

**DotConnectAfrica Trust vs. Internet  
Corp. for Assigned Names and Numbers**

**Reporter's Transcript of Proceedings  
August 22, 2019**



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**Transcript of Proceedings**

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APPEARANCES :

FOR PLAINTIFF:       Brown Neri Smith & Khan  
                          BY: Ethan J. Brown, Esq.  
                          BY: Sarah C. Colon, Esq.  
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FOR DEFENDANT:       Jones Day  
                          BY: Jeffrey A. LeVee, Esq.  
                          BY: Erin L. Burke, Esq.  
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1 CASE NUMBER: BC607494  
 2 CASE NAME: DotconnectAfria VS.  
 3 Internet Corp. For assigned  
 4 LOS ANGELES, CALIFORNIA Thursday, August 22, 2019  
 5 DEPARTMENT 53 HON. Robert B. Broadbelt, JUDGE  
 6 APPEARANCES: (AS HERETOFORE NOTED.)  
 7 TIME: 10:10 A.M.  
 8

9 THE COURT: Good morning, everyone. We're back on  
 10 the record. The court will call No. 10 on the calendar,  
 11 DotConnectAfrica Trust versus Internet Corporation for  
 12 assigned names and numbers. This is case number BC607494.  
 13 The court notes that it has signed today and will file an  
 14 order appointing court approved reporter as official  
 15 reporter pro tempore, appointing Tracy Dyrness to serve as  
 16 the official reporter pro tempore for today's hearing.  
 17 Thank you. At this time, I will ask counsel to please  
 18 state their appearances, beginning with plaintiff counsel.

19 MR. BROWN: Ethan Brown for DotconnectAfrica Trust.

20 MS. COLON: Sara Colone for DotconnectAfrica Trust.

21 MR. LEVEE: Good morning, Your Honor. Jeff LeVee.  
 22 With me is Erin Burke. We're from Jones Day on behalf of  
 23 defendant ICANN.

24 THE COURT: Thank you. Do we also have counsel for  
 25 the intervenors ZA Century Registry present.

26 MR. KESSELMAN: Yes, Your Honor. David Kesselman on  
 27 behalf of ZACR, present in the courtroom. Although, we  
 28 did not participate in the trial proceeding on the

1 affirmative defense raised by ICANN.

2 THE COURT: Thank you. Please feel free to be  
3 seated everyone if you like or however you're most  
4 comfortable. The matter's on calendar today for two  
5 things. The first is the continuation of the court trial  
6 on phase 1 of the bifurcated trial on defendant ICANN's  
7 affirmative defense of judicial estoppel. The second  
8 thing on calendar today is the trial setting conference on  
9 remaining issues. So, first, the court will take up the  
10 continuation of the trial on the bifurcated trial, phase  
11 one, on affirmative defense of judicial estoppel.

12 The court has prepared a tentative decision on  
13 bifurcated trial, phase 1, on affirmative defense of  
14 judicial estoppel, which I'm going to sign today and file.  
15 Let me make sure that counsel received a copy of that  
16 tentative decision. Plaintiff's counsel.

17 MR. BROWN: Yes.

18 MS. COLON: We did, your honor.

19 THE COURT: Defense counsel?

20 MR. LEVEE: Yes, Your Honor. We received it.

21 THE COURT: Okay. Thank you. Mr. Kesselman, did  
22 you receive a copy of that too?

23 MR. KESSELMAN: I have read. Thank you, Your Honor.

24 THE COURT: Thank you, everyone. The court's  
25 tentative decision for the reasons stated -- it's an  
26 11-page tentative decision. For the reasons set forth in  
27 the court's tentative decision, the court's order is to  
28 find in favor of defendant ICANN and against plaintiff

1 DotConnectAfrica trust on ICANN's affirmative defense of  
2 judicial estoppel and to bar plaintiff DotConnectAfrica  
3 trust from bringing or maintaining its claims against  
4 ICANN alleged in the first amended complaint in this  
5 lawsuit. All right. Let me first -- that is the  
6 tentative decision. I first want to state this. I think  
7 counsel for both sides in the trial on the bifurcated  
8 issue of affirmative defense of judicial estoppel asserted  
9 by defendant ICANN.

10 I think both plaintiff's counsel and defendant  
11 ICANN's counsel did a really excellent job in presenting  
12 their cases and in representing their respective clients  
13 on the bifurcated trial and also in the closing argument  
14 briefs that were presented. I thought the quality of the  
15 trial presentations made by both sides were of the highest  
16 level. Also I thought the quality of the closing argument  
17 briefs was of the highest level. They were both very  
18 helpful to the court.

