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

DotConnectAfrica Trust, Appellant, v. Internet Corporation for Assigned Names and Numbers, Respondent.	Court of Appeal Case No. B302739 Trial Court Case No. BC607494

On Appeal From a Judgment of the Superior Court,
County of Los Angeles, Honorable Robert B. Broadbelt, III

RESPONSE TO RESPONDENTS' MOTION TO DISMISS APPEAL

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, Rule 8.208, the following entities and persons may have an interest in this case: ZA Central Registry, a South African non-profit company; and DotAfricaRegistry Ltd., a company organized and incorporated under the laws of Mauritius and which is affiliated with Plaintiff-Appellant DotConnectAfrica Trust.

Dated: December 31, 2019

Respectfully submitted,

By: /*s/ Anna Q. Do*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

Under the plain text and abundant case law governing Rule 8.104(a), the notice of appeal in this case was filed well within the applicable deadline. Plaintiff-Appellant DotConnectAfrica Trust ("DCA") filed its notice of appeal on December 3, 2019—before the 60-day deadline that was triggered by Defendant-Respondent Internet Corporation for Assigned Names and Numbers' ("ICANN") service of a "Notice of Entry of Final Judgment" on October 10, 2019. ICANN's notice of entry was the only 60-day-deadline triggering event that the trial court ordered to occur, and it is the only triggering event that actually occurred. Because DCA filed its notice of appeal before the December 9, 2019, deadline triggered by that event, the notice of appeal was timely and this appeal should not be dismissed.

ICANN's argument that an earlier deadline accrued based on the clerk's service of the final judgment and a separate "certificate of mailing" is patently incorrect. The plain terms of Rule 8.104(a)(1)(A) require that, to trigger an earlier deadline, the superior court clerk must serve "a file-endorsed copy of the judgment, *showing the date [it] was served*." (emphasis added.) The California courts have squarely and repeatedly held that the subsection is triggered only when the clerk serves a single, self-contained document that satisfies all of the Rule's requirements. Accordingly, the California Supreme Court has specifically held

that a clerk's service of the final judgment does not trigger the deadline to appeal unless the document "*itself* shows the date on which it was mailed . . . without reference to other documents." (*Alan v. Am. Honda Motor Co., Inc.* (2007) 40 Cal.4th 894, 900, 904 (hereinafter *Alan*), emphasis added.) There is an avalanche of appellate decisions applying *Alan* to reject arguments like ICANN's here. In particular, the courts have applied the strict single-document requirement to hold that service of the final judgment and a separate proof of service is insufficient to trigger the deadline. (*M'Guinness v. Johnson* (2015) 243 Cal.App.4th 602, 612 (hereinafter *M'Guinness*).) And this Court has held that parties and the courts are not required to sort through separate documents to determine whether the notice of appeal deadline has been triggered. (*Bi-Coastal Payroll Servs., Inc. v. Cal. Ins. Guarantee Ass'n* (2009) 174 Cal.App.4th 579, 586 (hereinafter *Bi-Coastal Payroll Servs.*).) Yet, ICANN's motion does not so much as cite these on-point precedents that undermine its motion. By failing to mention—let alone engage with—*Alan* and its progeny, ICANN both violates its duties to this Court and waives any argument that those precedents do not apply here.

In fact, on its face, ICANN's motion fails under the plain terms of Rule 8.104(a)(1)(A) and the litany of precedents applying it. ICANN's own exhibits to its motion conclusively establish that the single-document rule was *not* satisfied here: Nowhere on the

final judgment that ICANN attached as Exhibit A does the document "show[] the date [it] was served." Likewise, the "Certificate of Mailing" that ICANN attached as Exhibit B is not part of the final judgment served by the Court. Rather, it is a separate, stand-alone document that was not attached to the final judgment, but was instead attached to *other* documents and itself speaks of the final judgment as a separate document. And the Minute Order ICANN attached as Exhibit C confirms that the trial court ordered ICANN, not the clerk, to trigger the notice of appeal deadline by serving DCA with a Notice of Entry of Judgment—which is what occurred on October 10. Thus, rather than supporting ICANN's argument, the record conclusively refutes it.

Moreover, to the extent there is any lingering ambiguity in the events that unfolded below, the law requires the court to "'accord[] the right to appeal in doubtful cases.'" (*Alan*, *supra*, 40 Cal.4th at page 902, quoting *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.) In addition to the above facial deficiencies, a number of irregularities in the items that ICANN relies upon raise serious ambiguity as to whether the clerk actually served the final judgment on October 3, 2019. The final judgment that ICANN claims was served on October 3, 2019, bears a date stamp on the lower left side of each page bearing the date: "10/04/2019." And the envelope in which the final judgment

was mailed to DCA's trial counsel was postmarked October 4, 2019. Thus there is significant ambiguity as to whether service actually occurred on October 4, 2019, which would render DCA's notice of appeal timely even under ICANN's flawed theory. Especially where the trial court did not order the clerk to trigger the notice period, the courts have consistently held that ambiguity should be resolved in favor of a finding that the notice of appeal was timely filed.

