRET THE GUIDEBOOK. THIS IS HOW YOU SHOULD
10 INTERPRET THE BYLAWS." IT'S ALL BASED ON A ARM'S-LENGTH
11 READING OF THESE DOCUMENTS. SO THAT FOR ME, YOUR HONOR,
12 THEY'RE NOT FRAUD CLAIMS.

13 THE COURT: BUT SIMILAR READING THAT I'VE DONE IN
14 THE AREA OF JUDICIAL ESTOPPEL INDICATES THAT IT'S A
15 DRASTIC REMEDY AND IT OUGHT TO BE USED WITH GREAT CARE
16 IN ITS APPLICATION. SO I KNOW WHAT YOU'RE SAYING. I
17 KNOW THAT THEY'RE CHARACTERIZING A SET OF FACTS AND
18 TRANSACTIONS IN A DIFFERENT WAY THAN WAS DONE IN THE
19 UNDERLYING PROCEEDING, BUT IT'S STILL A DIFFERENT --
20 IT'S STILL A DIFFERENT CLAIM REQUIRING DIFFERENT
21 ELEMENTS AND DIFFERENT PROOF.

22 MR. LAVEE: IT IS AND IT ISN'T, YOUR HONOR. IN
23 THE DCA IRP -- AND I'VE ATTACHED RELEVANT POSITIONS OF
24 THE PANEL'S FINAL DECLARATION AT TAB FOUR -- IT WAS ALL
25 ABOUT WHETHER -- THERE WERE ALL SORTS OF CLAIMS MADE
26 THAT ICANN DID TERRIBLE THINGS TO DCA STARTING WITH THE
27 GOVERNMENT ADVISORY COMMITTEE WHICH ISSUED CONSENSUS
28 ADVICE AGAINST DCA'S APPLICATION, BUT THERE WAS ALL

1 SORTS OF TESTIMONY ABOUT ALLEGED BAD THINGS THAT ICANN
2 HAD DONE TO FAVOR ZACR, THE COMPETING APPLICANT, ALL OF
3 WHICH WERE ARGUED TO VIOLATE THE GUIDEBOOK, THE BYLAWS,
4 THE ORDINANCE. IF YOU WANT TO --

5 THE COURT: YOU'RE SAYING THAT THE FRAUD FACTS ARE
6 LITIGATED IN THE UNDERLYING CASE.

7 MR. LAVEE: MANY OF THOSE SAME FACTS WERE
8 LITIGATED. NOW THE PANEL DIDN'T RULE. THE PANEL LISTS
9 A BUNCH OF THE FACTS -- THE DISPUTES AND SAYS WE'RE ONLY
10 GOING TO RULE ON THE GAC ISSUE BECAUSE WE -- THE PANEL
11 DON'T NEED TO RULE ON ALL THESE OTHERS. WE'RE GOING TO
12 RULE THAT THE GAC ADVICE, THAT THE BOARD SHOULD NOT HAVE
13 FOLLOWED THE GAC ADVICE AS IT DID. AND WE'RE GOING TO
14 INSTRUCT ICANN TO RETURN DCA'S APPLICATION TO
15 PROCESSING. THAT'S THE ENTIRETY OF THE RULING. THERE'S
16 A LOT OF EVIDENCE THAT WENT INTO THE REST, BUT THE PANEL
17 SAYS WE'RE JUST NOT GOING TO RULE ON THAT.

18 MY POINT TO YOUR HONOR IS THAT A LOT OF
19 THESE BAD ACT CLAIMS WERE PART AND PARCEL OF THE CONTEXT
20 OF THE IRP BECAUSE DCA HAD ASKED FOR A LOT OF OTHER
21 RELIEF. THE PANEL HAD TO HAVE UNDERSTOOD THAT DCA WAS
22 ARGUING THAT IT WAS BARRED FROM ALLEGING ANY CLAIMS, NOT
23 JUST CONTRACT CLAIMS BUT ANY CLAIMS AGAINST ICANN
24 BECAUSE THAT IS WHAT THE COVENANT SAYS.

25 YOUR POINT, I THINK, IS, WELL, THE COVENANT
26 SAYS THAT, BUT I ALSO HAVE TO RECONCILE THAT WITH CIVIL
27 CODE SECTION 1668 TO DECIDE CAN ICANN EXEMPT ITSELF FROM
28 FRAUD. I WANT TO ARGUE A LITTLE BIT ABOUT THAT TOPIC IN

1 THE FIRST INSTANCE BECAUSE WE REALLY HAVEN'T EXEMPTED
2 OURSELVES. BUT SETTING THAT ASIDE, DCA'S ARGUMENT WAS
3 NOT WE CAN FILE CERTAIN KINDS OF CLAIMS BUT NOT OTHER
4 KINDS OF CLAIMS. DCA'S ARGUMENT WAS WE CANNOT SUE ICANN
5 RELATING TO THE FACTS THAT GIVE RISE TO THIS IRP. IF WE
6 LOOK AT THE COMPLAINT, MOST OF THE COMPLAINT IS RELATING
7 TO THE FACTS THAT WERE PRESENTED TO THE IRP AND WHETHER
8 ICANN HONORED THE IRP, WHETHER ICANN TOOK THE IRP
9 PROCESS SERIOUSLY, ET CETERA.

10 NOW, THERE ARE OTHER THINGS THAT ALSO
11 OCCURRED LATER BECAUSE AFTER THE IRP, DCA DIDN'T MEET
12 THE REQUIREMENT FOR THE 60 PERCENT APPROVAL BY THE
13 AFRICAN GOVERNMENTS, SO THAT'S ALSO PART OF THE LAWSUIT.
14 BUT AGAIN, IT'S PART -- THAT'S PART OF THE PROCESSING OF
15 THE APPLICATION, AND THE ARGUMENT IS THAT -- OR THE
16 ALLEGATION IN THE COMPLAINT IS, WELL, YOU VIOLATED THE
17 GUIDEBOOK, AND YOU VIOLATED THE BYLAWS.

18 LET ME JUST GIVE YOU AN EXAMPLE. IF YOU
19 LOOK AT TAB ONE, TAB ONE IS THE COMPLAINT, AND LET ME
20 ASK YOU -- I INCLUDED THE ENTIRE COMPLAINT, BUT LET ME
21 ASK YOU TO TURN TO PAGE 16. SO THIS IS THE SECOND CAUSE
22 OF ACTION, AND IT'S FOR FRAUD OR INTENTIONAL
23 MISREPRESENTATION. FIRST CAUSE OF ACTION IS FOR BREACH
24 OF CONTRACT. I'M SORRY, IF YOU GO BACK TO THE FIRST
25 CAUSE OF ACTION, LOOK AT PAGE 13. IT'S FOR BREACH OF
26 CONTRACT, AND IF YOU LOOK AT PARAGRAPH 68, THE
27 ALLEGATION IS, WELL, WE BREACHED THE AGREEMENT TO REVIEW
28 PLAINTIFF'S APPLICATION IN ACCORDANCE WITH THE BYLAWS,

1 THE ARTICLES, AND THE GTLD RULES AS EVIDENCED BY THE IRP
2 DECLARATION.

3 SO WE START OUT WITH A BREACH OF CONTRACT
4 CLAIM. WHAT I'M SAYING TO THE COURT IS EVERY OTHER
5 CLAIM IN THIS COMPLAINT, IT'S THE SAME THING. YOU CAN
6 SPIN IT AS FRAUD, BUT THEY'RE ALL BREACH OF CONTRACT
7 CLAIMS. SO LET'S LOOK AT THE SECOND CAUSE OF ACTION. I
8 HIGHLIGHTED PARAGRAPH 74. WHAT IT SAYS IS ICANN MADE
9 THE FOLLOWING INTENTIONAL MISREPRESENTATIONS ON ITS
10 WEBSITE AND IN THE GUIDEBOOK TO PLAINTIFF OR PLAINTIFF'S
11 AGENTS. THERE'S NO EVIDENCE THAT THE -- THAT DCA'S COME
12 FORWARD WITH THAT SOMEBODY AT ICANN SPOKE TO THE
13 PLAINTIFF. IT'S THAT WE PUT STUFF IN OUR GUIDEBOOK. A,
14 WE REPRESENTED THAT OUR APPLICATION FOR DOTAFRICA WOULD
15 BE REVIEWED IN ACCORDANCE WITH ICANN'S ARTICLES OF
16 INCORPORATION AND THE NEW GTLD GUIDEBOOK, ALL OF WHICH
17 PROMISED A FAIR AND TRANSPARENT PROCESS AND SO FORTH.

