

B302739

IN THE CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT - DIVISION P

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DotConnectAfrica Trust,  
*Appellant,*

v.

Internet Corporation for Assigned Names and Numbers, et al.,  
*Respondent.*

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Trial Court Case No. BC607494  
On Appeal From Los Angeles County Superior Court  
Honorable Robert B. Broadbelt III, Judge

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**RESPONDENT'S MOTION TO  
DISMISS LATE-FILED APPEAL**

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INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS

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**CERTIFICATE OF  
INTERESTED PARTIES**

Pursuant to California Rules of Court, rule 8.208, the following entity may have an interest in this case: ZA Central Registry, a South African non-profit company.

Dated: December 20, 2019

Respectfully submitted,

JONES DAY

By: /s/ Erica L. Reilley  
Erica L. Reilley

*Attorney for Defendant-  
Respondent*

INTERNET CORPORATION  
FOR ASSIGNED NAMES AND  
NUMBERS

## INTRODUCTION

Pursuant to California Rules of Court, rules 8.54 and 8.104, Defendant-Respondent Internet Corporation of Names and Numbers (“ICANN”) respectfully moves to dismiss the late-filed appeal by Plaintiff-Appellant DotConnectAfrica Trust (“DCA”). The Rules of Court require that any notice of appeal must be filed no later than 60 days after the appellant was served with notice of the entry of judgment *or* a filed-endorsed copy of the judgment, *whichever is earliest*. (Cal. Rules of Court, rule 8.104(a)(1).) Here, the superior court clerk served a filed-endorsed copy of the trial court’s judgment on all parties on October 3, 2019. DCA, however, filed its notice of appeal on December 3, 2019 – the 61st day following service of a filed-endorsed copy of the judgment. DCA’s notice of appeal is thus untimely and this Court lacks jurisdiction to hear the appeal. As such, this appeal must be dismissed.

## ARGUMENT

The California Rules of Court are clear and unequivocal regarding the timing for filing a notice of appeal. The notice of appeal must be filed “on or before the earliest of”:

(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled “Notice of Entry” of judgment or a filed-endorsed copy of the judgment, showing the date either was served;

(B) 60 days after the party filing the notice of appeal serves or is served by a party

with a document entitled “Notice of Entry” of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or

(C) 180 days after entry of judgment.

(Cal. Rules of Court, rule 8.104(a)(1).)

“Timely filing of an appeal is an absolute prerequisite to the exercise of appellate jurisdiction.” (*Janis v. Cal. State Lottery Com.* (1998) 68 Cal.App.4th 824, 828–829.) Because the deadline to appeal is jurisdictional, absent statutory authorization, neither the trial nor appellate courts have the power to extend or shorten the time for appeal, “even to relieve against mistake, inadvertence, accident, or misfortune,” and even if no objection is made. (*Hollister Convalescent Hospital, Inc. v. Rico* (1975) 15 Cal.3d 660, 666–67, quotation marks omitted; *see also* Cal. Rules of Court, rule 8.104(b)[“[Absent a public emergency], no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.”].) Instead, if the notice of appeal was not filed within the 60-day period dictated by rule 8.104(b), the appellate court must dismiss the appeal for lack of jurisdiction. (Cal. Rules of Court, rule 8.104(b).)

This is true even if the appellant misses the deadline by only one day. California appellate courts routinely dismiss appeals under the exact same circumstances, holding that “[t]he rule is applicable even though notice of appeal is filed but one day late.” (*Nu-Way Associates, Inc. v. Keefe* (1971) 15 Cal.App.3d 926, 928–929, italics

added [dismissing appeal filed 61 days after the clerk of the court mailed notice of entry of judgment]; *see also* *L.A. County v. Jamison* (1961) 189 Cal.App.2d 267, 269 [dismissing appeal filed one day late for lack of jurisdiction]; *O'Donnell, Pacific Emp. Ins. Co., Interveners v. City and County of S.F.* (1956) 147 Cal.App.2d 63, 66–67 [same]; *Taliaferro v. Davis* (1963) 217 Cal.App.2d 215, 216 [same].)