At bottom, ICANN's motion is a spurious effort to twist the rules to deny DCA its day in court, despite on-point precedents rejecting ICANN's argument. And it is wholly inappropriate to seek dismissal of DCA's appeal without ever informing the Court that there is a landmark California Supreme Court decision and a number of lower court decisions that foreclose that result. In these circumstances, ICANN's failure to engage with those binding precedents is both inexcusable and fatal to its motion. The Court should accordingly deny ICANN's baseless motion.

STATEMENT OF FACTS

On October 3, 2010, the trial court entered its final judgment. (Motion to Dismiss, Ex. A.) That same day, the trial court entered a minute order, denying DCA's objections to the trial court's proposed statement of decision. (*Id.*, Ex. C.) The minute order also directed the clerk to "give notice of *this order*"—i.e., the minute order—but neither the final judgment

nor the minute order directed the clerk to give notice of the final judgment. (*Id.*, Ex. A; Ex. C, emphasis added.) Instead, the minute order directed ICANN "to give notice of the entry of judgment." (*Id.*, Ex. C.)

In accordance with the trial court's order, the clerk executed a "certificate of mailing" stating that it would mail a copy of the minute order to the parties on October 3 (Ex. G.), and ICANN served DCA with notice of the entry of judgment on October 10 (Ex. D.). In addition, on October 3, the clerk entered another certificate of mailing on the docket that was separate from any other document and stated that it would serve each party with the "Statement of Decision On Bifurcated Trial (Phase One) On Affirmative Defense of Judicial Estoppel and Final Judgment" by "placing . . . one copy of the original filed/entered herein in a separate sealed envelope." (Motion to Dismiss, Ex. B.) The clerk did not purport to mail a file-endorsed copy of the judgment that itself stated when it was being served. (See *ibid.*) On October 7, 2019, DCA's trial counsel, Ethan J. Brown of Brown, Neri, Smith & Kahn received these materials—the two certificates of mailing, the minute order, the final judgment, and the statement of decision—in a single envelope. (Brown Decl. ¶¶ 5-6.) The final judgment and statement of decision were not attached to anything else, but the two certificates of mailing and minute order were all attached to each other. (*Ibid.*) And the

envelope in which all the materials arrived was postmarked October 4, 2019—the day after the certificate of mailing states that the materials were served. (Ex. F.)

On October 10, 2019, DCA received the only copy of the judgment that the court had ordered to be served: a copy sent from ICANN pursuant to the trial court's minute order, and attached to a document entitled "Notice of Entry of Final Judgment." (Ex. D.) That copy of the judgment, like the copy of the judgment entered on the docket, was file-stamped on the first page as "Filed Oct 03 2019," yet also was stamped "10/04/2019" in the left-hand margin on every page. DCA does not dispute that its receipt of the "Notice of Entry of Final Judgment" on October 10, 2019, triggered a 60-day deadline under Rule 8.104(a)(1)(B).

Accordingly, DCA filed its notice appeal on December 3, 2019—well within the 60-day deadline that ran from October 10 and expired on December 9. Seventeen days later, on December 20, 2019, ICANN filed its motion to dismiss the appeal as untimely. (See Motion to Dismiss.)

ARGUMENT

I. DCA's Notice Of Appeal Was Timely Filed.

A. DCA Filed Its Notice of Appeal Within 60 Days From ICANN's Service of The Notice of Entry of Judgment—The Only Applicable Triggering Event Under Rule 8.104(a).

DCA's notice of appeal was timely under the plain terms of Rule 8.104(a). Under Rule 8.104(a)(1)(C), the default rule is that the deadline for filing a notice of appeal is "180 days after entry of judgment." That default period is shortened to 60 days only if one of the triggering events identified in subsections (a)(1)(A) or (a)(1)(B) occurs. Those provisions provide similar mechanisms—with critical differences regarding service—for either the superior court clerk or one of the parties to trigger the 60-day deadline.

Specifically, under subsection (a)(1)(A), a notice of appeal must be filed within "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." Meanwhile, under subsection (a)(1)(B), a notice of appeal must be filed within "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."

As the California Supreme Court has recognized, those requirements are plainly different. One requires a document "showing the date [it] was served," while the other need only be "accompanied by proof of service." (See *Alan*, *supra*, 40 Cal.4th at page 904.) Based on that difference, the California Supreme Court has held that, to qualify as a triggering event, a file-endorsed copy of the judgment served by the clerk must show the date served *within the document itself*. (*Ibid.*) As explained below, the clerk's mailing of the judgment in this case did not satisfy that strict requirement.