18 SUB A IS WE PROMISED WE WOULD COMPLY WITH
19 OUR GOVERNMENT DOCUMENTS. IT'S NOT A FRAUD CLAIM. IT'S
20 A CONTRACT CLAIM.

21 SUB B, WE PROMISED THAT WE HAD IN PLACE AN
22 ACCOUNTABILITY MECHANISM TO ENSURE THE PLAINTIFF WOULD
23 BE PROVIDED PROPER DUE PROCESS IN THE EVENT OF A
24 DISPUTE. AGAIN, THIS IS IN THE BYLAWS THAT WE HAVE AN
25 IRP PROCESS. THE ALLEGATION IS WE BREACHED THAT
26 PROMISE. SUBSECTION C, ICANN REPRESENTED IT WOULD
27 PARTICIPATE IN GOOD FAITH WITH ANY APPLICANT WHO DESIRED
28 TO INITIATE AN IRP PROCESS IN ORDER TO ENSURE THAT

1 APPLICANTS RECEIVE PROPER DUE PROCESS.

2 AND THEN D, ICANN REPRESENTED THAT ALL
3 APPLICANTS FOR THE AFRICA GTLD WOULD BE SUBJECT TO THE
4 SAME AGREEMENT, RULES, AND PROCEDURES.

5 THESE ARE NOT CLAIMS OF FRAUD IN THE
6 TRADITIONAL SENSE. THEY'RE CONTRACT CLAIMS DRESSED UP
7 AS FRAUD. AND THERE'S REALLY NO OTHER WAY TO READ THEM.
8 I CAN RESPOND TO THE SPECIFIC ALLEGATIONS, BUT THEN IF
9 YOU LOOK AT THE THIRD CAUSE OF ACTION, WHICH IS
10 NEGLIGENT MISREPRESENTATION, IT'S A REPEAT OF THE SECOND
11 CAUSE OF ACTION. AND I COULD GO ON, BUT ALL OF THIS IS
12 ARISING OUT OF ALLEGED FAILURE BY ICANN TO CONDUCT
13 ITSELF IN CONFORMANCE WITH THE APPLICANT GUIDEBOOK,
14 ICANN'S BYLAWS, AND ICANN'S ARTICLES OF INCORPORATION.
15 YOU CAN CALL IT FRAUD, BUT IT'S NOT REALLY A
16 REPRESENTATION AT ALL. THESE ARE OUR GOVERNMENT
17 DOCUMENTS. OF COURSE WE HAVE TO CONFORM TO THEM.

18 AND THE MOST IMPORTANT THING IS THAT THESE
19 KINDS OF CLAIMS ARE REMEDIABLE IN AN INDEPENDENT REVIEW
20 PROCESS. DCA ARGUES IN ITS OPPOSITION BRIEF, WELL, WE
21 HAVE FRAUD CLAIMS, AND THE INDEPENDENT REVIEW PROCESS
22 CAN'T ADJUDICATE A FRAUD CLAIM. THAT'S JUST WRONG. IF
23 YOU ARE SAYING THAT WE DIDN'T COMPLY WITH OUR GUIDEBOOK
24 FOR OUR BYLAWS OR OUR ARTICLES, YOU'RE SAYING WE
25 BREACHED OUR GOVERNING DOCUMENTS. THAT'S EXACTLY THE
26 PURPOSE OF AN INDEPENDENT REVIEW PROCEEDING IN OUR
27 BYLAWS. SO JUST AS THEY BROUGHT AN INDEPENDENT REVIEW
28 PROCEEDING WITH RESPECT TO THE GOVERNMENT ADVISORY

1 COMMITTEE'S ADVICE TO ICANN, SO TOO COULD THEY HAVE
2 BROUGHT AN INDEPENDENT REVIEW PROCEEDING WITH RESPECT TO
3 EVERY SINGLE ONE OF THESE CAUSES OF ACTION THAT
4 ALLEGEDLY SOUNDED FRAUD. AND THAT'S THE REASON THAT I
5 WOULD URGE THE COURT TO ACTUALLY, YOU KNOW, TO LOOK AT
6 THE COMPLAINT. I'M NOT TRYING TO CHARACTERIZE IT. I'M
7 JUST READING THE WORDS. BECAUSE IF FRAUD CLAIMS, TRUE
8 FRAUD CLAIMS ARE GOING TO BE EXEMPTED, I UNDERSTAND THE
9 LOGIC OUT OF CIVIL CODE 1668, BUT THESE ARE CLAIMS THAT
10 THE BOARD DID NOT CONFORM TO ITS GOVERNING DOCUMENTS.
11 AND NO SEPARATE REPRESENTATION THAT SOMEBODY SAID TO AN
12 EMPLOYEE OF DCA, BY THE WAY, WE'VE GOT THIS BYLAW, AND
13 THIS IS HOW YOU SHOULD READ IT, YOU SHOULD TAKE COMFORT
14 IN THIS AND THEN SOMEHOW THAT ALLEGATION PROVES TO BE
15 WRONG, THERE'S NOTHING OF THAT SORT. THIS IS ALL --

16 THE COURT: LET'S ASSUME THAT YOU'RE NOT CORRECT
17 AND WE GO TO TRIAL AND YOU RAISE JUDICIAL ESTOPPEL
18 AGAIN, PROBABLY IN THE FORM OF A MAYBE A MOTION IN
19 LIMINE TO PRECLUDE EVIDENCE AS TO FRAUD MAYBE, I DON'T
20 THINK THAT I CAN RULE ON THAT, RIGHT, BECAUSE IT'S A
21 DISPOSITIVE RULING ON A MOTION IN LIMINE, AND I THINK
22 THERE'S CASE LAW THAT SAYS I CAN'T REALLY DO THAT. SO
23 LET'S ASSUME WE HAVE TO GO TO TRIAL.

24 MR. LAVEE: YES.

25 THE COURT: AT SOME POINT DURING THE TRIAL YOU
26 WOULD MAKE SOME KIND OF A MOTION BECAUSE THIS IS A
27 JUDICIAL ESTOPPEL, IT SOUNDS TO ME LIKE IT'S A JUDGE
28 QUESTION RATHER THAN A JURY QUESTION AS TO WHAT THE

1 FACTS ARE. AND THE JURY CAN BE PRESENTED WITH ALL YOUR
2 EXCERPTS AND THEN DECIDE WHETHER OR NOT IT'S REALLY A
3 FRAUD CLAIM DISGUISED AS A CONTRACT CLAIM. SO THE COURT
4 WILL MAKE A DECISION. YOU MAKE A MOTION FOR NONSUIT, A
5 MOTION FOR DIRECTED VERDICT WHETHER JUDICIAL ESTOPPEL
6 WOULD APPLY BECAUSE IT LITERALLY HAS THE EFFECT OF
7 FORECLOSING THE ENTIRE ACTION, REMAINING CLAIMS BECAUSE
8 THEY ALL SOUNDED FRAUD. YET YOU WANT ME TO DO IT NOW,
9 AND LATER THERE PROBABLY AREN'T GOING TO BE ANY
10 ADDITIONAL FACTS, ARE THERE? WE HAVE THE PROVISIONS, WE
11 HAVE THE ARGUMENTS THAT ARE MADE. WE HAVE THE
12 COMPLAINT; CORRECT?