Here, the trial court issued its “Statement of Decision on Bifurcated Trial (Phase One) on Affirmative Defense of Judicial Estoppel” (“Statement of Decision”), resolving all the remaining causes of action, and entered a Final Judgment in favor of ICANN and against DCA on October 3, 2019. (Reilley Decl. ¶ 5.) On October 3, 2019, the Executive Officer/Clerk of the Los Angeles Superior Court served the filed-endorsed copies of Statement of Decision and the Final Judgment on all parties’ counsel, including DCA’s counsel Brown, Neri, Smith & Khan, LLP. (*Id.* ¶6, Exh. A.) The Clerk also served and filed on the docket the Certificate of Mailing reflecting that service. (*Id.* ¶6, Exh. B. ) Under rule 8.104(a)(1)(A), DCA’s deadline to file a notice of appeal was December 2, 2019 – i.e., the 60th day after the Clerk served a filed-endorsed copy of the Final Judgment on October 3. DCA did not file its notice until December 3, 2019.

Based on DCA’s notice of appeal and civil case information sheet, even though DCA was served by the Clerk on October 3, 2019, DCA may argue that its deadline to appeal was triggered by the

notice of entry of judgment ICANN filed on October 10, 2019.<sup>1</sup> (Reilley Decl. ¶ 7.) DCA was mistaken. The Rules of Court are clear – if the party filing an appeal is served a filed-endorsed copy of the judgment by the superior court clerk on one date *and* a notice of entry of judgment by a party on another, the notice of appeal “must be filed on or before” 60 days after “the *earliest* of” those two dates. (Cal. Rules of Court, rule 8.104(a)(1)(A), (B), italics added.) In other words, the Rules of Court specifically contemplate that more than one of these triggering events may occur in any given case and the deadline to appeal begins to run from the earliest of such events. Here, the superior court clerk’s service of the filed-endorsed copy of the judgment to all parties occurred prior to ICANN’s notice of entry of judgment and thereby triggered the parties’ deadline to file a notice of appeal.<sup>2</sup>

Finally, to the extent DCA seeks to excuse its untimely appeal by noting its retention of new counsel, that argument cannot provide any relief. To start, retention of new counsel does not provide grounds to extend the time to appeal. (See, e.g., *Hollister, supra*, 15

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<sup>1</sup> In its October 3, 2019 Minute Order, the trial court directed ICANN to provide notice of entry of judgment. Although the Clerk served filed-endorsed copies of the Statement of Decision and the Final Judgment that same day, one week later on October 10, 2019, ICANN complied with the trial court’s directive nonetheless and filed a notice of entry of judgment. (Reilley Decl. ¶ 7.)

<sup>2</sup> Indeed, both ICANN and Intervenor ZACR understood the triggering effect of the superior court clerk’s service and timely filed their memoranda of costs on October 18, which was 15 days after that service. (Cal. Rules of Court, rule 3.1700(a)(1).)

Cal. 3d at p. 666 [deadline for appeal cannot be extended “even to relieve against mistake, inadvertence, accident, or misfortune”], quotation marks omitted.) What is more, although DCA retained new counsel for appeal, its trial counsel, Brown, Neri, Smith & Khan, LLP, remain counsel of record in the appeal. DCA’s trial counsel was thus directly on notice of the superior court clerk’s service and had an obligation to ensure preservation of their client’s right to appeal. Ultimately, the jurisdictional nature of the deadline to appeal renders any mistake or inadvertence of counsel inexcusable. (See *Branner v. Regent of Univ. of Cal.* (2009) 175 Cal.App.4th 1043, 1049 [dismissing untimely appeal notwithstanding counsel’s mistake].)

### CONCLUSION

For the foregoing reasons, ICANN respectfully requests that the Court dismiss DCA’s untimely appeal for lack of appellate jurisdiction.

Dated: December 20, 2019

Respectfully submitted,

JONES DAY

By: /s/ Erica L. Reilley

Erica L. Reilley

*Attorney for Defendant-  
Respondent*

INTERNET CORPORATION  
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## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies, pursuant to California Rules of Court, rule 8.204(c)(1), that the enclosed brief was produced using 13-point type, including footnotes, and contains approximately 1,170 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 20, 2019

Respectfully submitted,

JONES DAY

By: /s/ Erica L. Reilley

Erica L. Reilley

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