Here, the superior court ordered only one form of service under Rule 8.104(a)—notice of entry of judgment by ICANN—and DCA timely filed its notice of appeal within 60 days from service of that notice. In the superior court's minute order, "[t]he court order[ed] ICANN to give notice of entry of the judgment." (Motion to Dismiss, Ex. C.) Service of a notice of entry by the prevailing party is the most common method of triggering a 60-day deadline to appeal. (Cal. Civ. Prac. Proc. § 37:2 (2019).)[1]

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[1] See also *Loeb v. Record* (2008) 162 Cal.App.4th 431, 447 ["The usual deadline for filing a notice of appeal is '60 days after the party filing the notice of appeal . . . is served by a party with' the notice of entry of judgment."], quoting Rule 8.104(a)(2); *Davis v. Mariposa Cty. Bd. of Supervisors* (2019) 38 Cal.App.5th 1048, 1054 ["A notice of appeal is generally due within 60 days of service of the notice of entry of judgment . . . ."]; *Kaufman v. Diskeeper Corp.* (2014) 229 Cal.App.4th 1, 8 [The "deadline [to

And on October 10, 2019, ICANN served DCA with notice of entry of judgment, which triggered a December 9, 2019, deadline for the notice of appeal.

There is no dispute that DCA filed its notice of appeal within that 60-day period. Although the trial court ordered the clerk to give notice of the minute order, it did not order the clerk to provide notice of the final judgment at all—let alone in compliance with Rule 8.104(a)(1)(A). (Motion to Dismiss, Ex. C.) Without a court order, the clerk had no obligation at all to serve the final judgment. (See Cal. Code Civ. Proc. § 664.5.)[2] Although that fact alone is not dispositive, see *Hughes v. City of Pomona* (1998) 63 Cal.App.4th 772, 776, in similar cases, where ambiguity arises because a party was ordered to provide notice and the clerk was not, this Court has held that the party's notice—rather than earlier, deficient service by the clerk—determines the deadline. (*Bi-Coastal Payroll Servs.,* 174 Cal.App.4th at page 586-587 [noting that a minute order "expressly provide[d that] 'Counsel

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appeal] ordinarily falls 60 days after notice of entry of judgment, or 180 days after entry of judgement."].

[2] "Superior court clerks are required to serve notice of entry of judgment only in Family Code dissolution, nullity and legal separation cases; actions to establish a parental relationship; proceedings where the prevailing party is not represented by counsel; or when the judge makes an order requiring notice by the clerk." (Cal. Civ. Prac. Proc. § 37:3 (2009).)

for plaintiffs to give notice.' As a result . . . it placed plaintiffs' counsel in the position of guessing" whether a clerk's service triggered a 60-day deadline].) The same result is required here.

B. On Its Face, ICANN's Motion Is Foreclosed By Binding Precedents Enforcing Rule 8.104(a)(1)(A)'s Strict Requirements.

Because the superior court clerk's mailing of the final judgment did not comply with Rule 8.104(a)(1)(A)'s strict requirements, it did not trigger an earlier deadline. The California courts have squarely and repeatedly held that "documents mailed by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents *strictly comply* with the rule." (*Alan*, *supra*, 40 Cal.4th at page 902, emphasis added.) Because the requirements of Rule 8.104(a) are jurisdictional, and the consequences of noncompliance are severe, the courts "must apply [Rule 8.104(a)(1)(A)] strictly and literally according to its terms; the rules 'must stand by themselves without embroidery.'" (*Ibid.*, quoting *In re Marriage of Taschen* (2005) 134 Cal.App.4th 681, 686.) "'Neither parties nor appellate courts should be required to speculate about jurisdictional time limits'" or "guess, at their peril" their time to appeal. (*Id.* at 905, quoting *Van Beurden Ins. Servs., Inc. v. Customized Worldwide Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 64; see also *Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 585.) Rather, the

clerk's service of a final judgment must unambiguously satisfy Rule 8.104(a) for it to trigger a deadline to appeal.

The California Supreme Court has further explained that Rule 8.104(a)(1)(A)'s plain terms impose a "single-document" requirement, which was not satisfied here. In *Alan*, the Supreme Court held that a final judgment sent by the clerk does not trigger the time to appeal unless "the clerk has sent a *single, self-sufficient document* satisfying all of the rule's conditions." (*Alan*, *supra*, 40 Cal.4th at page 903, emphasis added.)[3] As *Alan* made clear, the plain text of Rule 8.104(a)(1)(A) refers to "a document" in the singular that is both a "file-endorsed copy of the judgment" and also shows "the date it was served." (*Id.* at 903-04; *M'Guinness*, *supra*, 243 Cal.App.4th at page 612 [holding that a "file-endorsed" copy of the order did not trigger the rule because it "did not show the date it was served" even though it was mailed with a "corrected proof of service"].) That literal interpretation is supported by both the Rule's express terms and by the principle in favor of "according the right to appeal in doubtful cases." (*Alan*, *supra*, 40 Cal.4th at page 902.)

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[3] See also Cal. Civ. Ctrm. H'book & Desktop Ref. § 42:3 (2019) [noting that, to trigger Rule 8.104(a)(1)(A), "[t]he document itself must be a single, self-sufficient document satisfying all the requirements of" the Rule].