13 MR. LAVEE: I THINK ALL THE SALIENT FACTS ARE
14 BEFORE YOU. CERTAINLY AT TRIAL THERE MIGHT BE TESTIMONY
15 THAT, YOU KNOW --

16 THE COURT: SO THIS IS A QUESTION. SO REALLY WHAT
17 YOU'RE SAYING IS THAT IT'S A MATTER OF LAW JUDICIAL
18 ESTOPPEL SHOULD APPLY AND THAT 1668 SHOULD NOT TRUMP THE
19 JUDICIAL ESTOPPEL POSITION THAT WAS TAKEN BY THE -- BY
20 DCA AND THE OTHER PROCEEDING?

21 MR. LAVEE: THAT IS CORRECT. THAT IS OUR
22 POSITION.

23 THE COURT: OKAY. ANYTHING MORE?

24 MR. LAVEE: VERY BRIEFLY. THE -- WITH RESPECT TO
25 1668, I MENTIONED BEFORE, THE TERMS OF THE STATUTE SAY
26 THAT A PARTY CANNOT EXEMPT ITSELF FROM FRAUD, "EXEMPT"
27 BEING THE KEYWORD. AND I DO THINK BECAUSE OF THE
28 ACCOUNTABILITY MEASURES THAT ARE IN PLACE WHICH THE

1 COURT HAD ADDRESSED IN THE PRELIMINARY INJUNCTION ORDERS
2 PREVIOUSLY THAT THE COVENANT IS NOT AN EXEMPTION OF
3 FRAUD. THE CASES ON WHICH DCA RELIES ARE SITUATIONS
4 WHERE A PARTY SIGNS A CONTRACT AND THEN LITERALLY HAS NO
5 RECOURSE OF THE CASE THAT DCA RELIES ON MOST HEAVILY IS
6 THE BLANKENHEIM, B-L-A-N-K-E-N-H-E-I-M, CASE WHERE
7 THERE'S A HOLD HARMLESS AGREEMENT IN CONJUNCTION WITH AN
8 INVESTMENT TRANSACTION AND THE INVESTMENT GOES SOUR AND
9 THE DEFENDANT SAYS, "WELL, YOU CAN'T SUE ME. I'M, IN
10 ESSENCE, JUDGMENT PROOF."

11 THIS IS A DIFFERENT KIND OF SITUATION
12 BECAUSE THE COVENANT SPECIFICALLY CALLS OUT THE
13 AVAILABILITY OF ALL THESE OTHER FORMS OF RELIEF, AND
14 WHAT DCA'S PRIMARY RESPONSE IS, YEAH, BUT THE -- YOU
15 HAVEN'T ANNOUNCED THAT IRP DECLARATIONS ARE BINDING. IN
16 THIS CASE THE IRP PANEL SAID ITS DECLARATIONS WERE
17 BINDING. ICANN IMPLEMENTED THE DECISION WHEN I TOOK THE
18 DEPOSITION OF 30(B)(6) DEPOSITION OF DCA, THE WITNESS,
19 THE CEO, ACKNOWLEDGED. I HAVE IT IN THE MATERIALS THAT
20 I'VE GIVEN TO THE COURT. THAT'S WHAT WE WERE ENTITLED
21 TO, TO GO BACK INTO PROCESSING. WE WEREN'T ENTITLED TO
22 AUTOMATICALLY PASS THE GEOGRAPHIC NAMES REVIEW, WHICH IS
23 WHAT IS ALLEGED IN THE COMPLAINT. WE KNEW WE HAD TO GO
24 BACK INTO PROCESSING. THAT'S WHAT THE PANEL ORDERED,
25 AND THAT'S WHAT THE BOARD OF ICANN IMPLEMENTED. SO I
26 UNDERSTAND YOUR HONOR'S TENTATIVE THAT WOULD APPLY 1668,
27 BUT I THINK THIS IS A DIFFERENT KIND OF SITUATION
28 INASMUCH AS COVENANT DOESN'T SAY YOU HAVE NO RECOURSE.

1 YOU DO HAVE RECOURSE. DCA AVAILED ITSELF OF ONE OF
2 THOSE MECHANISMS, AND IT WON. IT COULD HAVE AVAILED
3 ITSELF OF THE SAME MECHANISM AT IRP WHEN IT FAILED TO
4 GET THE APPROVAL OF THE 60 PERCENT OF THE GOVERNMENTS.
5 COULD HAVE FILED ANOTHER IRP, AND THAT WOULD HAVE BEEN
6 ABSOLUTELY APPROPRIATE. SO IT HAD RECOURSE, AND IF
7 THE -- IF THE ISSUE IS WHETHER IT HAD RECOURSE FOR
8 CLAIMS OF FRAUD, I WOULD ASK YOUR HONOR SIMPLY TO READ
9 THE ALLEGATIONS OF THE COMPLAINT BECAUSE NONE OF THOSE
10 LOOK LIKE FRAUD CLAIMS TO ME.

11 LET ME JUST CONCLUDE THERE ARE -- THERE'S
12 AN ELEMENT OF JUDICIAL ESTOPPEL THAT'S IN THE COURT'S
13 TENTATIVE WHERE YOU QUOTE THE KELSEY CASE, AND I DID
14 WANT TO MENTION THAT THE KELSEY CASE INVOLVED A
15 SITUATION WHERE THE TRIAL COURT -- WHERE THE PLAINTIFF
16 HAD NOT DISCLOSED WHEN HE FILED BANKRUPTCY THAT HE HAD A
17 CLAIM AGAINST THE DEFENDANTS, JUST NOT ON HIS SCHEDULES,
18 HIS BANKRUPTCY SCHEDULES, AND DCA DESCRIBES THE CASE IN
19 ITS OPPOSITION AS, QUOTE, REJECTING JUDICIAL ESTOPPEL
20 BECAUSE DEFENDANT FAILED TO SHOW THE PLAINTIFF'S FAILURE
21 TO STATE A CLAIM WAS INTENTIONAL AND NOT THE RESULT OF
22 IGNORANCE, CLOSE QUOTE. BUT THAT'S NOT WHAT THE CASE
23 SAYS AT ALL.

