Jeffrey A. LeVee (State Bar No. 125863)
Erin L. Burke (State Bar No. 186660)
Amanda Pushinsky (State Bar No. 267950)
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071.2300
Telephone: +1.213.489.3939
Facsimile: +1.213.243.2539

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

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

Defendant.

CASE NO. BC607494

Assigned for all purposes to
Hon. Howard L. Halm

ICANN'S RESPONSE TO DCA'S NEVER-BEFORE-MADE ARGUMENTS IN ITS JULY 13 BRIEF REGARDING CALIFORNIA RULE OF COURT RULE 3.1591

Complaint Filed: January 20, 2016
Jury Trial Date: August 22, 2018

Hearing: July 20, 2018
Time: 1:30 p.m.

I. INTRODUCTION

Plaintiff DotConnectAfrica Trust's ("DCA") July 13 response regarding whether this Court can issue a decision on Phase One of this bifurcated action ("Response") raises entirely new arguments (albeit ones that DCA could have made earlier) that Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") has not had an opportunity to address and which therefore compels this brief response. Notwithstanding DCA's belated attempts to obfuscate the issues, the case law establishes that a judgment on Phase One is interlocutory, thereby requiring the same judge to hear all phases of the trial. Notably, DCA originally argued that whether a Phase One judgment was interlocutory was an irrelevant "red herring." DCA has now changed course and acknowledges the relevance of this inquiry, but attempts to refute it on other grounds. DCA's arguments do not change the law: This Court's ruling on Phase One of the trial would result in an interlocutory judgment, which means the same judge must hear all phases of the bifurcated trial absent stipulation by the parties. And here, ICANN and Intervenor ZA Central Registry ("ZACR") ***do not so stipulate***.

II. ARGUMENT

As ICANN has urged this Court previously, the Court should not make a decision on Phase One of this trial because doing so will result in an interlocutory judgment that will be subject to a mistrial by the successor judge that inevitably will step into this case. *European Beverage v. Superior Court*, 43 Cal. App. 4th 1211 (1996) makes clear that "[w]here there has been an interlocutory judgment rendered by one judge, and that judge then becomes unavailable to decide the remainder of the case, a successor judge is obliged to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise." *Id.* at 1214. An interlocutory judgment is any judgment where further "judicial action on the part of the court is essential to a final determination of the rights of the parties." *Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 698-99 (2001). Similarly, rulings on affirmative defenses are interlocutory where they require further action by the courts, such as a trial on the merits. *Jacobs-Zorne v. Superior Court*, 46 Cal. App. 4th 1064,

1071 (1996) (deeming order granting summary adjudication on affirmative defense to be interlocutory).

By contrast, a final judgment is one that "dispose[s] of all issues in the action . . . it completely resolve[s] plaintiffs' allegations." *Griset*, 25 Cal. 4th at 698-99. Moreover, "[i]t is settled that as a general rule there can be only one final judgment in a single action." *Nicholson v. Henderson*, 25 Cal. 2d 375, 378 (1944). Thus, any judgment or order issued prior to a final judgment disposing of "all issues in the action" is necessarily an interlocutory one.

Against this backdrop and contrary to DCA's attempt to confuse the issues,[1] the relevant part of Section 597 states:

> If the decision of the court, or the verdict of the jury, upon the special defense or defenses so tried is in favor of the plaintiff, trial of the other issues shall thereafter be had either upon the court's own motion or upon the motion of any party, and judgment shall be entered thereon in the same manner and with the same effect as if all the issues in the case had been tried at one time. In such an event any and all decisions or verdicts upon the special defense or defenses, and all rulings on the trial thereof shall be deemed excepted to and may be reviewed on motion for a new trial or upon appeal from the judgment.

Even without mentioning the term "interlocutory," the statute's reference to a decision or verdict regarding a special defense is expressly describing an interlocutory judgment, as there can be no final judgment until further judicial action is taken—namely, a "trial of the other issues."

Here, if the Court were to issue a Phase One ruling in DCA's favor, that ruling necessarily would be interlocutory because it would require further judicial action—that is, a "trial of the other issues." DCA's argument otherwise mistakes semantics for substance, as does its argument that a ruling on Phase One somehow falls outside of *European Beverage* because it is not a "judgment." Section 597 and the case law interpreting it make clear that "judgment" in this context refers to a *final* judgment of which there can be only one. *See Nicholson*, 25 Cal. 2d at 378; *Woodhouse v. Pacific Elec Ry. Co.*, 112 Cal. App. 2d 22, 25 (1952) (following ruling in plaintiff's favor under 597, court defers entry of final judgment until conclusion of merits trial).[2]

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[1] DCA argues that because the term "interlocutory" only appears in a different section of the statute, the relevant portion must not describe an order that is interlocutory in nature.

[2] Contrary to DCA's argument, *Woodhouse* does not suggest that a court's ruling on a bifurcated trial under Section 597 is "not a judgment at all"; rather, it explains that such a ruling is

Similarly, DCA's reliance on *Valentine v. Baxter Healthcare Corp.*, 68 Cal. App. 4th 1467 (1999), is misplaced. That case concerned a jury trial during which the jury reached a verdict on two causes of action, but hung on a third cause of action. 68 Cal. App. 4th at 1470-71. The parties proceeded to try the third cause of action before a new jury, apparently without raising their right to have the same fact-finder consider all issues until *after* the second trial. *Id.* at 1480. The court held that the first jury verdicts were final and not subject to modification, and therefore did not violate the "same fact-finder" right. *Id.* Thus, on the facts, *Valentine* is distinguishable.

Indeed, here, any ruling or judgment on Phase One is necessarily subject to modification by the successor judge because all the merits issues remain to be tried and no final judgment has been entered. This is precisely what *European Beverage* intended to prevent, absent stipulation: "[A]n interlocutory judgment is subject to modification at any time prior to entry of a final judgment. It is considered a denial of due process for a new judge to render a final judgment without having heard all of the evidence." *European Beverage, Inc.*, 43 Cal. App. 4th at 1214; *see also David v. Goodman*, 114 Cal. App. 2d 571, 574-75 (1952) ("[Litigants] cannot be compelled to accept a decision upon the facts from another judge.").

Put simply, DCA's new arguments cannot and do not change the well-established California law that a Phase One ruling would be interlocutory, which requires the successor judge "to hear the evidence and make his or her own decision on all issues, including those that had been tried before the first judge, unless the parties stipulate otherwise." *European Beverage, Inc.*, 43 Cal. App. 4th at 1214. The parties here have not so stipulated. Thus, a ruling by this Court on Phase One would create a reversible error and risk a mistrial.

III. CONCLUSION

For the foregoing reasons, Phase One cannot proceed before Judge Halm.

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not a *final* judgment.

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2 Dated: July 18, 2018 JONES DAY
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4 By: [signature]
5 Jeffrey A. LeVee
6 Counsel for Defendant Internet Corporation For Assigned Names And Numbers
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8 Dated: July 18, 2018 KESSELMAN BRANTLY STOCKINGER LLP
9
10 By: [signature]
11 David Kesselman
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