19 I want to thank counsel for plaintiff and defendant  
20 ICANN for their presentations on their client's cases on  
21 the bifurcated trial. Let me start. I really did give  
22 the evidence and the arguments of counsel and the closing  
23 argument briefs a great deal of consideration. If there's  
24 anything briefly either side wishes to address with the  
25 court, I would be happy to give you a very brief  
26 opportunity to do that but closing arguments were really  
27 presented in the closing argument briefs. I did continue  
28 the matter to today in case I had any questions or wanted

1 to hear additional closing argument. I don't feel I need  
2 to. I spent a lot of time writing the tentative decision.  
3 It's 11 pages. I put a lot of thought into it. If  
4 there's anything that counsel for plaintiff or defendant  
5 ICANN wish to address briefly on the tentative decision, I  
6 will give you that opportunity. Either Mr. Brown or Ms.  
7 Colon, was there anything you would like to address.

8 MS. COLON: Yes, I would like to be heard, Your  
9 Honor. I guess one quick point that I have is, your  
10 honor, in your well thought out tentative went through  
11 several positions that DCA took during the IRP with  
12 positions that ICANN highlighted both throughout trial and  
13 in its closing brief. However, I really think only one  
14 position matters for judicial estoppel, and that is the  
15 position of whether or not DCA could bring its claims in  
16 court. The IRP simply did not rule on that issue. It  
17 never adopted that position.

18 I know your honor has seen this language before, but  
19 the language in the IRP declaration about that issue, the  
20 only language, is "assuming that the forgoing waiver of  
21 any and all judicial remedies is valid and ENFORCEABLE,  
22 then the only and ultimate accountability remedy for the  
23 applicant is the IRP." So the IRP didn't say, the  
24 forgoing waiver of any and all judicial remedies is valid  
25 and ENFORCEABLE. It said "assuming." In other words, if  
26 the forgoing waiver of any and all judicial remedies is  
27 valid and enforceable, so that issue was an open question  
28 when the IRP issued its final declaration. Not to belabor

1 the point, but as we noted in our brief, in fact, that was  
2 an issue that the IRP could not have ruled on based on its  
3 jurisdiction, based on its limited scope of review to  
4 ICANN board action and inaction pursuant to its bylaws.  
5 It had no authority to rule on the applicability of the  
6 litigation waiver.

7 THE COURT: I gave that issue some thought actually.  
8 Didn't the IRP panel when they said assuming, aren't they  
9 assuming that DCA's position is correct; that it was  
10 arguing about the covenant and the effect of the covenant  
11 not to sue?

12 MS. COLON: That's certainly one interpretation,  
13 your honor. I think they're making an if-then statement.  
14 "Assuming" instead of the word "if." The reason I say  
15 that is because, again, the context of what they're  
16 actually allowed to make a decision about, what they're  
17 actually allowed to make a ruling on, which is clearly  
18 limited by the bylaws to reviewing ICANN board action or  
19 inaction pursuant to ICANN's own bylaws. The IRP isn't  
20 even making any rulings with regard to laws.

21 They're purely looking at ICANN's own bylaws with  
22 regard to any decision they make, which is again limited  
23 to board action or inaction. The next point I would make  
24 is with regard to the IRP being a quasi-judicial or  
25 judicial proceeding, I noted that the court did go through  
26 Nada in its tentative; however, I just -- by definition a  
27 nonbinding opinion is just a recommendation. ICANN could  
28 easily have said, we don't want to apply the IRP's



1 declaration. We don't want to carry out the IRP's  
2 declaration. The Court in Nada did say the most important  
3 hallmark of a judicial or quasi-judicial proceeding is  
4 that it had the ability to issue a decision, a binding  
5 decision.

6 THE COURT: So didn't the IRP panel make a  
7 determination that the IRP procedure was binding, and that  
8 was at the request of DCA. That was the position DCA was  
9 asking the IRP panel to adopt, and it did adopt that  
10 position that the IRP procedure was binding, correct?

11 MS. COLON: That's true, your honor. The IRP panel  
12 found that it was a binding proceeding, but ICANN ignored  
13 that part of the declaration. If your honor goes back and  
14 looks at --

15 THE COURT: Let's say there's a court proceeding and  
16 the court makes -- it's a judicial proceeding. The court  
17 makes an order, and one of the parties says, I don't view  
18 that as binding.