24 WHAT THE COURT HELD IN THAT CASE WAS THE
25 PLAINTIFF HAD SUBMITTED A DECLARATION SAYING, "I DID NOT
26 REALIZE WHEN I FILED MY BANKRUPTCY SCHEDULES THAT I WAS
27 SUPPOSED TO LIST MY CLAIM AGAINST THE DEFENDANT AS AN
28 ASSET. DIDN'T KNOW IT. NOBODY TOLD ME THAT I WAS

1 SUPPOSED TO DO IT. AND SO MY OMISSION IN MY BANKRUPTCY
2 SCHEDULES OF THIS CLAIM CAN'T BE HELD AGAINST ME BECAUSE
3 IT WASN'T AN INTENTIONAL OMISSION." THAT'S ALL THE CASE
4 STANDS FOR. IT DOESN'T STAND FOR THE PROPOSITION THAT
5 WE, ICANN, HAVE TO AFFIRMATIVELY PRESENT EVIDENCE THAT
6 DCA UNDERSTOOD WHAT IT WAS SAYING. I DID PRESENT THAT
7 EVIDENCE. IT'S AT TAB THREE. THIS IS A BRIEF WRITTEN
8 BY A WELL RESPECTED LAW FIRM, AND THERE'S NO EVIDENCE
9 FROM DCA SAYING, "OOPS, I DIDN'T KNOW WHAT MY LAWYERS
10 WERE SAYING. I DIDN'T REALIZE THAT THEY WERE GOING TO
11 TAKE THIS POSITION." THERE'S A FULL ACKNOWLEDGMENT THAT
12 THIS IS THE POSITION DCA TOOK KNOWINGLY AND
13 INTENTIONALLY. THERE'S NO OTHER OBLIGATION ON ICANN'S
14 PART TO COME FORWARD WITH EVIDENCE. IT'S CRYSTAL-CLEAR
15 THIS IS THE -- A FILING IN A JUDICIAL PROCEEDING. SO
16 I'LL LEAVE IT AT THAT.

17 I -- I REALLY WOULD URGE THE COURT TO TAKE
18 A SECOND LOOK AT THE JUDICIAL ESTOPPEL ISSUE BECAUSE I
19 KNOW THAT THE RESULT IS CHARACTERIZED BY THE COURTS AS
20 EXTREME, BUT WHERE IT'S APPROPRIATE AND WHERE YOU CAN
21 NOT HAVE TO ADDRESS SOMETHING AT A TRIAL, IT GETS
22 ENTERED ALL THE TIME. THERE ARE PLENTY OF CASES ON
23 WHICH THE PARTIES BOTH RELY WHERE COURTS DISMISS ACTIONS
24 DUE TO JUDICIAL ESTOPPEL; SO IT'S -- IN MANY WAYS IT'S
25 NOT UNLIKE A SUMMARY JUDGMENT IN AND OF ITSELF.

26 THE COURT: I APPRECIATE THAT.

27 COUNSEL FOR ZACR, DID YOU WANT TO SAY
28 ANYTHING OR ADD ANYTHING?

1 MR. KESSELMAN: NO, YOUR HONOR. THE ONLY ISSUE --
2 WE CERTAINLY HOPE YOU'LL RECONSIDER AS WELL.

3 THERE IS ONE VERY MINOR POINT, WHICH I
4 DISCUSSED WITH PLAINTIFF'S COUNSEL. THE SEVENTH CAUSE
5 OF ACTION, WHICH WAS SPECIFIC TO ZACR ONLY, THAT CAUSE
6 OF ACTION IS ACTUALLY ALREADY OUT OF THE CASE BECAUSE
7 ZACR WAS DISMISSED AS A PARTY, SO THAT WOULD JUST BE A
8 CORRECTION TO THE TENTATIVE.

9 THE COURT: WHAT PAGE IS THAT ON?

10 MR. LAVEE: YOUR HONOR, THE VERY LAST PAGE OF THE
11 TENTATIVE SAYS ICANN'S MOTION FOR SUMMARY JUDGMENT IS
12 DENIED. IT LISTS CAUSES OF ACTION INCLUDES THE SEVENTH,
13 BUT THE SEVENTH CAUSE OF ACTION WAS ALREADY OUT OF THE
14 CASE.

15 THE COURT: SO JUST DELETE SEVENTH?

16 MR. LAVEE: YEAH. AND ALSO, THE TENTH CAUSE OF
17 ACTION IS ACTUALLY A DECLARATORY RELIEF CAUSE OF ACTION.
18 IT'S NOT A FRAUD CLAIM, AND SO IF THE COURT STICKS BY
19 ITS TENTATIVE, I THINK THE TENTH CAUSE OF ACTION SHOULD
20 ALSO BE ELIMINATED.

21 THE COURT: OKAY. ALL RIGHT. SO THE -- COUNSEL
22 FOR DCA, I THINK WHAT I NEED ASSISTANCE ON IS THE
23 QUESTION THAT I ASKED COUNSEL, THAT IS -- THAT IS IF THE
24 APPLICABILITY OF JUDICIAL ESTOPPEL IS GOING TO BE A
25 JUDGE QUESTION ULTIMATELY, WHY CAN'T THAT BE DECIDED
26 HERE RATHER THAN AT TRIAL?

27 MR. BROWN: WELL, I THINK THERE'S REALLY TWO
28 ISSUES BEHIND THAT, ONE IS WHETHER JUDICIAL ESTOPPEL IS

1 APPLICABLE HERE AT ALL, AND I THINK THERE'S A LOT OF
2 REASONS WHY IT'S NOT APPLICABLE. I'D LIKE TO GO THROUGH
3 THOSE IF YOU'RE WILLING TO HEAR THAT.

4 SO I THINK -- IN THE FIRST INSTANCE, I
5 THINK THERE'S REALLY A DISCONNECT HERE BETWEEN WHAT
6 YOUR HONOR RULED AND WHAT JUDICIAL ESTOPPEL EVEN IS
7 ALLEGED IN THIS PARTICULAR CASE. AS I READ THE COURT'S
8 RULING, THE RULING IS IS THAT THE TENTATIVE RULING IS
9 THAT THE PROSPECTIVE RELEASE DOESN'T COVER CERTAIN
10 CLAIMS, AND THEREFORE, ANY STATEMENT THAT WE MAY OR MAY
11 NOT HAVE MADE IN THE PRIOR PROCEEDING THAT THE COVENANT
12 IS ENFORCEABLE DOESN'T SPEAK TO THE SCOPE OF THE -- OF
13 THE COVENANT NOT TO SUE, AND I THINK YOUR HONOR'S RULING
14 RELATE TO THE SCOPE, NOT TO ENFORCEABILITY ULTIMATELY;
15 SO I DON'T EVEN THINK JUDICIAL ESTOPPEL EVEN APPLIES IN
16 THEORY.

17 SECONDLY, THERE IS -- THERE ARE VERY STRICT
18 REQUIREMENTS FOR THE APPLICATION OF JUDICIAL ESTOPPEL,
19 AND WE DON'T THINK THOSE ARE MET HERE. FIRST OF ALL,
20 THERE'S THE ARGUMENT THAT WE SOMEHOW WON IN THE IRP.
21 WELL, IF YOU LOOK AT WHAT THE IRP ACTUALLY SAYS, THE IRP
22 SAYS, "THUS ASSUMING THAT THE FOREGOING WAIVER OF ANY
23 AND ALL JUDICIAL REMEDIES IS VALID AND ENFORCEABLE, THEN
24 THE ONLY ULTIMATE ACCOUNTABILITY REMEDY FOR THE
25 APPLICANT IS THE IRP." IRP NEVER RULED. IT NEVER
26 REACHED A CONCLUSION ON WHETHER THE COVENANT NOT TO SUE
27 WAS ENFORCEABLE OR NOT. THAT'S ONE ISSUE IN TERMS OF US
28 WINNING THAT PARTICULAR ISSUE.

