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9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES – CENTRAL**

12 DOTCONNECTAFRICA TRUST, a
13 Mauritius Charitable Trust,

14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
17 ASSIGNED NAMES AND NUMBERS, a
18 California Corporation; ZA CENTRAL
REGISTRY, a South African non-profit
company; and DOES 1-50, inclusive;

19 Defendant.

[Assigned for all purposes to:
Hon. Howard L. Halm Dep't 53]

Case No.: BC607494

**PLAINTIFF DCA'S SUPPLEMENTAL
CLOSING TRIAL BRIEF REGARDING
MISTRIAL**

[Request for Judicial Notice filed
concurrently herewith]

Date: June 1, 2018
Time: 1:30 p.m.
Dep't.: 53

1 **I. INTRODUCTION**

2 Plaintiff DotConnectAfrica Trust (“DCA”) submits this supplemental brief in response
3 to the Court’s directive at the May 22, 2018 hearing in this matter. At the hearing, the Court
4 instructed the parties to consider whether a mistrial would occur if Judge Halm decided the
5 judicial estoppel trial and another judge presided over the trial on the merits scheduled for
6 August 22, 2018. DCA submits that it would cause a mistrial if Judge Halm *did not* issue a
7 statement of decision on the judicial estoppel trial, regardless of whether a different judge
8 presides over the August trial. In contrast, there is no case law supporting the notion that a
9 party is entitled to the same judge during a *jury* trial. To the contrary, and as DCA explains
10 further below, even a defendant in a capital punishment case is not entitled to the same judge
11 during a jury trial.

12 Furthermore, it would be fundamentally unfair to DCA were Judge Halm not to decide
13 the judicial estoppel trial. This case has been pending for more than two years. The Court
14 has postponed the trial on the merits several times. The trial on the merits would inevitably
15 be postponed again were Judge Halm not to decide the judicial estoppel phase of the trial,
16 which DCA spent enormous resources to defend. Although the Court offered a July trial on
17 the merits so that Judge Halm could decide both trials, ICANN rejected that schedule. All of
18 the case law on point suggests that Judge Halm can properly decide the judicial estoppel trial.
19 Accordingly, DCA respectfully requests that Judge Halm hear closing arguments (currently
20 set for June 1, 2018) and issue a statement of decision on the judicial estoppel trial.

21 **II. STATEMENT OF FACTS**

22 On May 26, 2017, ICANN moved for summary judgment, arguing in part that DCA’s
23 claims were barred by the doctrine of judicial estoppel. The Court denied that ruling. On
24 August 9, 2017 the Court issued a ruling bifurcating the trial, and setting a February 28, 2018
25 bench trial on the threshold issue of whether DCA’s claims were barred by the doctrine of
26 judicial estoppel (Phase One). Phase One of the trial took place on February 28-March 1,
27 2018. Closing arguments were initially set for March 26, 2018 but were postponed twice by
28 the Court. Closing arguments were then set for May 7, 2018 but were again postponed due to

1 illness of lead counsel for DCA.

2 On May 22, 2018, when the parties appeared for the re-scheduled Phase One closing
3 arguments, the Parties were informed that Judge Halm was retiring on August 3, 2018, and
4 therefore would not be able to preside over an August 22, 2018 jury trial. The Court set a new
5 hearing date on June 1, 2018 for Phase One closing arguments in order to allow the Parties time
6 to consider whether they wanted Judge Halm to issue a decision on Phase One. The Court noted
7 that there was a question as to whether two separate judges presiding over the bench trial and the
8 jury trial would be grounds for a mistrial.

9 DCA posits that there would only be grounds for a mistrial if Judge Halm *does not* issue
10 a decision on Phase One and accordingly asks the Court to hear closing arguments on June 1,
11 2018.

12
13 **III. ARGUMENT**

14 **A. Legal Standard for Mistrial**

15 A mistrial is only mandatory where the judge presiding over a case testifies as a witness
16 (Cal. Evid. Code §703(b)), a juror testifies as a witness (Cal. Evid. Code §704(c), there are an
17 insufficient number of jurors, or where a judge is unable to complete a *nonjury* trial
18 (*Guardianship of Sullivan* (1904) 143 Cal. 462, 467). In its discretion, a court may grant a
19 motion for mistrial based on the misconduct of counsel or the judge. *See* Code Civ. Proc.
20 § 657(1); *Pacific Gas & Electric Co. v. Spencer* (1960) 181 Cal. App. 2d 171, 172. In addition, at
21 the discretion of the court, a mistrial may be declared based on jury misconduct. *See* Code Civ.
22 Proc. § 657(2).