19 MS. COLON: Right.

20 THE COURT: I don't think that makes the court's  
21 decision any less binding. I don't see just because a  
22 party or because a party may have to -- for example, an  
23 organization may have to get approval of the board to  
24 implement relief taken or measures taken to implement the  
25 court's order. I don't think that makes the order any  
26 less binding. Similarly here, whether or not ICANN agreed  
27 with the IRP panel, the IRP panel on the issue of whether  
28 its decision was binding -- the IRP panel made that

1 determination that its decision was binding; didn't it?

2 MS. COLON: Yes, Your Honor. But I think an  
3 indication of whether or not a ruling or an opinion is  
4 binding is whether or not it's ENFORCEABLE against the  
5 parties. The court judgment would be ENFORCEABLE against  
6 the parties. The IRP's declaration, had ICANN chosen to  
7 completely disregard it would not have -- DCA could not  
8 have not gone and enforced it against ICANN. It couldn't  
9 have confirmed the award in court. It could not have  
10 appealed the award. It was an illusory award.

11 It was simply -- the IRP was an internal  
12 accountability mechanism that ICANN was using to review  
13 its own action. If the ICANN board disagreed with the IRP  
14 ruling, they could have simply just disregarded. My last  
15 point I think, your honor, is that -- leads into this idea  
16 that that's the entire subject of the phase two trial,  
17 whether or not ICANN actually followed through with the  
18 IRP's ruling because DCA contends that it did not.

19 THE COURT: Okay. Thank you, Ms. Colon. I  
20 appreciate your presentation, both at the trial and today.

21 MS. COLON: Thank you.

22 THE COURT: Either Mr. LeVee or Ms. Burke.

23 MR. LEVEE: Good morning, your honor. First of all,  
24 ICANN thanks you for your tentative order. It's thorough  
25 and does reflect what we do believe was the evidence at  
26 the trial. I'm happy to respond to the points Ms. Colon  
27 made. I'm also happy not to in the interest of time. The  
28 only thing I did want to definitely respond to is the

1 first point, where she said the panel did not take up the  
2 question and then rule on whether the covenant was binding  
3 such that DCA could not sue ICANN. Your honor pointed out  
4 that the panel clearly and implicitly acknowledged DCA's  
5 argument that the covenant was ENFORCEABLE. More  
6 importantly, in order for collateral estoppel to apply,  
7 the first tribunal need not make any ruling on the issue  
8 raised by the party against whom judicial estoppel is  
9 being enforced. DCA could have said the sky is black  
10 repeatedly at trial.

11 The IRP panel could have said, Okay. You say the  
12 sky is black. I'm going to do a bunch of things. It  
13 didn't matter whether the sky was black. The panel ruled  
14 based on the representations that DCA was making. What  
15 DCA is confusing, as we point out in our brief, is the  
16 doctrine of collateral estoppel where the court or the  
17 tribunal does need to make a ruling on the issue in  
18 dispute in order for that issue to be binding later as  
19 opposed to judicial estoppel where no ruling by the panel  
20 needs to be made. So there are a bunch of cases that DCA  
21 cites. They're all collateral estoppel cases.

22 None is a judicial estoppel case; that's simply not  
23 a factor that the courts look at to question whether the  
24 panel ruled on the correctness of the argument that DCA  
25 made. That's primarily the response that I wanted to make  
26 to Ms. Colon's argument. Your honor had already addressed  
27 the Nada decision, had already addressed the issue of the  
28 fact that the IRP panel repeatedly did rule that its

1 decision would be binding and also addressed the  
2 consequences of that and the fact that ICANN adopted the  
3 ruling. Whether in some theoretical matter the panel's  
4 ruling might not have been, quote, unquote, appealable,  
5 which is not a factor for judicial estoppel. The point is  
6 ICANN adopted the ruling. We showed what the  
7 recommendations of the panel were. We showed the ICANN  
8 Board resolution adopting those recommendations in total.

9 THE COURT: Sorry to interrupt. So how do you  
10 respond to Ms. Colon's argument that the IRP panel's  
11 decision was not binding because it wasn't ENFORCEABLE?  
12 That's her position.

13 MR. LEVEE: It is the IRP panel's decision -- first  
14 of all, two things. One, as you correctly note, DCA  
15 argued vehemently that the IRP panel had to issue a  
16 binding declaration, and it did. So we will never know  
17 what might have happened if ICANN had not completely  
18 adopted the ruling. I'm not saying that it's appealable  
19 or not appealable. The issue of whether it's appealable  
20 or not appealable, which is an argument they made in their  
21 brief.