1 SECONDLY, THE -- WE DIDN'T WIN IN A
2 CONVENTIONAL SENSE BECAUSE WE GOT A RULING FROM THE IRP
3 THAT SAYS ASSUMING -- ASSUMING THIS THING IS
4 ENFORCEABLE, WHICH THEY DIDN'T DECIDE, THEN WE THINK
5 IT'S BINDING. BUT THEN IN ORDER FOR IT TO ACTUALLY BE
6 BINDING, IT HAS TO THEN GO UP TO THE BOARD OF ICANN AND
7 BE APPROVED BY THE BOARD OF ICANN. IN THIS PARTICULAR
8 CASE, THE BOARD OF ICANN CHOSE TO ACCEPT IT. WE THINK
9 THEY CHOSE TO ACCEPT IT BECAUSE THEY KNEW THEY HAD
10 ANOTHER WAY TO TERMINATE DCA'S OR DENY DCA'S
11 APPLICATION. SO WE THINK THEY JUST SAID, WELL, THE IRP,
12 NO BIG DEAL. WE'LL JUST SEND IT DOWN TO GEOGRAPHIC
13 REVIEW AND MAKE THEM LOSE AGAIN. SO WE THINK THEY
14 ACCEPTED IT.

15 BUT THE POINT IS IS THAT WHETHER OR NOT ANY
16 IRP RULING IS EVER IMPLEMENTED IS AT THE DISCRETION OF
17 THE ICANN BOARD OF DIRECTORS. SO WE DIDN'T WIN IN THE
18 CONVENTIONAL SENSE OF DEMONSTRATING ALL IRP'S ARE
19 BINDING. IF WE WENT BACK AND DID THIS AGAIN, WE WENT
20 THROUGH THE ENTIRE IRP PROCESS, WHERE WOULD WE BE IF WE
21 WON? WE'D BE BACK BEFORE THE BOARD ASKING THE BOARD TO
22 AFFIRM AN IRP RULING THAT THE IRP CONCLUDED THAT THEY
23 COMMITTED FRAUD. THE LIKELIHOOD OF THE IRP [SIC] BOARD
24 AGREEING WITH AN IRP RULING THAT SAYS THEY ACTED WITH
25 FRAUD IS ABOUT ZERO, I THINK.

26 SO THERE'S, AT THE VERY LEAST, A DISPUTE OF
27 FACT AS TO WHETHER THERE'S ANY REAL DECISION THAT'S
28 BEING MADE BY THE IRP BECAUSE IT'S DISCRETIONARY. AND

1 ESPECIALLY WHEN LOOKING AT A FRAUD DECISION. YOU'RE
2 LOOKING AT A DECISION WHERE THE IRP SAYS THE BOARD OF
3 ICANN COMMITTED FRAUD, AND THEN YOU'RE ASKING THE BOARD
4 OF ICANN TO DECIDE WHETHER OR NOT THEY'RE GOING TO AGREE
5 WITH THAT? I MEAN, THAT'S ILLUSORY. YOU DON'T SUE THE
6 BOARD. IF I TAKE A BAD DRUG AND I GO TO COURT AND I GET
7 A RULING THAT SAYS THIS BAD DRUG CAUSED ME HARM, I GET A
8 MILLION-DOLLAR JUDGMENT, THE BOARD OF PFIZER DOESN'T GET
9 TO DECIDE WHETHER THEY'RE GOING TO PAY IT. THEY'D SAY
10 NO, THEY'RE NOT GOING TO PAY IT. IT'S NOT REAL. SO
11 FUNDAMENTALLY THERE'S REALLY NOT -- THERE'S NOT A WIN
12 HERE BOTH BECAUSE THE IRP DIDN'T ULTIMATELY DECIDE
13 WHETHER THIS COVENANT IS ENFORCEABLE, WHICH IS REALLY
14 THE ISSUE BEFORE YOU. WE DIDN'T WIN ON THAT POINT. AND
15 SECONDLY, IT'S NOT REAL IN THE SENSE THAT WE DIDN'T
16 REALLY WIN ANYTHING BECAUSE WE JUST WON A DECLARATION
17 FROM THE IRP THAT COULD OR COULD NOT BE ADOPTED BY
18 ICANN.

19 SECONDLY, THIS IS NOT A REAL JUDICIAL
20 FORUM. MR. LAVEE TELLS YOU ABOUT, SURE, THERE WERE
21 WITNESSES, THERE WERE DOCUMENTS, THERE WERE JUDGES ON
22 THE PANEL, THERE WERE ALL THESE THINGS, BUT A REAL
23 JUDICIAL -- A REAL JUDICIAL PROCEEDING IS BINDING AT THE
24 END. IT'S NOT BINDING AT THE DISCRETION OF THE
25 DEFENDANT. IT'S ACTUALLY BINDING. AND THIS ONE'S NOT.
26 THIS ONE'S BINDING ONLY AT THE DISCRETION OF THE
27 DEFENDANT.

28 NEXT, WERE THE STATEMENTS TOTALLY

1 INCONSISTENT? I DON'T THINK THEY WERE. MR. LAVEE SAYS
2 THEY ARE. THEY'RE NOT TOTALLY INCONSISTENT BECAUSE THE
3 CONTEXT IS DIFFERENT. THE CLAIMS IN THE ORIGINAL IRP
4 PROCEEDING DID NOT INCLUDE A FRAUD CLAIM. SO WHEN THE
5 STATEMENT IS MADE, "OH, WE CAN ONLY BRING THIS IN THE
6 IRP," THAT -- YOU HAVE TO CONSIDER THE CONTEXT. THE
7 CONTEXT IS YOU'RE IN AN ICANN PROCEEDING UNDER THE ICANN
8 RULES WHERE ICANN HAS TAKEN THE POSITION THE ONLY WAY
9 YOU CAN PROCEED IS THROUGH AN IRP. AND WE ACCEPTED
10 THAT. MY CLIENT ACCEPTED THAT IN THAT CONTEXT, IN THE
11 CONTEXT OF ENTIRELY DIFFERENT CLAIMS THAT WERE BROUGHT
12 HERE. IT'S TRUE THAT SOME OF THE FACTS OVERLAP, AND A
13 LOT OF THE FACTS DON'T OVERLAP. THEY'RE FUNDAMENTALLY
14 DIFFERENT CLAIMS. THE CLAIMS BEFORE YOUR HONOR INCLUDE
15 THAT THE IRP WASN'T ADEQUATELY FOLLOWED, THAT IT WASN'T
16 RESPECTED, THAT IT WAS SUBVERTED IN VARIOUS WAYS, THAT
17 THERE WERE THINGS DONE AFTER THE IRP PROCESS WAS OVER
18 THAT WERE PRETEXTUAL IN NATURE, INTENTIONAL IN NATURE TO
19 FAVOR A DIFFERENT APPLICANT OVER MY CLIENT. THOSE ARE
20 ALL ISSUES THAT ARE BEFORE THIS COURT THAT -- BASED ON
21 FACTS THAT WERE NOT BEFORE THE IRP. THEY'RE FACTS THAT
22 HADN'T EVEN HAPPENED YET AT THE IRP. SO THEY CAN'T BE
23 THE SAME CLAIMS. IT'S IMPOSSIBLE THEY'RE THE SAME
24 CLAIMS. THEY'RE NOT FRAUD. THEY'RE NOT EVEN UNDER THE
25 SAME CONCEPTUAL UMBRELLA OF FRAUD, AND THEY'RE BASED ON
26 DIFFERENT FACTS.