As a result, Rule 8.104(a)(1)(A) is not triggered where, as here, the clerk does not serve a single document that contains all of the Rule's prerequisites within its four corners. (*In re Marriage of Lin* (2014) 225 Cal.App.4th 471, 475 ["The triggering document must show the date on which it was served."]; Cal. Prac. Guide Civ. App. & Writs Ch. 3-B § 3(c)(2)(e) (2019) [Rule 8.104(a)(1)(A)'s "requirements must be satisfied by a *single* document—whether a properly-titled 'notice of entry' or a file-endorsed copy of the judgment—to trigger the 60-day appeal deadline."].) Faced with virtually identical circumstances as those presented here, the courts have held that the Rule is not satisfied where the clerk serves the final judgment along with a separate document showing the date of service. (*M'Guinness*, 243 Cal.App.4th at page 612 ["[T]he file-endorsed copy of the order cannot be read in conjunction with the separate . . . 'proof of service' to satisfy the requirements of Rule 8.104(a)(1)(A)."], internal quotation and punctuation marks omitted.) That is because Rule 8.104(a) "does not require litigants to glean the required information from multiple documents or to guess, at their peril, whether such documents in combination trigger the duty to file a notice of appeal." (*Alan*, *supra*, 40 Cal.4th at page 905.) Instead, to trigger the 60-day notice of appeal deadline, the file-endorsed copy of the judgment must *itself* unambiguously show the date it was served.

Under the bedrock principles articulated in *Alan* and many lower court decisions applying it to circumstances like these, ICANN's motion to dismiss necessarily fails. ICANN's own motion confirms that the clerk's service plainly did not satisfy the single-document requirement. The file-stamped copy of the final judgment attached to ICANN's motion does not show when it was served. (See Motion to Dismiss, Ex. A.; cf. *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1338 ["Nor did the clerk serve a file-endorsed copy of the judgment showing the date it was served."].) Under *Alan* and precedents applying it, that failure is fatal. And the clerk's failure to serve the final judgment in accordance with Rule 8.104(a)(1)(A)'s strict requirements was in line with the fact that the trial court ordered ICANN, not the clerk, to trigger the filing deadline under Rule 8.104(a)(1). Because the clerk did not effectuate service in compliance with Rule 8.104(a)(1)(A)'s single-document rule, no deadline-triggering event occurred until ICANN served DCA with its notice of entry of final judgment on October 10. (See *M'Guinness*, *supra*, 243 Cal.App.4th at page 612; *Alan*, *supra*, 40 Cal.4th at page 904.)

Not once does ICANN's motion cite or discuss any of these central precedents. Instead, without actually engaging with the relevant doctrine, ICANN seems to suggest that the final judgment and the separate certificate of mailing can be viewed together to satisfy the Rule. (See Motion to Dismiss at 5.) But

that is squarely foreclosed by the case law (that ICANN never mentions). Both this Court and the California Supreme Court have held that "rule 8.104(a) does not require litigants to glean from multiple documents the information necessary to determine when the 60-day period for the filing of a notice of appeal commenced." (*Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 586; *Alan*, *supra*, 40 Cal.4th at page 905.)

In fact, ICANN's own motion confirms that the certificate of mailing is a separate document from the final judgment. It was entered separately on the court's docket, it is attached to ICANN's motion as a separate exhibit, and on its face the certificate of mailing speaks of the final judgment as a separate document, stating that the clerk would place "one copy of" that final judgment and the superior court's statement of decision (another separate document) "in a separate sealed envelope." (Motion to Dismiss, Ex. B.) And, as in *Alan*, the certificate of mailing and final judgment have different titles, different paginations, and are simply distinct documents—they do not claim to be a continuation of each other, and they were not attached to each other when mailed; in fact, the certificate of mailing was attached to *other documents*. (See *Alan*, *supra*, 40 Cal.4th at page 898, 905; Brown Decl. ¶ 6.) Indeed, by ICANN's own telling, the clerk "served the file-endorsed copies of [the] Statement of Decision and the Final Judgment" and "*also* served

and filed on the docket the Certificate of Mailing reflecting that service." (Motion to Dismiss 5, emphasis added.) Thus, under ICANN's own theory, the single-document requirement was not satisfied here.

It makes no difference whether the clerk mailed the items together. Indeed, *Alan* squarely rejected that view by holding that the two documents at issue there were not a "single document," even though they were mailed together "in a single envelope." (*Alan*, *supra*, 40 Cal.4th at page 898, 905; see also *M'Guinness*, *supra*, 243 Cal.App.4th at page 611-12.) Because the two documents had different titles, different paginations, and were plainly separate documents, the California Supreme Court held that they did not satisfy the single-document requirement. (*Alan*, *supra*, 40 Cal.4th at page 905.) Likewise, in *M'Guinness*, the Sixth District held that "the court clerk's service of [a] file-endorsed order, either separately or in conjunction with service of" proof of service did not satisfy Rule 8.104(a)(1)(A) under *Alan*. (*M'Guinness*, *supra*, 243 Cal.App.4th at page 611-612.) The same is true here.