22 There is no case that says that a decision by the  
23 first tribunal has to be appealable in order for judicial  
24 estoppel to be applied. Here, ICANN, as I said, did  
25 exactly what the panel ordered. ICANN saw a panel that  
26 had issued a ruling, which the panel itself described as  
27 binding. ICANN then implemented that decision.

28 THE COURT: Put aside the issue of appealability.

1 That's review. That's review of a tribunal's decision.  
2 What about the ability to enforce the decision? I think  
3 that's Ms. Colon's point.

4 MR. LEVEE: It's correct under the bylaws that DCA  
5 would not have been able to go to court to enforce the  
6 decision. But as I said, I view that issue in this  
7 instance as academic because DCA requested a binding  
8 decision, received from the panel a binding decision and  
9 then ICANN accepted the decision. So it's completely  
10 different than the Nada situation where the DRP panel is  
11 essentially a mediator. They have no power even to issue  
12 a decision in the first instance.

13 No one in a construction contract situation can go  
14 into a dispute resolution panel, DRP panel and say, we ask  
15 you to issue a binding decision. That's not in the tool  
16 kit of a new board. Here, DCA did ask the panel to issue  
17 a binding decision, and there was extensive litigation in  
18 the IRP as to whether that would occur. The panel ruled,  
19 yes, we are issuing a decision that we say is binding.  
20 They did that twice. Once in a formal ruling and once  
21 then again in their final ruling that they issued finding  
22 that ICANN had violated its bylaws.

23 THE COURT: Okay. Thank you, Mr. LeVee. I  
24 appreciate your presentation at trial and today as well.  
25 Ms. Colon, anything you wish to respond to briefly?

26 MS. COLON: Yes, I would. Thank you, Your Honor.  
27 Mr. LeVee referred to this question of whether or not the  
28 IRP declaration would be ENFORCEABLE as an academic

1 question. I respectfully disagree. The reason that DCA  
2 brought its claims in this court in the first place is  
3 because it did not feel that ICANN had followed the IRP  
4 ruling. It's a very practical question. Furthermore, DCA  
5 presented evidence at trial, both testimony from Akram  
6 Attallah and Christine Willet, stating that the IRP was  
7 not binding. ICANN never thought that the IRP was  
8 binding. That's all, your honor.

9 THE COURT: Thank you, Ms. Colon. I appreciate your  
10 presentation. Thank you. So the court has just signed  
11 and will file today its tentative decision on bifurcated  
12 trial, phase one, on affirmative defense of judicial  
13 estoppel. For the reasons stated in the tentative  
14 decision, the court exercises its discretion to find in  
15 favor of defendant ICANN and against plaintiff DCA on  
16 ICANN's affirmative defense of judicial estoppel and to  
17 bar DCA from bringing or maintaining its claims against  
18 ICANN alleged in the first amended complaint in this  
19 lawsuit.

20 The court's tentative decision also orders ICANN to  
21 give notice of the ruling and to lodge and serve a  
22 proposed judgment with the court. All right. Thank you.  
23 So now that concludes the trial on the phase one of the  
24 bifurcated trial on the affirmative defense -- ICANN's  
25 affirmative defense of judicial estoppel. So now what  
26 we'll do is turn to the trial setting conference on  
27 remaining issues in the case. Perhaps Mr. Kesselman  
28 wishes to -- you may join us at counsel table at this

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1 point. You were in the audience section.

2 MR. LEVEE: Your honor, I'm a little confused. Our  
3 affirmative defense of judicial estoppel applies to the  
4 entirety of the first amended complaint, which you've now  
5 granted.

6 THE COURT: I'd like to hear what remaining issues,  
7 if any, are there and what the affect of the court's  
8 tentative decision on the bifurcated issue of ICANN's  
9 affirmative defense of judicial estoppel.

10 MR. LEVEE: As far as we're concerned, your honor,  
11 there are no remaining issues to be tried. The judgment  
12 that your honor would enter now that you've signed the  
13 opinion would cause a judgment to be entered in the  
14 entirety of the case.

15 THE COURT: I guess my question is as to defendant  
16 ICANN, I understand that.

17 MR. LEVEE: Yes.

18 THE COURT: I don't know if there are remaining  
19 causes of action against the other defendant, ZA Central  
20 Registry, who is an intervenor.