27 MR. LAVEE MAKES A BIG POINT OF LOOKING AT
28 OUR COMPLAINT AND TAKES YOU THROUGH ON THE SECOND CAUSE

1 OF ACTION, TAKES YOU THROUGH PARAGRAPH 74 AND REFERENCES
2 THE MISREPRESENTATIONS. BUT THERE ARE
3 MISREPRESENTATIONS. YOU CAN HAVE A MISREPRESENTATION
4 BASED ON FAMILY DOCUMENTS, YOU CAN HAVE A
5 MISREPRESENTATION BASED ON CONTRACTS. IT'S CALLED
6 PROMISSORY FRAUD. BUT THAT'S NOT THE SAME AS A CONTRACT
7 CLAIM. SOME OF THE FACTS THAT YOU MAY PROVE ARE
8 SIMILAR, BUT IT'S NOT THE SAME CLAIM. IN ORDER TO PROVE
9 A PROMISSORY FRAUD CLAIM, WE'RE GOING TO HAVE TO SHOW
10 THAT ICANN KNEW THESE STATEMENTS WERE FALSELY MADE, THAT
11 THEY DIDN'T INTEND TO -- THAT THEY DIDN'T INTEND TO
12 COMPLY WITH THESE. THAT'S DIFFERENT THAN SAYING THEY
13 MADE A MISTAKE AND THEY DIDN'T ACTUALLY DO THESE THINGS.

14 OUR CLAIM IS DIFFERENT THAN THAT. IF YOU
15 READ THE REST OF THE CLAIM, THE CLAIM THAT MR. LAVEE
16 LEFT OUT, PARAGRAPH 75, "ICANN HAD NO INTENTION OF
17 FOLLOWING ITS BYLAWS, ARTICLES OF INCORPORATION, OR THE
18 RULES WITH RESPECT TO THE DCA APPLICATION. ICANN HAD NO
19 INTENTION OF EVER PARTICIPATING IN THE IRP PROCESS IN
20 GOOD FAITH AND AT ALL TIMES BELIEVED IT COULD DO
21 WHATEVER IT WANTED. ICANN NEVER HAD ANY INTENTION OF
22 TREATING APPLICANTS THE SAME." THERE ARE ELEMENTS OF
23 THIS CLAIM THAT ARE FUNDAMENTALLY DIFFERENT AND GO WELL
24 BEYOND WHAT WOULD BE ANY CONVENTIONAL TYPE OF FRAUD
25 CLAIM, AND THOSE ARE NOT THE CLAIMS THAT WERE BROUGHT IN
26 THE IRP PROCEEDING.

27 SECONDLY, I THINK BECAUSE OF THE -- AS
28 YOUR HONOR POINTED OUT, JUDICIAL ESTOPPEL IS A DRASTIC

1 REMEDY. AND WHEN YOU CONSIDER WHAT HAPPENED HERE FROM
2 MY CLIENT'S PERSPECTIVE, THE CONTEXT REALLY IS
3 FUNDAMENTALLY DIFFERENT. IT WENT THROUGH THE IRP THE
4 FIRST TIME IN GOOD FAITH. IT LOST ITS APPLICATION
5 BECAUSE OF -- BECAUSE OF THIS GAC ADVICE THAT WAS
6 RENDERED. IT TOOK THAT ISSUE TO THE IRP. IT PROCEEDED
7 TO SPEND TWO YEARS, LOTS OF TIME, LOTS OF EFFORT TO GET
8 A RULING. IT FINALLY GOT THAT RULING. AND THEN WHAT
9 HAPPENED? IT JUST GOT SENT BACK TO THE SAME PLACE AND
10 WAS DENIED ON PRETEXTUAL GROUNDS. FACTS WERE CONSIDERED
11 THAT WOULD NEVER HAVE EVEN BEEN BEFORE THE EVALUATION
12 PANEL IF HAD NOT BEEN FOR THE TWO-YEAR EXODUS WE HAD TO
13 MAKE FOR THE IRP. THEY CONSIDERED NEW FACTS THAT CAME
14 TO LIGHT ONLY AFTER THE IRP PROCESS, WHICH WE THINK IS
15 IMPROPER. WE THINK THERE IS FUNDAMENTALLY A DISPUTE
16 ABOUT WHETHER THE IRP PROCESS OR THE IRP RULING WAS
17 ADEQUATELY IMPLEMENTED. IF YOU LOOK -- MR. LAVEE POINTS
18 OUT MY CLIENT'S TESTIMONY. THEY RELY ON THE STATEMENT.
19 BUT JUST TO BE CLEAR, NOTHING IN THE FINAL
20 DECLARATION OF THE IRP SAYS THAT YOU GET TO SKIP THE
21 GEOGRAPHIC REVIEW PROCESS; RIGHT? MY CLIENT DOESN'T SAY
22 THEY GOT TO SKIP IT. BUT MY CLIENT'S CONTENTION IS
23 THEY'D ALREADY BEEN MOST OF THE WAY THROUGH IT, THAT
24 THERE WERE ALREADY DECISIONS THAT HAD BEEN MADE ON ITS
25 APPLICATION, ON THAT ASPECT OF ITS APPLICATION, AND THAT
26 WE SHOULDN'T HAVE HAD TO GO BACK TO THE BEGINNING OF THE
27 REVIEW AND THAT WE SHOULDN'T HAVE HAD TO GO BACK AND
28 CONSIDER NOW FACTS THAT ONLY CAME TO LIGHT BECAUSE OF

1 THE IMPROPER CONDUCT THAT ICANN HAD ENGAGED IN THAT
2 CAUSED US TO GO THROUGH THIS TWO-YEAR HIATUS THROUGH THE
3 IRP PANEL. THAT'S NOT THE SAME THING AS SAYING WE GET
4 TO SKIP IT; SO THERE REALLY IS A FUNDAMENTAL DISPUTE AS
5 TO WHETHER THE IRP RULING WAS ADEQUATELY IMPLEMENTED.

6 SO, YOU KNOW, THE CONTEXT IS REALLY -- THE
7 CONTEXT, I THINK, IN TERMS OF YOUR HONOR'S DISCRETION
8 ABOUT APPLYING JUDICIAL ESTOPPEL, YOU REALLY SHOULD TAKE
9 INTO ACCOUNT THE FACT THAT WHEN THESE ARGUMENTS WERE --
10 MADE THE FIRST GO-AROUND, IT WAS THE FIRST TIME THROUGH
11 THE IRP, IT WAS THE FIRST TIME THAT ICANN HAD MADE A
12 DECISION THAT TOOK US OUT OF THE APPLICATION PROCESS.
13 BY THE TIME WE FIND OURSELVES HERE, WE'VE GONE THROUGH
14 AN IRP, WE'VE GONE THROUGH A CONTEXT WHERE OUR
15 APPLICATION WAS LOOKED AT AGAIN. IT WAS KIND OF, WE
16 THINK, PUSHED BACK IN THE PROCESS SO EVEN MORE
17 EVALUATION WAS TAKEN. WE THINK IT WAS DENIED ON A
18 PRETEXT, AND THEN WE'RE ASKED TO GO THROUGH AN IRP
19 AGAIN, AN IRP WE KNOW -- BY NOW WE KNOW ICANN GETS TO
20 DECIDE AT THE END OF THE DAY WHETHER THEY'RE EVER GOING
21 TO ACCEPT THE RULING OF THAT IRP. IT'S IN THEIR
22 DISCRETION AS TO WHETHER TO DO, AND THAT IRP IS BASED ON
23 FRAUD. THEY'RE NEVER GOING TO ACCEPT IT.