Worse yet, the clerk's mailing included *other* documents as well—precluding any finding that the mailed package somehow constituted a single, self-sufficient document. (Brown Decl. ¶¶ 5-6.) ICANN has not—and cannot—plausibly argue that all five documents that DCA received, including the two certificates of

mailing, the final judgment, the statement of decision, and the minute order (which directed ICANN to trigger Rule 8.104(a)(1)(B)), are all one document that satisfies Rule 8.104(a)(1)(A). And still worse, rather than being attached to the final judgment, the certificate of mailing was attached to the minute order and the other certificate of mailing. (Brown Decl. ¶ 6.) As *Alan*, *M'Guinness*, and *Bi-Coastal* have squarely held, parties are not required to "glean from multiple documents" and "guess, at their peril" which particular combination could possibly trigger Rule 8.104(a). (*Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 586; see also *Alan*, *supra*, 40 Cal.4th at page 905; *M'Guinness*, *supra*, 243 Cal.App.4th at page 612.)

Both ICANN's motion and the clerk's mailing thus also foreclose any suggestion that the clerk "satisf[ied] the single-document requirement by attaching a certificate of mailing to the file-stamped judgment." (*Alan*, *supra*, 40 Cal.4th at page 905.)[4] The certificate of mailing was *not* attached not to the final

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[4] Indeed, other cases demonstrate that clerks know how to incorporate a certificate of mailing into a final judgment or a notice of entry when they intend to do so. (See *Sunset Millennium Asso'c, LLC v. Le Songe, LLC* (2006) 138 Cal.App.4th 256, 257-58 [describing a certificate of mailing incorporated into a minute order with consecutive pagination]; *InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1134 [noting that the clerk had "mailed a document entitled 'Notice of Entry of Judgment and Certificate of Mailing'"].)

judgment, but was instead attached to *other*, unrelated documents. (Brown Decl. ¶ 6.) And, even if ICANN had not waived any such argument by not raising it in the opening brief (see *infra* Part II), the exhibits attached to ICANN's motion further confirms that the final judgment and the certificate of mailing were not a single document. Otherwise, they would have been entered on the docket together, and ICANN would not have proffered them as separate exhibits.[5] Instead, the facts as established by ICANN's own filing demonstrate that the clerk's mailing was deficient under Rule 8.104(a)(1)(A), as applied in *Alan* and its progeny. (*Alan*, *supra*, 40 Cal.4th at 905 [noting that the documents at issue did "not purport to incorporate" each other and had separate paginations]; Motion to Dismiss, Ex. A; *id.* Ex. B.)[6] It is therefore abundantly clear that the clerk did not

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[5] ICANN's treatment of the certificate of mailing and final judgment as separate documents is underscored by ICANN's treatment of its own Notice of Entry of Final Judgment, which it attached to its motion as one exhibit and which incorporated both the statement of decision and the final judgment with the notice of entry into a single document.

[6] While ICANN has waived the opportunity to argue this point in reply, no case it could cite would support its position. In addition to the case law cited above that rejects ICANN's argument, there are no reported cases that accept any form of ICANN's position here. In particular, any attempt to rely on *Van Sickle v. Gilbert* (2011) 196 Cal.App.4th 1495, 1514-15, would be off point because, although *Van Sickle* referenced a certificate of mailing as triggering a deadline to appeal, the court had no occasion to

serve a single document that itself satisfied all of 8.104(a)(1)(A)'s requirements, and DCA's deadline to file its notice of appeal was not triggered until ICANN served its notice of entry of judgment on October 10.

When faced with similar deficiencies, California courts have held time and again that documents that fail to strictly comply with the Rule do not trigger the time to appeal. (*E.g.*, *M'Guinness*, *supra*, 243 Cal.App.4th at page 612-13 [holding that separate documents could not in combination satisfy the rule]; *Alan*, *supra*, 40 Cal.4th at page 905 [same]; *Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 586-87 [serving an order not file-stamped or titled "Notice of Entry of Judgment" did not satisfy the rule].) They have held that a document does not trigger the time to appeal if is not "*entitled* 'Notice of Entry'"—even if the document later says "notice of entry" and is mailed with a certificate of mailing, or is even entitled a "Notice of *Ruling*." (*Sunset Millennium Asso'c, LLC v. Le Songe, LLC*

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consider *Alan*'s effect on the clerk's service because the appellant had clearly missed even the 180-day deadline under Rule 8.104(a)(1)(C) and neither party argued whether the clerk's mailing satisfied *Alan*'s one-document rule. (See *ibid.*) Likewise, in *Adaimy v. Ruhl* (2008) 160 Cal.App.4th 583, neither the parties nor the court discussed or considered whether the relevant service complied with *Alan*'s requirements. And in neither case is there a hint that the certificate of mailing was attached to other documents instead of the final judgment.