21 MR. KESSELMAN: I can address that, Your Honor. The  
22 answer is "no." The federal court dismissed all of the  
23 existing claims against ZACR prior to this case coming to  
24 the state court here. We then asked to intervene only to  
25 address certain injunctive relief and to be part of the  
26 trial proceedings if they were going to go forward against  
27 ICANN to protect ZACR's interest in the Dot Africa GTLD.  
28 Now that your honor has issued a ruling and if your honor

1 enters the judgment, there is no matter that we would  
2 continue to intervene in. From our perspective, it would  
3 be over.

4 THE COURT: Okay. I wasn't aware. I'm not aware of  
5 the entire history of the case. I appreciate counsel  
6 educating me. I want to hear from Ms. Colon on that in a  
7 moment. I know the case was removed to federal court for  
8 a period of time and then it was remanded back to state  
9 court. Can you just repeat what you were advising me, Mr.  
10 Kesselman?

11 MR. KESSELMAN: Sure, your honor. There were claims  
12 that were brought in the federal action against ZACR.  
13 Those claims -- we brought a motion to dismiss. That  
14 motion to dismiss was granted as to all claims against my  
15 client. When the case was remanded back and the  
16 litigation was going to proceed at that time just between  
17 DCA and ICANN, we asked for permission to intervene to  
18 protect my client's rights as to the Dot Africa GTLD.

19 THE COURT: You intervened in what capacity? As the  
20 defendant?

21 MR. KESSELMAN: On the defendant's side, exactly.  
22 Primarily to address the request for injunctive relief  
23 which we can argue about, but read broadly suggested that  
24 if DCA had prevailed in the case, there might be some  
25 opportunity for Dot Africa GTLD to be given back to DCA.  
26 Because that was such an important interest for client's  
27 point of view, we asked to intervene. We were given that  
28 right to intervene on ICANN's side for the defense.



1 THE COURT: Okay. Thank you. All right. Ms.  
2 Colon, do you agree?

3 MS. COLON: I agree, your honor.

4 THE COURT: Okay. Thank you. I wasn't aware of  
5 that history. I appreciate counsel advising me of that.  
6 So the judgment that should be prepared by ICANN will be a  
7 judgment on the entire case.

8 MR. LEVEE: Yes, Your Honor.

9 THE COURT: Dismissing the entire case. A judgment  
10 in favor of defendant ICANN, and then addressing that it  
11 dismisses the entire case; is that right?

12 MR. LEVEE: Yes, Your Honor.

13 THE COURT: Okay. You agree with that, Ms. Colon?  
14 I know you don't agree with the result, but you agree  
15 procedurally if the court -- based on the court's  
16 tentative decision today, that would be the correct --  
17 procedurally, the correct ruling for the court to enter  
18 judgment on the entire case, is that correct, DISPOSING of  
19 the entire case?

20 MS. COLON: Yes, Your Honor.

21 THE COURT: I appreciate that. All right. I'll ask  
22 the clerk to note in the minute order that plaintiff's and  
23 defendant's counsel represent to the court that the  
24 court's ruling on its tentative decision on the bifurcated  
25 trial, phase one, on affirmative defense of judicial  
26 estoppel will dispose of the entire case. The court's  
27 going to set an Order to Show Cause regarding entry of  
28 judgment. I'll ask the clerk for a date for that. I

1 would think early December would make sense.

2 THE CLERK: December 5, your honor.

3 THE COURT: Thank you. So the court sets an order  
4 to show cause regarding entry of judgment on December 5,  
5 2019 at 8:30 A.M. in department 53. Anything further for  
6 us to address? I think that covers everything for today.  
7 Anything further for us to address today, Ms. Colon?

8 MS. COLON: No, Your Honor.

9 THE COURT: Thank you. Mr. Levee?

10 MR. LEVEE: No, Your Honor.

11 THE COURT: Mr. Kesselman?

12 MR. KESSELMAN: No, Your Honor.

13 THE COURT: Again, I do want to thank counsel for --  
14 plaintiff's counsel, defendant ICANN's counsel for the  
15 truly EXCEPTIONAL job that they did in presenting their  
16 case at the bifurcated trial in this matter and the  
17 closing argument briefs that they presented. The case was  
18 presented by both sides efficiently and at the highest  
19 level of skill. I appreciate that. Thank you, counsel.  
20 Do all parties waive notice of the -- actually, I'm going  
21 to order defendant ICANN to give notice of all orders made  
22 today.

23 MR. LEVEE: Yes, Your Honor.

24 THE COURT: Thank you.

25 MS. COLON: Thank you, Your Honor.

26

27 (The proceedings concluded.)

28



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DotConnectAfrica Trust vs. Internet Corp. for Assigned Names and Numbers

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