24 THE COURT: THANK YOU.

25 MR. LAVEE: LESS THAN ONE MINUTE, YOUR HONOR?

26 THE COURT: THANK YOU.

27 MR. LAVEE: IF YOU LOOK AT THE COURT'S TENTATIVE,
28 AND THE PAGE NUMBERS ARE NOT HELPFUL, I DON'T THINK,

1 BECAUSE OF THE WAY THE TENTATIVES GET POSTED, BUT IN THE
2 JUDICIAL ESTOPPEL SECTION, IT SAYS, "JUDICIAL ESTOPPEL
3 APPLIES," AND IT QUOTES THE ELEMENTS. ELEMENT THREE IS
4 "THE PARTY WAS SUCCESSFUL IN ASSERTING THE FIRST
5 POSITION, I.E., THE TRIBUNAL ADOPTED THE POSITION OR
6 ACCEPTED IT AS TRUE." IF YOU THEN LOOK AT TAB FIVE,
7 WHICH IS THE DECISION I READ TO YOU, PARAGRAPH 131, TAB
8 FIVE, PARAGRAPH 131, THE PANEL RULES, QUOTE, BASED ON
9 THE FOREGOING AND THE LANGUAGE AND CONTENT OF THE IRP
10 PROCEDURE, THE PANEL CONCLUDES THAT THIS DECLARATION AND
11 ITS FUTURE DECLARATION ON THE MERITS OF THIS CASE ARE
12 BINDING ON THE PARTIES.

13 SO WHEN YOU LOOK AT THE THIRD ELEMENT OF
14 JUDICIAL ESTOPPEL, DCA WON. THE QUESTION OF WHETHER
15 ICANN'S BOARD LATER HAD SOME DISCRETION, IT'S NOT
16 RELEVANT TO THE JUDICIAL ESTOPPEL DETERMINATION. THE
17 JUDICIAL ESTOPPEL DETERMINATION IS DID YOU WIN THE
18 POSITION THAT YOU TOOK. THE ANSWER HERE IS DCA
19 ADVOCATED A POSITION, THE PANEL RULED, THE PANEL RULED
20 THAT ITS POSITION -- THAT ITS DECLARATION WOULD BE
21 BINDING, AND ICANN THEN IMPLEMENTED THE DECISION IN
22 FULL. THERE'S NO -- THERE'S NO ALLEGATION OF WHAT ICANN
23 DIDN'T DO. THE PANEL SAID RETURN THE APPLICATION TO
24 PROCESSING, AND THAT'S EXACTLY WHAT ICANN DID. BUT EVEN
25 IF THERE WAS SOME KIND OF FACT DISPUTE, IT'S STILL NOT
26 RELEVANT TO JUDICIAL ESTOPPEL. THESE ARE THE ELEMENTS
27 OF JUDICIAL ESTOPPEL, AND I THINK THEY ARE A HUNDRED
28 PERCENT MET IN THIS CASE. THANK YOU.

1 THE COURT: OKAY. I APPRECIATE THE ARGUMENTS THAT
2 WERE MADE, AND THE ARGUMENTS WERE EXCELLENT ARGUMENTS,
3 EACH OF THEM, BUT I'M GOING TO STAY WITH THE TENTATIVE
4 RULING. AND IN THAT REGARD, I WISH THERE WAS A
5 PROCESS -- IT WOULD BE NICE IF YOU CAN DEVISE SOME TYPE
6 OF A PROCESS WHERE WE CAN TEASE OUT THE ISSUE OF
7 JUDICIAL ESTOPPEL AS MAYBE DEFENSE UNDER CCP SECTION 597
8 AND HAVE A TRIAL ON THAT. SEEMS TO ME THAT YOU MIGHT BE
9 ABLE TO SAVE A LOT OF TIME AND MONEY IF WE GET THAT
10 RESOLVED BEFORE WE LAUNCH INTO EVERYTHING ELSE. SO YOU
11 MIGHT WANT TO JUST THINK ABOUT IT, MEET AND CONFER, AND
12 SEE IF THERE'S SOME WAY THAT YOU CAN COME UP WITH A PLAN
13 SHORT OF A FULL-BLOWN TRIAL.

14 MR. LAVEE: I THINK IN TWO DAYS, YOUR HONOR, WE
15 COULD HAVE A -- LITERALLY A TWO-DAY BENCH TRIAL, MAYBE
16 EVEN ONE WHERE WE PUT TWO OR THREE WITNESSES ON EACH FOR
17 LESS THAN AN HOUR.

18 THE COURT: I CAN EASILY SCHEDULE THAT AT SOME
19 TIME, YOU KNOW, DURING THE TIME THAT THE CASE IS SET FOR
20 TRIAL. BUT TO GO THE OTHER ROUTE, I THINK -- WHAT I'M
21 GOING TO DO NOW IS I'M GOING TO ORDER A 597 DEFENSE
22 TRIAL ON THE JUDICIAL ESTOPPEL, AND SO THE FIRST TRIAL
23 WILL BE LIMITED TO THAT. WOULD THAT BE A JUDGE OR JURY
24 TRIAL?

25 MR. LAVEE: THAT'S A JUDGE TRIAL.

26 MR. BROWN: I THINK THAT'S RIGHT, ALTHOUGH I WANT
27 TO RESERVE LOOKING AT IT, BUT MY INCLINATION IS THAT'S
28 CORRECT.

1 THE COURT: UNLESS THERE'S SOME DISPUTED FACTS
2 THAT ARE INVOLVED, I THINK OVERALL IT SHOULD BE A JUDGE
3 TRIAL.

4 MR. LAVEE: I AGREE.

5 THE COURT: AND SO GO THAT ROUTE AND MAYBE -- DO
6 YOU REMEMBER YOUR FSC, DO YOU REMEMBER WHEN THAT WAS?

7 MR. LAVEE: I DON'T. WE HAVE A FEBRUARY TRIAL
8 DATE.

9 THE COURT: WE'RE FAR ENOUGH IN ADVANCE.

10 MR. LAVEE: YEAH. BECAUSE WHAT THE COURT PROBABLY
11 DOESN'T RECALL, BUT WHAT THE PARTIES DID WAS WE
12 STIPULATED TO HOLD DISCOVERY IN ABEYANCE IN ORDER TO
13 LITIGATE THESE ISSUES, THE COVENANT AND THE EFFECT OF
14 THE COVENANT. NOW THAT THE COURT HAS RULED, WE HAVE
15 SOME AMOUNT OF DISCOVERY TO CONCLUDE AND THEN --

16 THE COURT: ALL I WAS GOING TO SAY WAS THAT FOR
17 THE FINAL STATUS CONFERENCE, THAT THE FOCUS WOULD BE ON
18 JUDICIAL ESTOPPEL, SO YOUR TRIAL BOOKS, IN ACCORDANCE
19 WITH THE TRIAL PREPARATION ORDER, THEN, WOULD ADDRESS
20 THAT IN MOTIONS IN LIMINE, TRIAL BRIEFS, AND YOUR
21 EXHIBIT LISTS, AND WITNESS LISTS. THAT'S ALL THAT YOU
22 WOULD NEED.

23 MR. LAVEE: SO LIMIT THE PAPERWORK TO JUDICIAL
24 ESTOPPEL?

25 THE COURT: RIGHT. YEAH. SO YOU WOULDN'T NEED
26 JURY INSTRUCTIONS. YOU WOULDN'T NEED VERDICT FORMS.
27 YOU WOULDN'T NEED ANYTHING ELSE. YOU WOULDN'T NEED A
28 STATEMENT OF THE CASE.

1 MR. BROWN: SO YOUR INCLINATION IS TO DO THAT ON
2 THE CURRENT SCHEDULE AND NOT HAVE AN EARLIER TRIAL ON
3 THE JUDICIAL ESTOPPEL? I JUST WANT TO MAKE SURE I
4 UNDERSTAND CORRECTLY.

5 THE COURT: SO THE TRIAL THAT'S SET RIGHT NOW WILL
6 BE ON THE, LET'S CALL IT PHASE ONE, IT WILL BE JUDICIAL
7 ESTOPPEL.