(2006) 138 Cal.App.4th 256, 259-60; *20th Century Ins. Co. v. Superior Court* (1994) 28 Cal.App.4th 666, 671 ["It might seem that the difference between a 'notice of ruling' and a 'notice of entry' is hypertechnical. In another context it might be. But . . . rules that measure [the time to appeal] must stand by themselves without embroidery."].) They have also held that e-mailing the judgment did not suffice under a previous version of the Rule that required a "mailed" copy of the judgment. (*Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, 1160; *see also InSyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, 1140 [strictly enforcing the requirements for now-permitted e-mail service].) They have held that a copy of the judgment sent by a party without proof of service cannot be cured by a later-executed proof of service. (*Thiara v. Pacific Coast Khalsa Diwan Soc'y* (2010) 182 Cal.App.4th 51, 58.) And they have held that a clerk's service was insufficient where its proof of service form did not "reflect that the order was file-stamped." (*Keisha W. v. Marvin M.* (2014) 229 Cal.App.4th 581, 585.)

This Court is compelled to reach the same result here. Because the certificate of mailing and final judgment were not "a single, self-sufficient document satisfying all the rule's conditions," they did not trigger the 60-day deadline in Rule 8.104(a)(1)(A). (*See Alan*, *supra*, 40 Cal.4th at page 905; *M'Guinness*, *supra*, 243 Cal.App.4th at page 612-13.) ICANN's

contrary suggestion would invite precisely the guesswork that Rule 8.104(a)(1) is meant to avoid.

II. By Failing To Cite Or Discuss *Alan* And Its Progeny, ICANN Has Violated Its Duty To This Court And Waived Any Arguments About Those Precedents.

Beyond its facial legal defects, ICANN's motion is remarkable for what it does not say. At no point in its motion does ICANN ever mention the bedrock legal principles discussed above, which govern the question it has placed before this Court. Nor does it even cite the California Supreme Court's binding decision in *Alan*, this Court's application of that landmark ruling in *Bi-Coastal Payroll Services*, or the Sixth District's factually analogous decision in *M'Guinness*.

In a motion aimed at foreclosing DCA from pursuing its appeal, that disregard for critical precedents is breathtaking. The only possible explanations for the failure are that ICANN's counsel failed to research the legal precedents that govern the Rule that ICANN's motion invoked or that they withheld the information in the hopes that DCA and the Court might not notice. Either explanation violates counsel's duties to this Court—especially in the context of a motion seeking to prevent DCA from exercising its appellate rights. And under longstanding waiver principles ICANN is precluded from advancing any argument in its reply brief regarding the precedents and principles it failed to discuss in its opening brief.

ICANN's failure to identify or discuss binding authorities that undermine its position violated its duties to this Court. "Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed." (*In re Reno* (2012) 55 Cal.4th 428, 510, citing Cal. R. Prof. Conduct Rule 3.3, other citation omitted.) A party's "failure to cite or even acknowledge . . . seminal cases . . . directly on point and counter to their argument in their opening brief violates [that] duty to the court." (*Love v. State Dep't of Educ.* (2018) 29 Cal.App.5th 980, 990; *see also People ex. rel. Feuer v. FXS Mgmt., Inc.* (2016) 2 Cal.App.5th 1154, 1160, fn.4 ["We remind counsel that attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed."], internal quotations omitted.)

Here, even the most basic research on Rule 8.104(a)(1)(A) reveals that *Alan* and its progeny are "directly on point and counter to" the claim ICANN makes in its motion to dismiss. A search on Westlaw's electronic database of California decisions using the search term "8.104(a)(1)(A)" yields *M'Guinness* as the first result.[7] That decision's analysis turns on the California

[7] The same search on Lexis' corresponding electronic database yields *M'Guinness* as the fourth result, and as the second published case.

Supreme Court's decision in *Alan*. And the simple act of checking which published Second District decisions have cited *Alan* would have pointed to this Court's decision in *Bi-Coastal Payroll Services*. In addition, the leading practice guides cite *Alan* and *M'Guinness* as the source of a "[s]ingle document required" rule and as authority for resolving ambiguities in favor of appellate review. (*See* Cal. Prac. Guide Civ. App. & Writs Ch. 3-B § 3(c)(2)(e) (2019); 4 Cal. Jur. 3d Appellate Review § 115 & fn.8 (2019).)[8] There is no excuse for ICANN counsel's failure to identify and discuss those decisions, given that its own motion establishes that the requirement was not met here.

