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10 DOTCONNECTAFRICA TRUST

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

13 DOTCONNECTAFRICA TRUST, a  
14 Mauritius Charitable Trust,

15 Plaintiff,

16 v.

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

22 Defendant.

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

Case No.: BC607494

**RESPONSE TO ICANN'S REPORT  
FOLLOWING THE COURT'S  
REQUEST THAT THE PARTIES  
MEET AND CONFER REGARDING  
STIPULATION FOR SEPARATE  
JUDGES TO HEAR PHASES OF  
TRIAL**

[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 response to Defendant  
3 Internet Corporation for Assigned Names and Numbers (“ICANN’s”) May 30, 2018 Report  
4 Following the Court’s Request that the Parties Meet and Confer Regarding Stipulation for  
5 Separate Judges to Hear Phases of Trial. A party is **not**, as ICANN misleadingly posits,  
6 entitled to have the same judge in any bifurcated trial. As explained further below, ICANN’s  
7 authority merely supports the position that a party is entitled to the same judge in a bifurcated  
8 *bench* trial. Nowhere do any of the cases ICANN cites indicate that a party is entitled to the  
9 same judge in a bifurcated jury trial or a bifurcated trial comprised of a bench trial followed  
10 by a jury trial. In its May 30, 2018 Supplemental Closing Trial Brief DCA cited California  
11 Supreme Court precedent for the proposition that a party is *not* entitled to the same judge in a  
12 jury trial. Accordingly, DCA respectfully requests that Judge Halm hear closing arguments  
13 (currently set for June 1, 2018) and issue a statement of decision on the judicial estoppel trial.

14                   **II. ARGUMENT**

15                   **A. ICANN’S Caselaw Does Not Support Its Position**

16                   ICANN argues that the Court’s ruling on the judicial estoppel trial would be an  
17 interlocutory judgment and that as a result a different judge presiding over the jury trial would  
18 not be able to enter a final judgment in the case. But this argument is a red herring. Whether  
19 or not a judgment is interlocutory is not the relevant inquiry. The law only requires that the  
20 same judge decide all bench trials and that the same jury decide all jury trials in a matter,  
21 unless the parties stipulate otherwise. All of the cases that ICANN cites for the proposition  
22 that a different judge cannot preside over the *jury trial* in this matter *did not actually involve*  
23 *jury trials*. Instead, all of the cases take place in the context of bifurcated *bench trials* where  
24 both parts of the trial were bench trials. Those cases merely stand for the proposition that  
25 *both bench trials* must be decided by the judge, who is the trier of fact. *See European*  
26 *Beverage, Inc. v. Superior Court*, (1996) 43 Cal. App. 4th 1211, 1214- 1215; *David v.*  
27 *Goodman*, (1952) 114 Cal. App. 2d 571, 574 – 575; *Hughes v. De Mund*, (1929) 96 Cal. App.  
28 365; 368.

1                   **B. California Supreme Court Precedent Indicates that a Different Judge Can**  
2                   **Properly Preside Over the Jury Trial in this Matter**

3                   As DCA explained in its Supplemental Closing Trial Brief, in *People v. Espinoza*, (1992)  
4 3 Cal. 4th 806 the California Supreme Court held that a defendant facing capital punishment  
5 was not entitled to have one judge preside over his jury trial. In *Espinoza*, “the guilt phase of  
6 defendant's trial commenced before Judge Kenneth Ferguson, who conducted the proceedings  
7 until, during the presentation of the defense, he became too ill to continue with the trial. The  
8 presiding judge of the San Joaquin County Superior Court then assigned Judge K. Peter Saiers to  
9 substitute for Judge.” *Id.* at 827 – 828 (internal quotations omitted). The trial judge denied  
10 defendant’s motion for a mistrial and “[a]t the conclusion of the penalty phase, the jury returned  
11 a verdict imposing the death penalty.” *Id.* at 828. The Supreme Court explained that the purpose  
12 of a trial by jury was “the interposition between the accused and his accuser of the commonsense  
13 judgment of laypersons at a trial presided over by a neutral judicial officer” and that this purpose  
14 was not implicated by the replacement of a judge mid-trial. *Id.* at 829. If the California Supreme  
15 Court found that there was no mistrial in *Espinoza* there would be no mistrial here if a second  
16 judge were to preside over the entirety of the Phase Two jury trial. This is because as in  
17 *Espinoza*, the trier of fact in the second phase is the jury, not the judge.

18                   **C. The Judge During Phase Two Will Not Make Factual Findings**

19                   In its report, ICANN incorrectly posits that “it is highly likely that any ruling from Phase  
20 One will leave open factual determinations that can **only** be made by the fact finder who heard  
21 the evidence from Phase One.” As an initial matter and by definition, the jury will make  
22 findings of fact in Phase Two, not the judge. Furthermore, the Court bifurcated the trial in this  
23 matter precisely because the issues relevant to judicial estoppel and the trial on the merits were  
24 severable. ICANN’s concerns about the ambiguity of the scope of the Court’s ruling on judicial  
25 estoppel are misplaced. The Court can easily specify in its ruling what it considers to have been  
26 adjudicated by the IRP and what remains to be adjudicated by the jury in Phase Two.

1           **III. CONCLUSION**

2           For the foregoing reasons, DCA respectfully requests that Judge Halm hear closing  
3 arguments on June 1, 2018 and issue a statement of decision on the judicial estoppel trial so that  
4 the parties may avoid a mistrial.  
5  
6

7 Dated: May 31, 2018

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8  
9 By: 

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