8 NOW, THERE'S A QUESTION AS TO WHETHER OR
9 NOT -- WELL, IF IT'S GOING TO BE A CLEAR COURT TRIAL,
10 THEN OF COURSE DON'T WORRY ABOUT A JURY. WE CAN JUST
11 HAVE A TRIAL ON THAT. AND IT SEEMS TO ME THAT I THINK
12 TWO DAYS WOULD PROBABLY BE PRETTY LIBERAL IN TERMS OF
13 THE TIME THAT WE WOULD NEED. SO YOU WOULD HAVE YOUR
14 DECISION ON THE APPLICABILITY OF JUDICIAL ESTOPPEL, AND
15 THEN AT THAT POINT WE CAN SET -- WE CAN TALK ABOUT A
16 TRIAL DATE. IF YOU NEED MORE -- IF YOU'VE BEEN NOT
17 DOING DISCOVERY TO SAVE MONEY AND YOU WANT TO DO
18 DISCOVERY AT THAT TIME, I DON'T HAVE A PROBLEM WITH
19 THAT. YOU WANT TO SET OUT SOME KIND OF A SCHEDULE OR
20 SOME KIND OF A TIMELINE?

21 MR. BROWN: I THINK WE WOULDN'T WANT TO DELAY THE
22 CASE ANY FURTHER, SO I THINK OUR PREFERENCE WOULD BE TO
23 GO AHEAD AND DO THE DISCOVERY AND HAVE --

24 THE COURT: YOU CAN DO THAT NOW IF YOU WANT. I'M
25 JUST SAYING DISCUSS IT AMONGST YOURSELVES.

26 MR. LAVEE: OKAY. SO I'M STILL PERHAPS SLIGHTLY
27 CONFUSED IN RESPONSE TO THE QUESTION YOU ASKED, WHICH IS
28 WE HAVE A FEBRUARY TRIAL DATE. THE COURT NOW IS

1 DESIGNATING THAT TRIAL DATE AS THE DATE BY WHICH PHASE
2 ONE, JUDICIAL ESTOPPEL, WOULD BE ADDRESSED?

3 THE COURT: CORRECT.

4 MR. LAVEE: OKAY. THAT MUCH I UNDERSTAND. IN THE
5 EVENT THE COURT OVERRULES JUDICIAL ESTOPPEL, WE WOULD
6 THEN SET A DATE FOR THE FULL-BLOWN TRIAL SHORTLY
7 THEREAFTER?

8 THE COURT: WELL, IT WOULD BE --

9 MR. LAVEE: BECAUSE WE WOULD NEED A JURY --

10 THE COURT: IF YOU TELL ME THAT YOU STILL NEED TO
11 TAKE DEPOSITIONS OF EXPERTS, FOR EXAMPLE, OR YOU NEED TO
12 DO -- YOU'VE BEEN HOLDING BACK DOING WORK BECAUSE YOU
13 WANTED A RESOLUTION ON THE JUDICIAL ESTOPPEL AND THAT
14 YOU'D LIKE TWO MONTHS OR THREE MONTHS, I DON'T HAVE A
15 PROBLEM WITH THAT.

16 MR. LAVEE: AS OF THIS MOMENT, THE PARTIES ALREADY
17 HAVE SCHEDULED DEPOSITIONS FOR THE NEXT COUPLE OF WEEKS.

18 THE COURT: IF YOU THINK THAT YOU'RE GOING TO BE
19 DONE WITH YOUR DISCOVERY --

20 MR. LAVEE: THAT WOULD BE OUR INTENT.

21 THE COURT: -- THEN WHAT I WOULD THINK IS THAT
22 THERE MIGHT BE MAYBE A 30-DAY LULL BETWEEN THE TWO
23 TRIALS, DEPENDING UPON WHAT ELSE IS GOING ON ON MY
24 CALENDAR.

25 MR. BROWN: SHOULD WE CALENDAR THAT NOW, OR DO YOU
26 WANT TO WAIT UNTIL THAT DECISION'S MADE? I'M JUST
27 CONCERNED YOUR CALENDAR MIGHT FILL.

28 THE COURT: YEAH, THAT'S TRUE. WELL, LET'S SEE.

1 THE TRIAL DATE IS FEBRUARY --

2 THE CLERK: 28, YOUR HONOR.

3 THE COURT: 28TH?

4 MR. BROWN: THE OTHER POSSIBILITY, I DON'T KNOW
5 HOW YOU FEEL ABOUT THIS, BUT IF WE WANTED TO DO THE
6 BENCH TRIAL IN, SAY, JANUARY AND THEN KEEP THE FEBRUARY
7 DATES FOR THE JURY TRIAL IF NEEDED. I THINK THAT WOULD
8 BE --

9 THE COURT: I THINK --

10 MR. LAVEE: I CAN'T -- YEAH, I DIDN'T -- SO ICANN
11 HAS A CALENDAR THAT IT -- THE BOARD AND EVERYONE GOES
12 OUT OF TOWN THREE OR FOUR TIMES A YEAR. I'M NOT OPPOSED
13 TO THAT AS A CONCEPT, BUT I DON'T WANT TO COMMIT TO IT
14 TODAY WITHOUT CHECKING THE SCHEDULES. WHEN WE SET THE
15 FEBRUARY TRIAL DATE, I HAD CLEARED THAT FOR ALL OF THE
16 POTENTIAL WITNESSES, AND I -- I DON'T KNOW --

17 THE COURT: RIGHT NOW I HAVE TIME AVAILABLE ON
18 APRIL 4TH AND 11TH, THOSE TWO DAYS. I'VE GOT SEVERAL
19 SLOTS FOR APRIL 4TH, AND I'VE GOT TWO SLOTS FOR
20 APRIL 11TH, SO YOU WANT ME TO JUST PICK A DATE?

21 MR. LAVEE: SURE.

22 THE COURT: OKAY. LET'S MAKE IT APRIL 4TH, THEN.

23 MS. COLON: YOUR HONOR, APRIL 4TH WOULD BE FOR
24 TRIAL ON EVERYTHING BUT JUDICIAL ESTOPPEL?

25 MR. BROWN: THE JURY TRIAL --

26 THE COURT: TRIAL OF ALL REMAINING ISSUES,
27 APRIL 4TH AT 9:30.

28 MR. LAVEE: THANK YOU, YOUR HONOR.

1 THE COURT: OKAY. ANYTHING ELSE? ANY OTHER
2 QUESTIONS? OKAY. THANK YOU VERY MUCH. IS NOTICE
3 WAIVED?

4 MR. LAVEE: NOTICE IS WAIVED.

5 MR. BROWN: NOTICE IS WAIVED.

6 THE COURT: THANK YOU.

7 (PROCEEDINGS CONCLUDED AT 10:06 A.M.)
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT 53 HON. HOWARD L. HALM, JUDGE

DOTCONNECTAFRICA TRUST,)
)
PLAINTIFF,) NO. BC607494
)
VS.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS,)
ET AL.,) REPORTER'S
) CERTIFICATE
DEFENDANTS.)
_____)

I, PAMELA L. MYERS, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT I DID CORRECTLY REPORT THE PROCEEDINGS CONTAINED HEREIN AND THAT THE FOREGOING PAGES 1 THROUGH 37, INCLUSIVE, COMPRISE A FULL, TRUE, AND CORRECT TRANSCRIPT OF THE PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE ABOVE-ENTITLED CAUSE ON WEDNESDAY, AUGUST 9, 2017.

DATED THIS 23RD DAY OF AUGUST, 2017.



PAMELA L. MYERS, CSR NO. 12940
OFFICIAL REPORTER PRO TEMPORE

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