Moreover, ICANN's failure to address these issues in its opening brief precludes it from raising any argument about them in its reply brief. It is axiomatic that arguments not raised in an opening brief are treated as waived, and that courts will not consider arguments raised for the first time in a reply brief. (*Karlsson v. Ford Motor Co.* (2006) 140 Cal.App.4th 1202, 1216-1217, citing *Am. Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 ["[S]uch consideration would deprive the respondent of an opportunity to counter the argument."].) That rule is

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[8] See also 9 Witkin, Cal. Proc. 5th Appeal § 578 (2008) [citing *Alan* and describing its one-document holding]; Cal. Civ. Ctrm. H'book & Desktop Ref. § 42:3 (2019) [citing *Alan* and noting its "single, self-sufficient document" holding]; Cal. Judges Benchbook Civ. Proc.-Trial § 15.56 (2019) [citing *Alan*].)

especially strong where the new argument in a reply brief is inconsistent with statements or arguments in the opening brief. (See *Conn v. W. Placer Unified Sch. Dist.* (2010) 186 Cal.App.4th 1163, 1182-83; *Wells Fargo Fin. Leasing, Inc. v. D&M Cabinets* (2009) 177 Cal.App.4th 59, 77.)

Here, ICANN did not even attempt to argue that the clerk's service satisfied the single-document requirement set forth in Rule 8.104(a)(1)(A) and *Alan*, *M'Guinness*, and *Bi-Coastal Payroll Services*. Any attempt to advance such an argument in ICANN's reply would be patently inconsistent with ICANN's opening brief, which explicitly designated the certificate of mailing and final judgment as separate documents by listing them as separate exhibits, and stated that the clerk served the final judgment and "*also* served" the certificate of mailing. (Motion to Dismiss at 5, emphasis added.) As a result, ICANN is foreclosed from belatedly making any such argument in its reply.

III. Any Ambiguity Must Be Resolved In DCA's Favor.

Finally, even if it were not already clear from the docket and ICANN's own filings that the clerk's mailing of the final judgment did not satisfy Rule 8.104(a)(1)(A), the law requires that any lingering ambiguity be resolved in DCA's favor. "[R]ule 8.104(a)(1) was intended to obviate the need for . . . guesswork when calculating jurisdictional time limits." (*Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 587.) Courts thus

routinely "accord[] the right to appeal in doubtful cases when such can be accomplished without doing violence to the applicable rules." (*M'Guinness*, *supra*, 243 Cal.App.4th at page 612, citation and internal quotations omitted; see also *Alan*, *supra*, 40 Cal.4th at page 902; *Citizens for Civic Accountability v. Town of Danville*, *supra*, 167 Cal.App.4th 1158, 1162; 4 Cal. Jur. 3d Appellate Review § 115 (2019) ["There is a strong public policy in favor of hearing appeals on their merits."], collecting cases.) This is true "even where such interpretations may be considered hypertechnical in other contexts." (*In re Marriage of Mosley* (2010) 190 Cal.App.4th 1096, 1103.)[9] If there is any ambiguity, it must be resolved in favor of appeal.

The final judgment and certificate of mailing do not unambiguously satisfy the requirements of Rule 8.104(a)(1)(A). As explained above, they do not satisfy the single-document requirement because they were entered as separate entries on the docket, were mailed by the clerk as separate documents that were not attached to each other, had different titles and

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[9] As this Court and the California Supreme Court have explained, "the older rule that technical defects in a notice of entry of judgment are excusable" in certain circumstances "has not been applied to rule 8.104(a)(1) or its identically worded, immediate predecessor." (*Alan*, *supra*, 40 Cal.4th at page 902; *Bi-Coastal Servs.*, *supra*, 174 Cal.App.4th at page 585, internal citations omitted.) As a result, any reliance on that bygone rule would be improper here.

pagination, and did not expressly incorporate each other. In fact, the certificate of mailing was attached to *other* documents.

In addition, there is serious ambiguity as to whether the documents were actually served on October 3, 2019. Although the upper-right hand corner on the first page of the final judgment says "Filed Oct 03 2019," the lower left-hand margin on every page is date-stamped "10/04/2019." (Motion to Dismiss, Ex. A.) As a result, the final judgment not only fails to show the date anything was served, it *creates* ambiguity over when service occurred. And the envelope in which the final judgment was mailed to DCA was post-marked "10/04/2019," which further suggests that service may have actually occurred on October 4—which would render DCA's notice of appeal timely even under ICANN's flawed theory. (Ex. F.)[10] The courts have repeatedly

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[10] Although courts generally presume that the clerk deposited the mailing on the date listed on the certificate of mailing, service occurs only when the clerk *actually* deposits the final judgment for mailing, and any ambiguity about when that occurred should be resolved in favor of preserving the right to appeal. (See *Alan*, *supra*, 40 Cal. 4th at page 902 [noting that courts "accord[] the right to appeal in doubtful cases when such can be accomplished without doing violence to the applicable rules"]; *Sharp v. Union Pac. R.R. Co.* (1992) 8 Cal.App.4th 357, 360 ["[S]ervice is complete at the time the document is *deposited* in the mail" under Cal. Code Civ. Proc. § 1013.], emphasis added; *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 511 ["[S]trict compliance with statutory provisions for service by mail [under § 1013] is required, and improper service will be given no

held that "[n]either parties nor appellate courts should be required to speculate about jurisdictional time limits." (*Alan*, *supra*, 40 Cal.4th at page 905; *Bi-Coastal Payroll Servs.*, *supra*, 174 Cal.App.4th at page 586.) Yet that is precisely what ICANN's argument would require here.