23 **B. If Judge Halm Does Not Issue a Decision on the Judicial Estoppel Trial, DCA**
24 **Will be Prejudiced by Being Forced to Retrv the Judicial Estoppel Trial**

25 If Judge Halm does not issue a statement of decision for Phase One that is grounds for a
26 mistrial unless DCA and ICANN are both willing to waive their right to have the trier of fact
27 observe witnesses. *See Linsk v. Linsk* (1969) 70 Cal. App. 2d 272, 276. In nonjury trials, the
28 facts must be decided by the judge who heard the evidence. Otherwise, the case must be retried
by another judge. *Guardianship of Sullivan* (1904) 143 Cal. 462, 467 ("A party litigant is

1 entitled to a decision upon the facts of his case from the judge who hears the evidence, where the
2 matter is tried without a jury, and from the jury that hears the evidence, where it is tried with a
3 jury. He cannot be compelled to accept a decision upon the facts from another judge or another
4 jury”); *see also Reimer v. Firpo* (1949) 94 Cal. App. 2d 798, 800 -801;— trial judge appointed to
5 court of appeal; *see also McAllen v. Souza* (1937) 24 Cal. App. 2d 247.

6 **C. There Are No Grounds for a Mistrial Where Two Different Judges Preside**
7 **Over a Jury Trial**

8 Although Judge Halm is required to decide Phase One in order to avoid a mistrial, he is
9 not also required to decide the Phase Two jury trial because the jury is the trier of fact for Phase
10 Two. The California Supreme Court case of *People v. Espinoza*, (1992) 3 Cal. 4th 806 - a
11 criminal case regarding a capital punishment trial – supports this conclusion. In *Espinoza*, “the
12 guilt phase of defendant's trial commenced before Judge Kenneth Ferguson, who conducted the
13 proceedings until, during the presentation of the defense, he became too ill to continue with the
14 trial. The presiding judge of the San Joaquin County Superior Court then assigned Judge K.
15 Peter Saiers to substitute for Judge Ferguson pursuant to section 1053, granting Judge Saiers “the
16 same power, authority and jurisdiction as if the trial had been commenced before [him].” *Id.* at
17 827 – 828 (internal quotations omitted). The trial judge denied defendant’s motion for a mistrial
18 and “[a]t the conclusion of the penalty phase, the jury returned a verdict imposing the death
19 penalty.” *Id.* at 828. The California Supreme Court rejected the defendant’s contention that the
20 midtrial substitution of Judge Saiers for Judge Ferguson violated his jury trial rights under the
21 federal and state Constitutions. *Id.* The court explained that the purpose of a trial by jury was
22 “the interposition between the accused and his accuser of the commonsense judgment of
23 laypersons at a trial presided over by a neutral judicial officer” and that this purpose was not
24 implicated by the replacement of a judge mid-trial. *Id.* at 829.

25 Certainly if there was no mistrial in *Espinoza* due to the mid-trial replacement of a judge
26 in a capital case where the jury sentenced a defendant to death, there would be no mistrial here if
27 a second judge were to preside over the entirety of the Phase Two jury trial. Furthermore, the
28 Court bifurcated the trial in this matter precisely because the issues relevant to judicial estoppel
and the trial on the merits were severable. The jury deciding, and the judge presiding over,

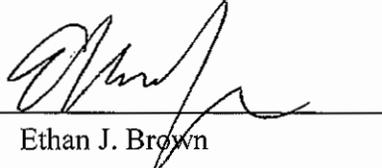
1 Phase Two will be presented with a different set of evidence and testimony than was presented to
2 Judge Halm for Phase One. That a second judge will have to review the case file to familiarize
3 herself or himself with the proceedings is not cause for a mistrial because the jury is the trier of
4 fact for Phase Two.

5 **IV. CONCLUSION**

6 For the foregoing reasons, DCA respectfully requests that Judge Halm hear closing
7 arguments on June 1, 2018 and issue a statement of decision on the judicial estoppel trial so that
8 the parties may avoid a mistrial.

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10
11 Dated: May 30, 2018

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12
13 By: 

14 Ethan J. Brown

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16 *DotConnectAfrica Trust*