The fact that the trial court expressly ordered ICANN to serve a notice of entry of judgment to trigger the notice of appeal deadline, but did not order the clerk to serve the parties with its final judgment, adds further confusion to the mix. (See Motion to Dismiss, Ex. A; Ex. C; *Bi-Coastal Payroll Servs., supra*, 174 Cal.App.4th at page 586-587.) In fact, the court even ordered the clerk to serve the parties with its minute order entered October 3, but did not issue a similar order for serving the final judgment. (Compare *id.* Ex. A with *id.* Ex. C.) Although the clerk filed a "Certificate of Mailing" and mailed a copy of the final judgment, the certificate of mailing itself says only that the clerk would mail "one copy of the original filed/entered"—it does not say that the clerk would mail a *filed-endorsed* copy of the final judgment or that the final judgment being mailed itself *shows the date it was served*. (See *id.* Ex. B; *Keisha W. v. Marvin M.*, *supra*, 229

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effect."]; *Valley Vista Land Co. v. Nipomo Water & Sewer Co.* (1967) 255 Cal.App.2d 172, 174 [noting that § 1013 applies in the time to appeal context, and that "successful service by mail requires strict compliance with the statute."].)

Cal.App.4th 581, 585 [holding that a proof of service of a copy of the order was insufficient under the Rule because "the form does not reflect that the [mailed] order was file-stamped"].)

At bottom, ICANN's motion to dismiss amounts to nothing more than procedural bluster. While ignoring the obvious deficiencies with the October 3 documents, ICANN flatly asserts that they triggered an earlier notice of appeal deadline. But even by ICANN's own telling, the documents were insufficient. Instead of grappling with the doctrine or the obvious flaws with its argument under Rule 8.104(a)(1)(A), ICANN makes irrelevant arguments concerning when it calculated its deadline to file a motion for costs under a *different rule*. But ICANN's belief over what triggered Rule 3.1700(a)(1), the rule governing its motion for costs, has no bearing on whether the clerk's mailing triggered DCA's deadline for filing a notice of appeal under Rule 8.104(a)(1)(A).

In fact, California courts have emphasized that the two Rules contain critical differences. Rule 3.1700(a)(1) is triggered *solely* by "the date of service of the notice of entry of judgment"—it does not require (as Rule 8.104(a)(1)(A) does) that the party be served a "file-endorsed copy of the judgment, showing the date [it] was served." Unlike Rule 8.104(a)(1)(A), Rule 3.1700(a)(1) thus has no requirement that the party be served a "single, self-sufficient document" that is both a file-endorsed copy of the

judgment and shows the date it was served. (Compare *Haley v. Casa Del Rey Homeowners Ass'n* (2007) 153 Cal.App.4th 863, 879-80 with *Alan*, *supra*, 40 Cal.4th at page 904.)[11] Moreover, because Rule 3.1700(a)(1) is not jurisdictional, it is not subject to the rule that any ambiguities are resolved in favor of allowing an appeal. (Compare *Gunlock Corp. v. Walk on Water, Inc.* (1993) 15 Cal.App.4th 1301, 1304 with *Alan*, *supra*, 40 Cal.4th at page 902.)

* * *

In conclusion, DCA filed its notice of appeal well within the 60-day deadline triggered by ICANN's Notice of Entry of Judgment, which was the only triggering event under Rule 8.104(a)(1)(A) or (B), and which was served on October 10 per the trial court's order. (See Motion to Dismiss, Ex. C; Ex. D.) Indeed, despite failing to even mention the relevant case law, ICANN's own motion and exhibits confirm that the clerk's earlier mailing did not satisfy Rule 8.104(a)(1)(A)'s strict requirements. And, at the very least, there is serious ambiguity as to whether the clerk actually served the final judgment on October 3, as opposed to the October 4 date on the face of the final judgment and the post-

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[11] In fact, Rule 3.1702, which governs the time to move for attorney's fees, explicitly incorporates Rule 8.104's time limits, underscoring the obvious differences between Rule 3.1700 and Rule 8.104. (Cf. *Kaufman v. Diskeeper Corp.*, *supra*, 229 Cal.App.4th 1, 7-8 [explaining both rules].)

mark of the envelope in which it was mailed. Because California courts have repeatedly stressed that Rule 8.104(a)(1)(A)'s requirements must be strictly enforced and any ambiguity must be resolved in favor of the right to appeal, DCA's notice of appeal was timely and ICANN's motion should be denied.

CONCLUSION

For the foregoing reasons, DCA respectfully requests that the Court deny ICANN's motion to dismiss.

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CERTIFICATE OF COMPLIANCE

Appellate counsel herby 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 6,800 words, exclusive of the materials stated in Rule 8.204(c)(3), which is less than the 14,000 words permitted by this rule. Counsel relied on the word count of the computer program used to prepare this brief.

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Respectfully submitted,

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